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EPA Inspections by Private Consultants and Trade Secret Confidentiality

As a means of enforcing environmental legislation, the Environmental Protection Agency (EPA) regularly conducts inspections of industries and businesses.¹ Private consultants are frequently employed by the EPA to assist in making these inspections because of inadequate staffing or the agency's need for specialized technical expertise.² In three recent cases businesses that were the subjects of such inspections objected to the use of private consultants because they feared disclosure of trade secrets.³

These cases illustrate the conflicting interests that may be involved when a private consultant under contract with a federal regulatory agency⁴ inspects a business establishment. The public and the agency desire that

² "Consulting firms ... often perform vital administrative agency functions. The participation of these entities in governmental activities benefits the government, for example, by providing specialized expertise in technical matters or fresh insights on problems." Note, The Definition of "Agency" Under the Freedom of Information Act As Applied to Federal Consultants and Grantees, 69 Geo. L.J. 1223, 1226 (1981); accord S. Rep. No. 698, 94th Cong., 2d Sess. 76, 77, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 4491, 4526; Government's Brief at 1-2 & n.4, In re Stauffer Chem. Co., 14 Env't Rep. Cas. (BNA) 1737 (D. Wyo. June 24, 1980). The EPA noted that in 1980 it had only three employee inspectors available for Region VIII, which consists of Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming. Id. For additional comments by the EPA concerning its need for private consultants, see note 55 infra.
⁴ Though this note discusses only the EPA, similar concerns may arise with other regulatory agencies that employ private consultants to perform a variety of functions. Many of these agencies have been excluded from the discussion here, however, because they do not use private consultants for the particular purpose of conducting inspections—in some instances because the enabling legislation does not permit that use and in others because the agency's regulations prohibit it. For example, the Federal Food, Drug, and Cosmetic Act, § 704(a), 21 U.S.C. § 374(a) (Supp. IV 1980), permits only officers and employees to make inspections, and under 15 U.S.C. § 1270(a) (1976), only those employed by the Consumer Product Safety Commission or by the state may conduct inspections. The EPA, when acting under the Federal Environmental Pesticide Control Act of 1972, § 9, 7 U.S.C. § 136(g)(a) (1976), may use only officers or employees for inspections.

It appears that the Department of Labor may use private consultants to make inspections under the Occupational Safety and Health Act (OSHA), §§ 7(c), 8(a), 29 U.S.C. §§ 656(c), 657(a) (1976), and 29 C.F.R. §§ 1903.3-4 (1981). Though the discussion in this note will be limited to the EPA and three statutes under which it might act—the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976); the Clean Water Act, 33 U.S.C. §§ 1251-1276 (1976); and the Clean Air Act, 42 U.S.C. §§ 7401-7442 (Supp. IV 1980)—the same problems may arise and the same principles may apply when the Department of Labor uses private consultants to make inspections of business establishments.
the purposes of the regulatory legislation be achieved as efficiently as possible, which may require the use of private consultants. On the other hand, affected businesses fear the use or disclosure of trade secrets by private consultants who are not under the same confidentiality restraints as government employees and who may be affiliated with firms that compete with the businesses subject to inspection. Another concern of businesses, though not central to the private consultant issue, is the requirement for public disclosure of information held by agencies under the Freedom of Information Act (FOIA).

This note seeks to balance these conflicting interests by focusing on the safeguards for trade secret confidentiality included in the EPA's statutory and regulatory scheme. The note first argues that a reasonable reading of the relevant EPA statutes permits the use of private consultants for inspections. Next, the note briefly examines general trade secret law. The note then contends that the use of private consultants for inspections by federal regulatory agencies is constitutional and that the EPA's statutory and regulatory scheme ensures affected businesses adequate protection for their proprietary interests.

