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APR 20 1998

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April 14, 1998

William Baggett, Jr., Esq.
Baggett, McCall & Burgess
3006 Country Club Road
Lake Charles, Louisiana 70605

RE: Ross v. Conoco
OUR FILE: 4951

Dear Billy:

Per your request, I enclose a set of the documents on which we have withdrawn the claims of privilege. CF

As we discussed by telephone, the first privilege log was done in an extremely low tech fashion by hand. The combination of newly produced documents, together with the new privilege log, includes everything that went before, plus all documents on which a claim of privilege was asserted in connection with the second wave of production. The only means of comparing the two documents would be to check the dates and descriptions. Consequently, I enclose a chronological printout of the new list which should assist you in this regard. If you have a specific question about a specific document which you cannot resolve in this fashion, please just let me know what document it is, and I will try to assist you.

With best personal regards, I remain,

Yours truly,



Thorne D. Harris III

TDH/drc
Enclosure
cc: R. Bruce Whitney, Esq.

APCI

Ross vs. Conoco

File No. 4851

**APCI Documents formerly claimed
as “Privileged” but produced
as of February 27,1998**

RECEIVED

JAN 26 1981

A. ROSS ADAMC

TELEPHONE

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CABLE ADDRESS "KELMAN"

WRITER'S DIRECT DIAL NUMBER

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January 21, 1981

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*ORIG BAR ONLY

Nancy -
Copy to JT Bar -
RCS -
Ray Schuck -

Mr. Peter E. Roggi
Stauffer Chemical Company
Westport, Connecticut 06880

Re: OSHA and Private Contractors

Dear Pete:

This letter follows our conversation of January 15, 1981, regarding a suggestion by an Occupational Safety and Health Administration (OSHA) official that Stauffer retain Enviro Control, Inc. to conduct an inspection of your Delaware City facility. As I stated on the phone, Enviro has been in business since 1970 and employs some 450 people. It has a close relationship with both OSHA and the National Institute for Occupational Safety and Health (NIOSH). By dollar volume, Enviro is the largest single NIOSH contractor, and Enviro contracts with OSHA in Pennsylvania, Louisiana and South Dakota to provide free on-site consultation for small businesses.

After reviewing this, Jerry Heckman indicated that such a strong link with OSHA would tend to motivate Enviro to reach a decision amicable to OSHA. At a minimum, Enviro's

AP00051041

Mr. Peter E. Roggi
January 21, 1981
Page Two

KELLER AND HECKMAN

strong financial connection to OSHA certainly gives the appearance of tainting Enviro's perspective.

Dr. Vochinski, who was mentioned by OSHA, has a Ph.D. in chemical engineering and has been involved in control-technology assessment studies. Somewhat surprisingly, Dr. Vochinski has not worked with the Enviro people involved in OSHA inspection activities. That section is headed by Donald Rumsey.

As I mentioned in our conversation, in Stauffer's Wyoming case, the district court held that the Environmental Protection Agency (EPA) could not obtain a warrant to force the entry of private contractors onto a facility. EPA appealed that decision to the United States Court of Appeals for the Tenth Circuit. Briefing is now completed, and oral argument is scheduled for January 27, 1981, in Denver, Colorado.

Stauffer's brief in the court of appeals argued that the only statute authorizing entry by private parties is section 3007 of the Resources Conservation and Recovery Act (RCRA), which was enacted in October 1980. The brief notes that administrative agencies, such as OSHA, have not used or attempted to use private parties in carrying out administrative inspections. Brief at 20-22.

From the position adopted in Stauffer's brief, it appears likely that any attempt by OSHA to force the entry of a private contractor through use of a warrant would be understandably and properly opposed. Our review of the Occupational Safety and Health Act reaches the same result. Congress authorized the "Secretary, upon presenting appropriate credentials to the owner" to enter and inspect. Section 8(a) of the Act, 29 U.S.C. § 657(a). The term "Secretary" refers to the Secretary of the Department of Labor, who can delegate this authority to OSHA officials. There is no authority under this section to delegate inspection authority to private persons. Another section of the statute does authorize OSHA to employ experts and consultants, but that section should be restricted to health standard and rulemaking studies. Section 7(c)(2) of the Act, 29 U.S.C. § 656(c)(2). In sum, given our reading of the Act and Stauffer's litigating position, there does not appear to be any legal basis for OSHA to force entry of a private contractor. Naturally, you may always consent to a consultant's inspection.

AP00051042

Mr. Peter E. Roggi
January 21, 1981
Page Three

KELLER AND HECKMAN

Following your suggestion, I have checked further on the other cases where EPA has attempted to force private contractors into plants. Two district courts have permitted EPA to use private contractors, and those decisions are presently on appeal. The North Carolina District Court decision I mentioned has been briefed and is scheduled to be argued on February 2, 1981 before the United States Court of Appeals for the Fourth Circuit in Richmond, Virginia. In re: Alumium Company of America, No. M-80-13 (M.D.N.C. Aug. 5, 1980), appeal docketed, No. 80-1599 (4th Circuit 1980). A second decision in Idaho is presently on appeal to the United States Court of Appeals for the Ninth Circuit. That Circuit is notoriously slow and a decision from them may take several years unless the case is expedited by the court. There are also two other cases pending in federal district courts where a decision has not yet been reached.

I hope this information proves of use to you. If you have any comments or suggestions please feel free to contact me.

Cordially yours

Peter L. de la Cruz

cc: Thomas J. McGrath
John R. Lawrence
Dr. A. Ross Adams ✓

AP00051043

Mr. Peter E. Roggi
January 21, 1981
Page Three

KELLER AND HECKMAN

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AP00051044

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Page Three

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AP00051045