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Environmental Law - Requirement of Notice in Visual Opacity Readings - Air Pollution Variance Board v. Western Alfalfa Corp., 94 S. Ct. 2114 (1974)

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COMMENT

ENVIRONMENTAL LAW—Requirement of Notice in Visual Opacity Readings—*Air Pollution Variance Board v. Western Alfalfa Corp.*, 94 S. Ct. 2114 (1974)

INTRODUCTION

On June 4, 1969, an inspector from the Division of Administration of the Colorado Department of Health made observations on the premises of Western Alfalfa Corporation without notice, warrant, or consent. Approximately two weeks later Western received a cease and desist order from the Division notifying it that three of the corporation's plants in northern Colorado were in violation of the Air Pollution Control Act.[1] A subsequent Air Pollution Variance Board hearing found that a violation had occurred, but the District Court of Weld County set aside this determination.[2] In affirming the district court judgment, the Colorado Court of Appeals held that the observations made by the State Health Inspector constituted an unreasonable search and that the failure to notify Western that observations were being made on its premises led to a denial of due process at the hearing before the Air Pollution Variance Board.[3] The Supreme Court of the United States granted certiorari and, speaking through Justice Douglas, concluded that no violation of the fourth amendment had occurred, and remanded the case to the Colorado Court of Appeals for rulings on any other issues.[4]

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[1] COLO. REV. STAT. ANN. §§ 66-29-1 to -6 (Supp. 1967), *as amended*, COLO. REV. STAT. ANN. §§ 66-31-1 to -16 (Supp. 1971). All observations were made for a period in excess of 3 minutes, and all readings were alleged to be darker in shade than a No. 2 on the Ringelmann Chart and equivalent to an opacity of 40 percent, in violation of the provisions of COLO. REV. STAT. ANN. § 66-29-5(2) (Supp. 1967). The Ringelmann test, a visual measurement of the density of black smoke, has been incorporated into air pollution enforcement statutes in the United States since 1910 when it appeared in the Boston Ordinance. *See* Kennedy & Porter, *Air Pollution: Its Control and Abatement*, 8 VAND. L. REV. 854, 866 (1955). Many statutes like the Colorado statute allow for equivalent opacity readings which correlate the percentage of obscuration of white smoke (visual opacity) with that of black smoke (under the Ringelmann test). *See* City of Portland v. Lloyd A. Fry Roofing Co., 3 Ore. App. 352, 357, 472 P.2d 826, 828 (1970), for a collection of cases approving the use of the Ringelmann Chart.

[2] Western Alfalfa Corp. v. Air Pollution Variance Bd., Civil No. 19974 (Colo. Dist. Ct., filed Nov. 18, 1971). COLO. REV. STAT. ANN. § 66-29-13 (Supp. 1967), *as amended*, COLO. REV. STAT. ANN. § 66-31-17 (Supp. 1971), provides for judicial review of a final order of the Air Pollution Variance Board.

[3] Western Alfalfa Corp. v. Air Pollution Variance Bd., 510 P.2d 907 (Colo. Ct. App. 1973).

[4] Air Pollution Variance Bd. v. Western Alfalfa Corp., 94 S.Ct. 2114 (1974).

Western's challenge to the Division's investigatory procedures brought into focus significant constitutional issues in the enforcement of environmental quality laws. The purpose of this comment is to analyze the fourth amendment doctrines which led the Supreme Court to conclude that visual opacity readings are not constitutionally prohibited searches and to further explore this yet unsettled due process/notice issue. It is concluded that the open fields and plain view doctrines properly exclude observations such as the Ringelmann test from the protection of the fourth amendment, but that due process requires notice to be given to potential violators shortly after such readings are made.