RECENT CHALLENGES TO INSPECTIONS BY PRIVATE CONSULTANTS

In three recent cases businesses challenged the involvement of private consultants in inspections of their premises because they feared disclosure of trade secrets. In each case the inspection was to be carried out under section 114(a) of the Clean Air Act, and each challenge arose on a mo-

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7 The Trade Secrets Act, 18 U.S.C. § 1905 (1976), provides that a federal employee may be subject to a fine or imprisonment for the unauthorized disclosure of trade secrets or other confidential information. The Federal Reports Act, 44 U.S.C. § 3508 (1976), governs interagency transfers of information and provides that an agency employee who receives confidential information from an employee of another agency is subject to the same sanctions that are applicable to the employee who originally obtained it.
9 5 U.S.C. § 552 (1976). The FOIA exempts trade secrets and other confidential business information from disclosure. Id. at § 552(b)(4). Disclosure under the FOIA may be a concern to businesses even when no private consultants are involved, and the involvement of private consultants does not exacerbate the problem. In fact, the use of private consultants might be advantageous to a business in one situation. If information remains in the control of a private consultant when it is unneeded for agency purposes, it does not constitute agency records under the FOIA and, therefore, is not obtainable through an FOIA request. See Note, supra note 2, at 1226.
tion to quash the administrative warrant. In *In re Aluminum Co. of America*, the inspection was conducted by an officer of the EPA and two private consultants without protest by the company; the motion to quash was filed five days after completion of the inspection. In both *In re Clean Air Act Administrative Inspection of the Bunker Hill Co.*, and *In re Stauffer Chemical Co.*, the EPA officers were allowed to enter the premises, but the private consultants were forbidden entry unless they agreed to sign a secrecy and hold harmless agreement, which they did not do. In each of the three cases the private consultants were to be accompanied and supervised by an EPA employee at all times during the inspection. The EPA contract with each consulting firm forbade the unauthorized disclosure of any information claimed to be confidential and recited that the terms of the contract were for the benefit of and enforceable by the affected business as well as the EPA.

The federal district courts in *Aluminum Co. of America* and *Bunker Hill* upheld the propriety of the EPA's use of private consultants to make inspections. The two courts employed similar reasoning and found that Congress did not intend that the right to enter and inspect under section 114(a) of the Clean Air Act be limited to officers and employees of the EPA and that the EPA regulations, along with other available remedies, provide adequate confidentiality safeguards. In contrast, the district court in *Stauffer* concluded that section 114(a) permits only EPA employees to make inspections and that trade secret law does not provide sufficient protection against disclosure by private consultants.

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13 15 Env't Rep. Cas. (BNA) 1116.
14 Id. at 1117.
15 15 Env't Rep. Cas. (BNA) 1063.
16 14 Env't Rep. Cas. (BNA) 1737.
17 Id. at 1738; 15 Env't Rep. Cas. (BNA) at 1064-65. 40 C.F.R. § 2.215(a) (1982) prohibits employees of, or private consultants contracting with, the EPA from entering into a confidentiality agreement with an affected business when that agreement is inconsistent with the EPA's regulations on confidentiality, 40 C.F.R. §§ 2.201-309 (1982). The EPA is obligated under the FOIA to make certain information available to the public, 5 U.S.C. § 552, and EPA regulations prevent the impairment of this obligation by contract. See 40 C.F.R. §§ 2.209(d), 2.215(d)(6) (1981).
18 See 15 Env't Rep. Cas. (BNA) at 1064; 15 Env't Rep. Cas. (BNA) at 1117; 14 Env't Rep. Cas. (BNA) at 1738.
19 15 Env't Rep. Cas. (BNA) at 1064 (contract also included agreement not to use confidential information to compete with affected businesses); 15 Env't Rep. Cas. (BNA) at 1117 (contract also required consulting firm to obtain confidentiality agreements from individual employees having contact with confidential information); Government's Brief at 3, 14 Env't Rep. Cas. (BNA) 1737.
20 15 Env't Rep. Cas. (BNA) 1116.
21 15 Env't Rep. Cas. (BNA) 1063.
24 14 Env't Rep. Cas. (BNA) at 1740-41. In determining that Stauffer's proprietary in-
The Statutes and Their Construction

The first question to be considered in determining whether the EPA may employ private consultants to make inspections of business premises is whether the statute under which the agency is acting authorizes that use. Although the three statutes examined here—the Clean Air Act, the Clean Water Act, and the Toxic Substances Control Act—do not explicitly authorize the use of private consultants to make inspections, each statute may be read to implicitly authorize such use. Because the Clean Air and Clean Water Acts are organized in the same manner and employ much of the same language, the two will be examined together.

The Clean Air and Clean Water Acts

Both section 114(a)(2) of the Clean Air Act and section 308(a)(B) of the Clean Water Act read in part: "[T]he Administrator or his authorized representative, upon presentation of his credentials . . . shall have a right to entry to . . . any premises . . . and . . . may at reasonable times . . . inspect any monitoring equipment or method required . . . ." Neither statute specifically defines "authorized representative," but when these words are read in conjunction with other sections of each statute it appears that the words were intended to embrace more than just employees of the Agency.

In other sections of the Clean Air and Clean Water Acts, Congress used the language "officers, employees, or authorized representatives." It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute. If the term "authorized representative" is read to include nothing more than officers and employees, part of the statutory language is rendered superfluous and

In the case of the epa, the court ignored the EPA's confidentiality regulations, 40 C.F.R. §§ 2.201-309 (1982).

33 U.S.C. § 1318(b) (1976); 42 U.S.C. §§ 7414(c), 7542(b) (Supp. IV 1980).
ineffectual.\textsuperscript{24} In other sections of the two statutes, Congress referred specifically to officers and employees.\textsuperscript{25} It is fair to conclude that had Congress intended to allow only EPA employees to make inspections, it would have said so by using the terms "officers" and "employees" in the inspection sections.\textsuperscript{26}

The legislative history of these two statutes does not resolve the issue. The Report of the Senate Public Works Committee on the Clean Water Act, referring to section 308,\textsuperscript{27} states:

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 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.\textsuperscript{28}

Although the language of the Committee report rules out the use of private consultants for inspection purposes, this language should not be seen as controlling for two reasons. First, the Committee plainly relied on what it believed to be the intended meaning of the section's counterpart in the Clean Air Act; it said: "Section 308 establishes authority identical to the authority for such purposes contained in the Clean Air Act."\textsuperscript{29} There is some indication, however, that under the Clean Air Act the intention was not to limit the authority to inspect to agency employees, for the conference committee rejected the more restrictive language of the House bill, "officers or employees designated by the Secretary,"\textsuperscript{30} for more expansive language: "the Administrator or his authorized

\textsuperscript{24} Each word in a statute should be given effect if possible. See Rockbridge v. Lincoln, 449 F.2d 547, 571 (9th Cir. 1971); United States v. Dinerstein, 362 F.2d 852, 856 (2d Cir. 1966); 2A J. SUTHERLAND, supra note 31, § 46.06.

\textsuperscript{25} 33 U.S.C. § 1361(b) (1976); 42 U.S.C. §§ 7525(c), 7542(a) (Supp. IV 1980). The sections of the Clean Air Act cited here refer to "officers or employees duly designated by the Administrator."

\textsuperscript{26} See In re Clean Air Act Admin. Insp. of the Bunker Hill Co., 15 Env't Rep. Cas. (BNA) at 1065; In re Aluminum Co. of America, 15 Env't Rep. Cas. (BNA) at 1117.

\textsuperscript{27} It is a rule of statutory construction that, if reasonably practicable, words used in one place in a statute with a plain meaning are given the same meaning when found in other parts of the same statute to the end that there may be a harmonious and consistent body of law. Randall's Case, 331 Mass. 383, 386, 119 N.E.2d 189, 190 (1954). It follows that the converse is also true: when different words are used in other parts of the same statute they are given different meanings. Cf. United States v. Atchison, T. & S.F. Ry., 220 U.S. 37, 44 (1911) ("The presence of ... a provision in one part and its absence in the other is an argument against reading it as implied.").


\textsuperscript{30} Id. at 62, reprinted in [1972] U.S. CODE CONG. & AD. NEWS at 3728.