I. THE COLORADO COURT OF APPEALS DECISION

The Air Pollution Control Act as it existed when the inspection occurred, allowed Division personnel to enter and inspect any property for the purpose of investigating an actual or suspected source of air pollution.[5] Neither notice nor a warrant was specifically required. The cease and desist order of June 16 was the first notification Western received that tests had been conducted on its premises and that its emissions had been found to be in excess of the statutory maximum. After filing a denial with the Variance Board that a violation had occurred,[6] Western retained an independent engineering firm to make a particulate study of its plant emissions.[7] Though both the district court and the court of appeals considered the particulate study more sophisticated than the Ringelmann test,[8] the Variance Board refused to accept the study.[9]

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[5] COLO. REV. STAT. ANN. § 66-29-8(2)(d) (Supp. 1967) provided authority for entrance on the premises to make inspections. This section was amended in the 1969 session of the legislature to require that a warrant or consent be obtained before entry on the premises. *See* COLO. REV. STAT. ANN. § 66-29-8(2)(d) (Supp. 1969). This provision now appears in COLO. REV. STAT. ANN. § 66-31-10(2)(d) (Supp. 1971).

[6] COLO. REV. STAT. ANN. § 66-29-10(4) (Supp. 1967), *as amended*, COLO. REV. STAT. ANN. § 66-31-13(4) (Supp. 1971).

[7] This test was made in August, 1969.

[8] The district court termed the particulate study a "more precise test of pollutant emissions." Western Alfalfa Corp. v. Air Pollution Variance Bd., Civil No. 19974 (Colo. Dist. Ct., filed Nov. 18, 1971). The court of appeals called the study a "sophisticated test." Western Alfalfa Corp. v. Air Pollution Variance Bd., 510 P.2d 907, 909 (Colo. Ct. App. 1973).

[9] COLO. REV. STAT. ANN. § 66-29-5(2)(e) (Supp. 1969) requires that the method of testing used by independent engineering firms be acceptable to the Division. Division personnel must be present at the time of testing to determine the acceptability of the test, but in this case Western did not notify them. There is, however, no reciprocal provision which allows company representatives to be present when the Division makes inspections.

Citing *Camara v. Municipal Court*[10] and *See v. City of Seattle*,[11] the court of appeals concluded that "the act of conducting tests on the premises of Western without either a warrant or the consent of anyone from Western, constituted an unreasonable search."[12]

The court of appeals also found a violation of due process in that Western was unable to present rebuttal evidence at the hearing before the Variance Board due to the "secret nature of the investigation."[13] The Air Pollution Control Act provides that violations of the kind Western was accused may be based upon the aggregation of emissions in three minutes of any hour.[14] As applied by the Variance Board, this provision of the Act is of critical significance in determining whether a violation of the Act has occurred. The Board in this case focused attention on the three minutes of the hour in question and excluded, for probative purposes, evidence collected at any other time. Thus, the Board did not consider Western's evidence of its emission levels in August as probative rebuttal evidence to the Division's conclusions of the emission levels in June.[15]

The court of appeals pointed out that the evidence by its nature was continually dissipating.[16] Implicit in this observation was the realization that since Western had no knowledge of the tests made on June 4, it had no opportunity to gather evidence that could successfully rebut the findings of the Division. The failure of the Division to notify Western that tests were being conducted resulted in a lack of due process at the hearing level because Western was foreclosed from presenting rebuttal evidence. The court concluded that it is mandatory in cases of this kind that the accused party be made aware of the taking of tests and measurements on its premises at the time they are made.[17]

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[10] 387 U.S. 523 (1967). *Camara* upheld a citizen's right to refuse a warrantless inspection of his home for possible violations of city housing regulations in non-emergency situations. This decision overruled Frank v. Maryland, 359 U.S. 360 (1959), which had held that warrantless searches designed to enforce health regulations were not subject to fourth amendment prohibition provided they were conducted at a reasonable time and place.

[11] 387 U.S. 541 (1967). A companion case to *Camara*, *See* applied the *Camara* rule to administrative searches of commercial premises.

[12] 510 P.2d at 909-10.

[13] *Id.* at 909.

[14] COLO. REV. STAT. ANN. § 66-29-5(a) (Supp. 1967), *as amended*, COLO. REV. STAT. ANN. § 66-31-11(1) (Supp. 1971).

[15] 510 P.2d at 910.

[16] *Id.*

[17] *Id.*

The court did not limit this mandate to the facts of Western, where the observer was *on* the defendant's premises, but implied that notice should be given even if the observer conducts the tests from *off* the premises.

II. THE SUPREME COURT DECISION

The decision of the U.S. Supreme Court was handed down on May 20, 1974.[18] Justice Douglas quickly cleared the air surrounding the issue of whether an unreasonable search occurred at Western. Citing *Hester v. United States,*[19] the Court determined that tests of this kind fall within the open fields exception to the fourth amendment.[20] Comparing this inspection to those under the Noise Control Act of 1972[21] (where an inspector may enter a railroad right-of-way to determine whether noise standards are being violated), the Court found that this kind of inspection cannot be said to constitute an invasion of privacy. "The invasion of privacy . . . if it can be said to exist, is abstract and theoretical."[22] Confining the *Camara* and *See* cases to their facts, Justice Douglas found them inapplicable to the factual situation in *Air Pollution Variance Board v. Western Alfalfa Corp.*:

> The field inspector did not enter the plant or offices. He was not inspecting stacks . . . boilers, scrubbers, flues, grates, or furnaces; nor was his inspection related to respondent's files or papers. He had sighted what anyone in the city who was near the plant could see in the sky—the plumes of smoke.[23]

Having settled the fourth amendment issue, the Court chose to sidestep the due process question, noting that perhaps the air surrounding this issue is not as clear.

> Whether the Court [of Appeals] referred to Colorado "due process" or Fourteenth Amendment "due process" is not clear. If it is the former, the question is a matter of state law beyond our purview. Since we are unsure of the grounds of that ruling we intimate no opinion on that issue. But on our remand we leave open that and any other question that may be lurking in the case.[24]

Justice Douglas left unsettled what is probably the more nagging issue in the case. Contrary to newspaper reports at the time the

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[18] 94 S. Ct. 2114, 2115-16 (1974).
[19] 265 U.S. 57, 59 (1924).
[20] 94 S. Ct. 2114, 2116 (1974).
[21] 42 U.S.C. § 4901-18 (Supp. II, 1972).
[22] 94 S. Ct. at 2116.
[23] *Id.* at 2115.
[24] *Id.* at 2116 (footnotes omitted).

decision was handed down,[25] the Supreme Court did not settle for all purposes the question of whether notice should be given when visual opacity readings are made.

While the statute as it existed on June 4, 1969, permitted entry onto an alleged violator's premises to make an inspection,[26] this section was amended in the 1969 session of the Colorado Legislature to require a warrant or consent before entry is made on the premises.[27] This amendment seems to satisfy any notice problem as long as the inspection is conducted on a person's property, premises, or place as was the case in *Western*. But what if the inspection is made from the property of an adjoining landowner or property owned by the public such as an adjacent public highway or right-of-way? The mandate of the court of appeals that searches of this kind (meaning visual opacity inspections) be made only with notice seems capable of compassing all such searches whether made from on or off premises. But neither the statute nor either of the opinions has squarely confronted the issue.

III. Did the Inspection Constitute an Unreasonable Search?

The warrantless administrative inspections in the *Camara* and *See* cases involved attempts to enter enclosed structures to recover evidence contained therein. The *Western* inspection, by contrast, was not an attempt to enter an enclosed structure but was confined solely to the premises or grounds surrounding the plants. The issue was, then, does the entrance of an inspector upon the grounds surrounding a commercial structure for the purpose of obtaining evidence open to the public eye constitute an unreasonable search prohibited by the fourth amendment?[28]

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[25] The Denver Post, May 20, 1974, at 4, col. 2 stated: "Authorities needn't obtain search warrants or give advance notice to go onto the property of potential polluters to make inspections, provided they make the inspections from areas open to the public, the Supreme Court ruled Monday." The Rocky Mountain News, May 21, 1974, at 1, col. 1 concluded, "the high court rejected the view that state officials must obtain either a search warrant or consent of the owner before taking pollution readings at a commercial or industrial site. Inspectors may enter the property of suspected pollutors as long as they don't invade areas normally closed to the public, the court ruled."

[26] Colo. Rev. Stat. Ann. § 66-29-8(2)(d) (Supp. 1967).

[27] Colo. Rev. Stat. Ann. § 66-29-8(2)(d) (Supp. 1969) "except that if such entry or inspection is denied or not consented to and no emergency exists, the division is empowered to and shall obtain from the district or county in which such property, premise or place is located, a warrant to enter and inspect any such property, premise, or place prior to entry and inspection."