Thus, reliance on the Clean Air Act history in order to obtain a restricted reading under the Clean Water Act is dubious. Second, it may be inferred that the Committee’s intent behind its exclusion of private consultants from inspections was to prevent disclosure or improper use of confidential business information by private consultants who appear, at first glance, not to be affected by the confidentiality restraints placed upon EPA employees by statute and regulation. But because EPA regulations effectively characterize private consultants under contract with the government in the same way as government employees with respect to confidentiality restraints, the Committee’s concern regarding private consultants is unfounded and the countervailing need for their additional expertise should permit their use. Furthermore, “[r]esort to legislative history is only justified where the face of the Act is inescapably ambiguous.” This is not the case with section 308(a)(B) of the Clean Water Act or section 114(a)(2) of the Clean Air Act. In these sections Congress used the phrase “the Administrator or his authorized representative,” while elsewhere it used the terms “officers” and “employees.” As Mr. Justice Holmes said: “We do not inquire what the legislature meant; we ask only what the statute means.”

The Toxic Substances Control Act

The EPA is also authorized to use private consultants to make inspections of business premises under section 11(a) of the Toxic Substances Control Act. This section reads in part: “For purposes of administering this chapter, the Administrator, and any duly designated representative of the Administrator, may inspect any establishment ... upon the presentation of appropriate credentials.” The statute does not define “duly designated representative,” but in other sections it uses the phrase “officer or employee,” suggesting that the two terms were not intended...

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42 See notes 134-37 & accompanying text infra.
46 33 U.S.C. § 1361(b) (1976); 42 U.S.C. §§ 7525(c), 7542(a) (Supp. IV 1980). For a discussion of the importance of this distinction, see notes 28-36 & accompanying text supra.
49 Id.
50 Id. §§ 2613(a), (d), 2625(e).
Moreover, Congress expressly contemplated the involvement of private consultants in performing the responsibilities imposed upon the EPA by the Act. Section 10 provides that "[t]he Administrator may enter into contracts. . . . for research, development, and monitoring under this subsection," and may also contract "for the development of a data retrieval system." Section 14(a) provides in part:

[ANY] information . . . obtained by the Administrator (or any representative of the Administrator) under this chapter . . . (E) shall be disclosed to contractors with the United States and employees of such contractors if in the opinion of the Administrator such disclosure is necessary for the satisfactory performance by the contractor of a contract with the United States . . . for the performance of work in connection with this chapter and under such conditions as the Administrator may specify.

Thus, private contractors are involved in acquiring and processing information—information often necessarily obtained by inspection. As further evidence of the propriety of using private consultants to make inspections, section 14(d) provides for criminal penalties for wrongful disclosure of information by an employee of the United States and that for this purpose contractors of the United States and their employees are considered employees of the United States.

It is reasonable to construe these three EPA statutes to permit the use of private consultants for inspection purposes. It is a principle of statutory construction that when a statute is susceptible of more than one reasonable interpretation, the one that best effectuates rather than frustrates the purpose of the act should be employed. Allowing private consultants to make inspections effectuates the purposes of these three statutes by helping to assure compliance with environmental legislation. A balancing of interests also favors a construction of these statutes allowing the use of private consultants to make inspections because there are adequate protections for trade secret owners who fear their proprietary interests might be jeopardized.

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53 Id. § 2609(b)(2)(B).
54 Id. § 2613(a).
55 Id. § 2613(d). This provision was one of the amendments proposed by the EPA. S. REP. NO. 688, 94th Cong., 2d Sess. 86, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 4491, 4536. In its explanation the EPA said: "EPA accomplishes a great deal of its investigatory and analytical tasks by contract. If contractors are not allowed access to information under this bill, EPA could not perform its duties satisfactorily without substantial manpower increases." Id.
56 Shapiro v. United States, 335 U.S. 1, 31 (1948).
57 For a discussion of these protections, see notes 109-38 & accompanying text infra.
THE LEGAL TREATMENT OF TRADE SECRETS

Trade secret protection is not an area of law that is reducible to a few simple maxims. Although the law of trade secrets is generally recognized, it has not been treated in a comprehensive manner. Protection of trade secrets is primarily a matter of state common law, and, under Erie Railroad Co. v. Tompkins, federal courts will apply the law of the appropriate state.

There is no universally accepted definition of a trade secret, but the one that is most often employed is that contained in Comment b to section 757 of the Restatement of Torts. That comment reads in part: "A trade secret may consist of 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." Secrecy is an unequivocal requirement to establish the ex-

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59 See, e.g., E.I. duPont deNemours & Co. v. Christopher, 431 F.2d 1012, 1014 (5th Cir. 1970), cert. denied, 400 U.S. 1024 (1971). Aside from common law rules, a substantial number of states have criminal statutes that impose liability for the theft of trade secrets. For an extensive discussion of the statutory provisions for each state, see Epstein, Criminal Liability for the Misappropriation of Trade Secrets (1979), in 2 R. Milgrim, Trade Secrets app. B-5 (1981). In addition to state criminal provisions, there are federal statutes that can be used to impose criminal liability for trade secret misappropriation. The National Stolen Property Act, 18 U.S.C. § 2314 (1976), prohibits interstate or foreign transportation of stolen property of a value of $5,000 or more. Some courts have included trade secrets within the statutory language of "goods, wares, or merchandise." United States v. Greenwald, 479 F.2d 320, 322 (6th Cir.), cert. denied, 414 U.S. 854 (1973); United States v. Bottone, 365 F.2d 389, 393 (2d Cir.), cert. denied, 364 U.S. 937 (1961). 18 U.S.C. § 2315 (1976) operates in a similar manner by making it unlawful to receive stolen "goods, wares, or merchandise" valued at $5,000 or more.
60 304 U.S. 64 (1938).
63 Restatement of Torts § 757, Comment b (1939).
64 Id. The comment also lists six factors to be considered in determining the existence of a trade secret: first, the extent to which the information is known outside of the business; second, the extent to which it is known by employees and others involved in the business; third, the measures taken by the owner to guard its secrecy; fourth, the value of the information to the business and to its competitors; fifth, the amount of money or effort expended by the business in developing the information; and sixth, the ease with which the information could be properly acquired by others. Id.

istence of a trade secret; if a reasonable degree of confidentiality is lost, the trade secret evaporates.

Although a number of theories have traditionally been asserted for relief for the misappropriation of trade secrets—property, confidential relationship, and contract—modern commentators view the property rationale as central to the protection of trade secrets, and most jurisdictions recognize trade secrets as property.

CONSTITUTIONAL LIMITATIONS

After an examination of the three statutes under which the EPA might act and a determination that the Agency has the statutory authority to use private consultants to make inspections, the constitutionality of such use becomes an issue. Administrative inspections that may involve access to trade secrets may be challenged under two constitutional provisions: first, the fourth amendment prohibition of "unreasonable searches and seizures," and second, the fifth amendment prohibition of the deprivation of "property without due process of law" and the taking of property "for public use without just compensation."

The Fourth Amendment and Administrative Inspections

The purpose of the fourth amendment is to protect persons from "unreasonable searches and seizures," and this protection is guaranteed

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[65] Except in a minority of jurisdictions, it is not required that the secret be known only to the owner; the majority requirement is one of "relative secrecy." See E. KIN TNER & J. LAHR, AN INTELLECTUAL PROPERTY PRIMER 141-42 (1975).


[68] 2 R. CALLMANN, supra note 66, § 51.1, at 352-53; 1 R. MILGRIM, supra note 59, at §§ 1.01-.08.


[71] U.S. CONST. amend. IV.

[72] U.S. CONST. amend. V.


[74] U.S. CONST. amend. IV.
by the requirement of a warrant issued only upon probable cause. The restrictions of the fourth amendment have traditionally been applied only to government action, but an inspection carried out by a private consultant under contract with the EPA would be deemed governmental and not private action.

These requirements apply to administrative inspections as well as to criminal searches. In Camara v. Municipal Court, the Court held unconstitutional a warrantless inspection authorized by a city housing code. The Court held that the particularized probable cause required in criminal cases is not necessary for administrative inspections, and that probable cause for an area inspection under a reasonable governmental scheme is sufficient. Camara thus shifted the focus from probable cause to reasonableness, balancing the public interest against the degree of the intrusion. In See v. Seattle, a companion case to Camara, the Court held that the Camara standard applies to administrative inspections of business establishments as well as of private residences.