[28] The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath

The fourth amendment's provision for protection of one's person, house, papers, and effects amounts to protection of one's privacy against unreasonable governmental intrusion.[29] Therefore, the fourth amendment offers protection only to those activities in which one has a reasonable expectation of privacy. This principle was announced in *Katz v. United States*,[30] a case which attempted to remodel traditional methods of applying fourth amendment problems. Prior to *Katz*, courts were consistently troubled by the requirement that a trespass—a physical penetration of a constitutionally protected area—was necessary before a search could be found unreasonable.[31] With the development of sophisticated electronic aids, it became apparent that one's privacy could be invaded without an actual physical intrusion.[32] *Katz* purported to offer a solution to the trespass requirement in search and seizure cases. At issue were the activities of government agents who electronically listened to and recorded the defendant's telephone conversation in a public telephone booth. Under the traditional requirements of trespass, no unreasonable search had taken place because there was no physical invasion of a constitutionally protected area. Nevertheless, it was apparent that the defendant's privacy had been invaded. Discarding the trespass requirement, the Court found that once a person's justifiable reliance on privacy had been invaded, an unreasonable search had taken place.[33] The concurring opinion indicated that there must be an actual subjective expectation of privacy, and that expectation must be recognized as reasonable by society.[34]

Relieving future courts of the outdated trespass requirement,

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or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[29] McDonald v. United States, 335 U.S. 451, 455 (1948); Johnson v. United States, 333 U.S. 10, 14 (1948); Davis v. United States, 328 U.S. 582, 587 (1946); Boyd v. United States, 116 U.S. 616, 635 (1886).

[30] Katz v. United States, 389 U.S. 347, 361 (1967).

[31] Since the common law was unexposed to non-trespassory (electronic) intrusion of one's privacy, it was not unusual that an actual physical invasion was thought necessary under the traditional analysis. *See* Mascolo, *The Role of Functional Observations in the Law of Search and Seizure: A Study in Misconception*, 71 DICK. L. REV. 380, 381 (1967).

[32] Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. REV. 968, 972 (1968).

[33] 389 U.S. at 353. Here it was held:

> [E]lectronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment.

[34] *Id.* at 361 (Harlan, J., concurring).

Katz concluded that the protection offered by the fourth amendment was for people (and their privacy), not places.[35] Subsequent decisions, however, indicate that it is almost impossible to determine whether a person's privacy has been invaded without taking account of the place. The problem is expressed by one writer who said:

> [T]he mechanics of applying the fourth amendment must of necessity be concerned with protecting private places . . . . [T]he courts, despite contrary assertions, have uniformly continued to treat searches and seizures as violations of private places . . . .[36]

One's reasonable expectation of privacy is then, at least in part, a function of the nature of the invaded area. If the invaded area is not one which has been traditionally considered constitutionally protected, then it is very difficult to successfully argue that an officer's intrusion into that area violates the privacy of the person, activity, or other evidence found within the area. Any consideration of the protection offered by the fourth amendment to the person must of necessity take into account the nature of the place. The observations made at Western must be measured against this background.

A. *Open Fields Doctrine*

Hester v. United States[37] established the rule that "the special protection accorded by the fourth amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields."[38] In *Hester,* officers conducted initial observations from and entered onto an open field without a warrant to seize evidence of concealed distilled spirits from the defendant. According to *Hester,* open fields are not "constitutionally protested areas." There, in contrast to *Katz,* the area, not the person, defined the boundaries of fourth amendment protection.

The officers in *Hester* were trespassers, but the Court declared it immaterial that a trespass was committed in the seizure of the evidence in the open field.[39] Under the *Hester* rationale,

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[35] *Id.* at 351.

[36] Note, *Concept of Privacy and the Fourth Amendment,* 6 U. MICH. J.L. REV. 154, 175-76 (1972). *See also* Mancusi v. DeForte, 392 U.S. 364, 368 (1968); United States v. Kahan, 350 F. Supp. 784, 791-92 (S.D.N.Y. 1972); United States v. Vilhotti, 323 F. Supp. 425, 431 (S.D.N.Y. 1971); Zamora v. People, 175 Colo. 340, 344, 487 P.2d 1116, 1118 (1971); People v. Ortega, 175 Colo. 136, 139, 485 P.2d 894, 896 (1971).