In Marshall v. Barlow’s, Inc., the Supreme Court made clear that the warrant requirement applies to federal regulatory agencies although the Court limited its holding to the Occupational Safety and Health Act. The Court held Section 8(a) of the Act unconstitutional insofar as it might be read to authorize warrantless inspections of an employer’s premises. The Court reasoned that the industries regulated under the Act did not have “such a history of government oversight that no reasonable expec-

77 For a case finding government action on facts somewhat analogous to an EPA inspection carried out by a private consultant see People v. Tarantino, 45 Cal. 2d 590, 290 P.2d 505 (1955) (fourth amendment violated by private engineer employed by district attorney and police department to plant hidden microphone on private property). When government officials instigate or participate in a search executed by a private person, courts generally characterize the search as government action. For an explanation of the theories upon which such a characterization may be based and supporting cases, see 1 N. LAFAE, SEARCH AND SEIZURE 114-39 (1978). For additional sources on the application of the fourth amendment to searches carried out by private parties, see Stapleton v. Superior Court, 70 Cal. 2d 97, 447 P.2d 967, 73 Cal. Rptr. 575 (1968).
79 Id. at 538.
80 See id. at 539.
81 387 U.S. 541 (1967).
84 Id. at § 657(a).
85 496 U.S. at 325.
tation of privacy could exist," and that inspections under the Act were not exempt from the requirements of the fourth amendment under the exception for "pervasively regulated business[es]" carved out in United States v. Biswell and Colonade Catering Corp. v. United States. The standard for probable cause applied in Barlow's was the lesser and more generalized one of Camara, requiring that the business be chosen as part of "a general administrative plan for the enforcement of the Act derived from neutral sources" and satisfying "reasonable . . . administrative standards for conducting an . . . inspection."

The Court in Barlow's followed the Camara reasonableness analysis, quoting the Camara Court's statement that "'reasonableness is still the ultimate standard.'" The Barlow's Court found that the requirement of a warrant issued upon probable cause served to assure the reasonableness of searches under the Occupational Safety and Health Act. The Barlow's Court left open the possibility that warrants might not be constitutionally required under other administrative statutes, stating that "[t]he reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute." A balancing of interests demonstrates that the use of private consultants by the EPA to make inspections of business premises is not inherently unreasonable.

The Fifth Amendment

As property, trade secrets are covered by the due process and "takings" clauses of the fifth amendment. In Wearly v. FTC, a federal district court found that trade secrets were property protected by the taking clause. The court said: "Failure to provide adequate protection to assure confidentiality [of trade secrets], when disclosure is compelled by the government, amounts to an unconstitutional 'taking' of property by

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90 Id. at 313.
93 387 U.S. at 538.
94 436 U.S. at 320-31.
95 Id. at 315 (quoting 387 U.S. at 539).
96 See id. at 323. It should be noted that 18 U.S.C. § 3105 (1976) requires that one of the agents directed in the warrant be present, but that he may request other persons to accompany and assist him. United States v. Clancy, 276 F.2d 617 (7th Cir. 1960), rev'd on other grounds, 365 U.S. 312 (1961), held that a search warrant may be directed to a class of agents. Id. at 623. Presumably a warrant could be issued to EPA officers as a class and one would have to be present during the search.
97 436 U.S. at 321.
98 See notes 109-38 infra.
99 U.S. Const. amend. V.
92 See id. at 597.
destroying it, or by exposing it to the risk of destruction by public disclosure or by disclosure to competitors. In *Wearly* a company challenged a subpoena duces tecum for documents containing trade secrets, alleging that Federal Trade Commission (FTC) procedures were inadequate to protect the confidentiality of the data. The court did not suggest that the FTC should not have access to the information under any circumstances; instead, it recognized a balancing of interests and focused on means of assuring confidentiality. The court said:

> [Compelled disclosures of proprietary information require a balancing *quid pro quo*. Because of the unique nature of the property, which exists only so long as *there is only a disclosure that is itself privileged, the only suitable *quid pro quo* is an arrangement, tailored to the particular case, that insures against accidental, . . . unauthorized, or improper disclosure.]

In *Zotos International, Inc. v. Kennedy*, a federal district court found that trade secrets were property for fifth amendment due process purposes. In that case, Zotos asked the Food and Drug Administration (FDA) for trade secret status for ingredients in one of Zotos' cosmetic products. The FDA denied the request, saying the ingredients were commonly used in such products and were not secret. After determining that Zotos' alleged trade secret was a property interest deserving due process protection, the district court held that the FDA procedures for evaluating requests for trade secret protection were invalid under the due process clause. The *Zotos* court held that, although a trial-type hearing was not required, a "petitioner must have some means, before an agency issues a final order, of engaging in a reasonably focused dialogue

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9 See id. at 598.
10 See id. at 591-93. An alternative allegation was that the FTC was unwilling to provide safeguards. Id. at 593. A trade secret owner might be justified in having greater fears of disclosure when dealing with the FTC than with other agencies. See Note, Constitutional Limitations on Government Disclosure of Private Trade Secret Information, 56 Ind. L.J. 347, 360 & nn.75-76 (1981). The risk under EPA procedures is not as great, however. See id. at 360-61.
11 462 F. Supp. at 599. Though the district court opinion was vacated on ripeness grounds, the Third Circuit agreed that FTC procedures were often inadequate to assure confidentiality and that it was "understandable" that the district court was concerned for the plaintiffs' constitutional rights in its proprietary interests. 616 F.2d at 664.
13 Id. at 273. The Supreme Court, in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), said that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Accord, *Perry v. Sindermann*, 408 U.S. 593, 601 (1977). Because states protect trade secrets, see notes 58-69 & accompanying text supra, the requisite rules and expectations are present.
14 460 F. Supp. at 270. Regulations issued pursuant to section 5 of the Fair Packaging and Labeling Act, 15 U.S.C. § 1454 (1976), provide that each ingredient of a consumer cosmetic must be listed on the product's label unless that would require divulgence of a trade secret. 21 C.F.R. § 701.3(a) (1982).
15 See 460 F. Supp. at 270.
16 Id. at 274-79.
with the agency concerning the major points at issue in a trade secret request." The court thus required at least the basics of due process—notice and opportunity to comment. EPA procedures provide these basics.

**THE USE OF PRIVATE CONSULTANTS TO MAKE INSPECTIONS IS WITHIN CONSTITUTIONAL LIMITATIONS**

The EPA has recognized the problems posed by trade secrets with respect to both the use of private consultants for inspections and the disclosure requirements of the Freedom of Information Act (FOIA). The EPA's policy statement on disclosure, contained in its regulations, says in part: "EPA will make the fullest possible disclosure of records to the public, consistent with the rights of individuals to privacy, [and] the rights of persons in business information entitled to confidential treatment."

In light of this policy, the EPA has promulgated regulations meant to assure trade secret owners protection of their proprietary interests that is adequate and that meets the requirements of the fourth and fifth amendments. Both the analysis under the fourth amendment and that under the fifth amendment suggest a balancing of the privacy protections in the statutory or regulatory scheme against the proprietary interests at stake.

**Protections Within the EPA Statutes**

Both the Clean Air Act and the Clean Water Act contain provisions exempting trade secrets from the requirements of public disclosure, as does the FOIA. These provisions of the Clean Air Act and the Clean Water Act refer to the Trade Secrets Act, which imposes criminal liability on officers or employees of federal departments or agencies who disclose confidential information, including trade secrets.

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108 Id. at 279.
109 The Supreme Court, in Mathews v. Eldridge, 424 U.S. 319 (1976), said: "The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." *Id.* at 348 (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1950) (Frankfurter, J., concurring)).
110 See text accompanying notes 121-23 infra.
112 Id. §§ 2.201-309.
113 See id. § 2.101(a).
114 See id. § 2.101(a).
115 See notes 73-94 & accompanying text supra.
116 See notes 95-108 & accompanying text supra.
118 5 U.S.C. § 552(b)(4) (1976) exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The EPA and other federal agencies are required to disclose nonexempt agency records on the request of "any person." *Id.* § 552(a).
The Toxic Substances Control Act contains its own criminal liability provision for wrongful disclosure. Under this provision, information that falls within the trade secret exemption of the FOIA may not be divulged. Under the Toxic Substances Control Act, the criminal penalties for disclosure of confidential information apply to private consultants as well as to EPA officers and employees.