[37] 265 U.S. 57 (1924).

[38] *Id.* at 59.

[39] *Id.* at 58. *See also* Giacona v. United States, 257 F.2d 450, 456 (5th Cir.), *cert. denied,* 358 U.S. 873 (1958) which held: "When the performance of his duty requires an

then, it is of no significance that the Division Health Inspector in *Western* may have committed a trespass while on the property of the corporation.

The commercial nature of Western's operations does not remove it from the open fields doctrine since the doctrine has been applied successfully to the open fields of commercial premises.[40]

The nature of an open field had been defined through a series of cases, several of which were decided after *Katz*.[41] The grounds surrounding a plant were found not subject to fourth amendment protection,[42] nor was the chimney of a barbecue in a backyard,[43] or the top of a foundation block only a foot or two removed from the open fields.[44]

The inspection at Western was made from the grounds surrounding the plant, an area which is not cloaked with constitutional protection. Nor was the evidence which the inspector viewed within a constitutionally protected area since the emissions were in the atmosphere immediately above the plants, not unlike evidence discovered in an open field. Therefore the inspection made by the Division on Western's premises did not constitute an unreasonable search within the meaning of the fourth amendment.

The open fields doctrine was not superceded by the *Katz* decision, for, as stated above, courts cannot analyze one's reason-

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officer of the law to enter upon private property, his conduct, otherwise a trespass, is justifiable." Koth v. United States, 16 F.2d 59, 61 (9th Cir. 1926) held: "The fact that the officers may have been trespassors does not exclude the evidence . . . ."

[40] McDowell v. United States, 383 F.2d 599, 603 (8th Cir. 1967) held:
> Although the Supreme Court has recently expanded the Fourth Amendment protection of the business enterprise, See v. City of Seattle, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967), it has not expanded such protection beyond that which a private dwelling and the curtilage thereof is likewise entitled. Therefore, a search of open fields, without a search warrant, even if such fields are construed as part of a commercial enterprise, is not constitutionally "unreasonable."

[41] The concept of curtilage has often controlled the decision of where the constitutional protection of an area ends and the open fields begin. Curtilage is a small area of land around a dwelling house, not necessarily enclosed, including the buildings used for domestic or family purposes. *See* James v. State, 94 Okla. Crim. 239, 234 P.2d 422 (1951). The curtilage of a dwelling is entitled to the protection of the fourth amendment. However, manufacturing plants such as Western are said to have no curtilage. *See* United States v. Vlahos, 19 F. Supp. 166, 170 (D. Ore. 1937).

[42] Monnette v. United States, 229 F.2d 847, 850 (5th Cir. 1962).

[43] People v. Alexander, 253 Cal. App. 2d 691, 61 Cal. Rptr. 814 (1967).

[44] Giacona v. United States, 257 F.2d 450 (5th Cir.), *cert. denied*, 358 U.S. 873 (1958).

able expectations of privacy without taking into account the nature of the place investigated. The 1973 decision of *United States v. Brown*[45] declares: "[T]he 'Open Fields Doctrine' still prevails. Search of open fields without a search warrant is not unreasonable and is not constitutionally impermissible."[46]

The amended Air Pollution Control Act of 1970[47] which requires a warrant or consent prior to entry upon any property, premises, or place for inspection purposes,[48] affects the open fields doctrine in that inspections made from any part of a company's property must be pursuant to a warrant or consent. The statute does not, however, address the question of whether inspections made from open fields of an adjoining property owner or an adjoining public right-of-way may be made only pursuant to consent or warrant. Under the open fields doctrine, the adjacent public right-of-way is not a constitutionally protected area, and observations of emissions from such a location would not be violative of the fourth amendment.

B. *Plain View Doctrine*

The plain view doctrine holds that evidence fully disclosed and open to the eye is not subject to fourth amendment protection because no search is required to obtain such evidence.[49] *People v. Rosenthal*[50] distinguished the warrantless search by a building inspector of the *interior* of an apartment house from his observations of the *exterior* of the apartment house. The court explained that a " '[s]earch' implies a prying into hidden places for that which is concealed and it is not a search to observe that which is open to view."[51] Evidence relating to the garage and porches of the apartment house was found to be admissible while evidence discovered on the interior of the same building was constitutionally inadmissible. Expressing similar conclusions about evidence found in plain view, *United States v. Vilhotti*[52] held: "The two most important variables in deciding whether a visual search contravenes the Fourth Amendment are accessibility to

[45] 473 F.2d 952 (5th Cir. 1973).