**EPA Regulations on Confidentiality**

Regulations promulgated by the EPA address more specifically concerns regarding private consultants' access to trade secrets, as well as more general concerns about public disclosure. They provide that an affected business may assert a confidentiality claim regarding information the EPA has obtained. The EPA will then make a preliminary determination on that claim, notifying the affected business and providing it with an opportunity to comment. The EPA will find that information is entitled to confidential treatment if, first, the business has taken reasonable steps to protect the confidentiality of the information; second, the information is not reasonably obtainable outside the business; third, no statute specifically requires disclosure; and fourth, either the business has shown that disclosure is likely to cause substantial harm or the information has been voluntarily submitted and disclosure would likely impair the government's ability to obtain information in the future. In the meantime, FOIA requests will be initially denied. A final confidentiality determination will be made after the opportunity to comment. If the final determination rejects the claim of confidentiality, the EPA will notify the affected business of that determination, of the reasons therefor, that it constitutes final agency action, and that the action is subject to judicial review under the Administrative Procedure Act (APA).

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15 U.S.C. § 2613(a)(2). This section states that for the purposes of imposing criminal liability on government employees “any contractor with the United States who is furnished information . . . and any employee of such contractor, shall be considered to be an employee of the United States.”
Id. § 2.203(a), (b).
Id. § 2.204(d), (e).
Id. § 2.205. The first and second factors track traditional trade secret law. See notes 64-66 & accompanying text supra.
Id. § 2.205.
Id. § 2.205(f)(2). The judicial review provisions of the APA are found at 5 U.S.C. §§ 701-706 (1976).
Although the information may not be released to the public, if a finding of confidentiality has been made it may be furnished to others in restricted situations. Information may be released if requested by Congress, or if disclosure is required by a court order. If an official need is shown, the information may be released within the EPA, or to another federal agency when the agency agrees in writing to make no unauthorized disclosure. EPA employees are prohibited from disclosing confidential information or using it for private advantage, and must take appropriate measures to protect its confidentiality. Violations are subject to a number of sanctions, ranging up to criminal prosecution for willful violations.

The EPA regulations specifically treat confidential information obtained by private consultants under the inspection sections of the Clean Air Act and the Clean Water Act. These regulations require that a consultant's access to trade secrets be limited to that necessary to enable him to carry out his functions under the contract between the EPA and the consulting firm. In addition, access is permitted only if the contract includes three obligations: first, that the contractor and its employees will use the information only for the purpose of carrying out the work required by the contract, will refrain from disclosing the information to anyone outside the agency without the written consent of the affected business or an EPA legal office, and will return all copies of the information when the required work is completed; second, that the contractor will obtain a written agreement to honor these terms from each of the employees who will have access to the information before access is allowed; and third, that the contractor acknowledges that the contract provisions concerning disclosure and use are included for the benefit of, and shall be enforceable by, both the EPA and any affected business.

The EPA statutes considered here and the regulations promulgated thereunder contain adequate safeguards for maintaining the confidentiality of trade secrets. This is true for private consultants as well as for Agency employees. Moreover, the EPA relies on the expertise and manpower of private consultants. In the interest of best achieving compliance with

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129 Id. § 2.209(b).
130 Id. § 2.209(d).
131 Id. § 2.209(c), (e).
132 Id. § 2.211.
133 Id. § 2.211(e).
134 Id. § 2.301(h).
135 Id. § 2.302(h).
136 40 C.F.R. § 2.301(h)(2)(i). The provisions of id. § 2.301(h) are incorporated by reference into id. § 2.302(h) (Clean Water Act) and id. § 2.306(j) (Toxic Substances Control Act).
137 Id. § 2.301(h)(2)(ii).
138 See notes 2 & 55 supra.
the statutes, the use of private consultants to make inspections should be permitted.

CONCLUSION

The EPA should be permitted to continue using private consultants to make inspections of business premises. A reasonable construction of the Clean Air Act, the Clean Water Act, and the Toxic Substances Control Act permits such use. Agency utilization of private consultants for inspection purposes does not exceed the constitutional limitations of the fourth or fifth amendments because the Agency's statutory and regulatory scheme offers adequate protection to trade secret owners against unauthorized use or disclosure by private consultants. The public interest and the Agency's need for the information outweigh the risks to trade secret owners.

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