[46] *Id.* at 954.

[47] COLO. REV. STAT. ANN. § 66-31-1 to -26 (Supp. 1971), *as amended*, ch. 212-13, [1973] Colo. Sess. Laws 736-43.

[48] *Id.* at § 66-31-10(2)(d).

[49] Harris v. United States, 390 U.S. 234, 236 (1968); United States v. Vilhotti, 323 F. Supp. 425 431 (S.D.N.Y. 1971); People v. Exum, 382 Ill. 204, 210, 47 N.E.2d 56, 59 (1943).

[50] 59 Misc. 2d 565, 299 N.Y.S.2d 960 (1969).

[51] *Id.* at 964.

[52] 323 F. Supp. 425 (S.D.N.Y. 1971).

view and the nature of the premises."[53] *Katz* verified the continuing validity of the plain view doctrine by stating, "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[54]

The inspection made at Western was a plain view observation since the emissions were visible whether one was on or off the premises.[55] *Katz* held that one's expectation of privacy must be reasonable for there to be an unconstitutional search.[56] Such an expectation cannot be justified when the objects or activities viewed are knowingly exposed to the public.[57] Western therefore had no justifiable expectation of privacy, and the evidence which was in plain view was not constitutionally protected.

The amendment to the Air Pollution Control Act[58] does not affect the operation of the plain view doctrine as long as observations of this kind are made from a point outside of the property, premises, or place owned by the party being inspected.

IV. WAS DUE PROCESS VIOLATED?

It has been well established that due process extends to administrative hearings such as the one Western was given before the Air Pollution Variance Board.[59] Equally well settled is the fact that corporations such as Western are entitled to the protection of due process of law.[60]

The Division's claim in *Western* was supported by the uncorroborated testimony of one individual who observed emissions for approximately ten minutes. Western had no knowledge of this inspection until 2 weeks later when it received the cease and desist order. The Variance Board permitted Western to introduce

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[53] *Id.* at 431.

[54] Katz v. United States, 389 U.S. 347, 351 (1967).

[55] Brief for Petitioner for Certiorari at 13, Air Pollution Variance Bd. v. Western Alfalfa Corp., *cert. denied* by the Colorado Supreme Court, June 25, 1973.

[56] Katz v. United States, 389 U.S. 347, 353 (1967).

[57] *Id.* at 351.

[58] *See* COLO. REV. STAT. ANN. § 66-31-10(2)(d) (Supp. 1971), *amending*, COLO. REV. STAT. ANN. § 66-29-8(2)(d) (Supp. 1967).

[59] Shoenberg Farms, Inc. v. People *ex rel.* Swisher, 166 Colo. 199, 212, 444 P.2d 277, 283 (1968); Puncec v. City & County of Denver, 28 Colo. App. 542, 544, 475 P.2d 359, 360 (1970); People v. Belcastro, 356 Ill. 144, 146-47, 190 N.E. 301, 303 (1934).

[60] Liggett Co. v. Baldridge, 278 U.S. 105, 111 (1928); Kentucky Fin. Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544, 550 (1923); Covington & Lexington Turnpike Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896); Beatrice Creamery Co. v. Cline, 9 F.2d 176, 177 (D. Colo. 1925). Due process as used in this comment refers to either the fourteenth amendment of the Constitution of the United States or Section 25, Article 2 of the Constitution of the State of Colorado, unless one or the other is specified.

evidence of an independent engineering test conducted 2 months after the Division inspection, but the report was objected to because the test was conducted without notification to the Department of Health. This resulted in the Division's not having personnel present to determine if the method of testing was acceptable.[61] The transcript from the hearing indicates that even had Western notified the Division that a test was being conducted, the Variance Board would not have considered the results probative. The Variance Board focused its attention primarily upon the evidence gathered by the Division on June 4. The transcript illustrates:

> MR. HEATON: When you made your visit on June 4, 1969 and made these observations, and you as a certified air pollution observer, these emissions did or did not exeed the state standards and the state air pollution control act?
> MR. CAWELTI: They did exceed.[62]
> MR. HEATON: The violation, I think, is June 4. You did not present evidence that you were not in violation on June 4.
> MR. CAWELTI: Of course, I think we all have to realize that it is physically impossible, because we didn't even know that we were being examined on June 4, and it wasn't until some 20 days later that we had been examined on that day, because it is a matter of history by the time we heard we were being charged for it.[63]
> MR. HEATON: Let me talk about the law on June 4. The specific law on June 4. As the law on that date, and as it reads on June 16. Could you have been in violation on those dates?
> MR. CAWELTI: Yes. Our own view is that we were not, and our own testimony is that we were not.
> MR. HEATON: No your testimony was that you were not in violation in August. I don't have the date of that report, but it was August.[64]

Paragraph 2 of the Air Pollution Variance Board's Findings of Fact states:

> Ringelmann and Opacity readings for a period in excess of three minutes were taken by personnel of the Colorado Department of Health on June 4, 1969, and all such readings were in excess of a Ringelmann 2 and an Opacity of 40%.[65]

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[61] Western Alfalfa Corp. v. Air Pollution Variance Bd., Civil No. 19974 (Colo. Dist. Ct., filed Nov. 18, 1971). COLO. REV. STAT. ANN. § 66-29-5(2)(e) (Supp. 1969) requires that in order for a person to avail himself of the independent testing, the method of such testing be acceptable to the Division.

[62] *See* State of Colorado Department of Public Health, Air Pollution Variance Board for transcript of proceedings in the Air Pollution Variance Board hearing records from *In re* Western Alfalfa Corp., Sept. 11, 1969, at 33.

[63] Record, Oct. 16, 1969, at 8-9, *In re* Western Alfalfa Corp.

[64] *Id.* at 12.

[65] Air Pollution Variance Board, Findings of Fact and Conclusions of Law in *In re* Western Alfalfa Corp., Jan. 30, 1970, at 2.

The preceding illustrates that the Variance Board rendered exclusive probative value to the evidence submitted by the Division inspector of the test made June 4.

Morgan v. *United States*[66] states that "in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing . . . .' "[67] Due process "secures the individual 'from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' "[68] Several facts must be considered in assessing the fairness of the investigation and resultant trial of Western Alfalfa Corporation.

A. *The Ringelmann Test: Notice and Certification*

The district court noted that the Division objected to the independent engineering test of Western because it was done without notification to the Department of Health, and as a consequence the Division had no personnel present to determine if the method of testing was acceptable. The district court concluded, "If this be objectionable, then it is likewise objectionable if the Department of Health makes its examination of opacity and pollutants without the presence of personnel of the person or company being examined for possible violations of the Air Pollution Control Act."[69] Implicit in the court's comment is the notion of fairness. While the statute suggests protection of the Division against the self-justifying instincts of the citizens, nothing in the statute protects the citizens against the unhampered zeal of an administrative officer intent upon discovering, and possibly inventing, violations of the Air Pollution Control Act.

Another fact to consider is that the State of Colorado permits certification of experts in the use of the Ringelmann Chart, but certifies only persons employed by the State.[70] This certification of the State employees authenticates their credentials. Though an individual not employed by the State may have gone through the very same training as a certified expert, his qualifications lack the aura of authentication implied by the credentials of a State

[66] 304 U.S. 1 (1938).

[67] *Id.* at 14-15.

[68] La Plata River & Cherry Creek Ditch Co. v. Hinderlider, 93 Colo. 128, 132, 25 P.2d 187, 188 (1933), *appeal dismissed,* 291 U.S. 650 (1933).

[69] Western Alfalfa Corp. v. Air Pollution Variance Bd., Civil No. 19974 (Colo. Dist. Ct., filed Nov. 18, 1971).

[70] *Id.*

employee. While the fact of certification may not preclude challenge to the testimony of a State-employed expert, it would certainly increase the burden one must bear in challenging such testimony. Certification adds credence to the testimony of the State's witness. One must question whether the testimony of a "non-certified" smoke reader would have inherently been at some disadvantage simply because of the "non-certification"? The unfairness of such a situation is palpable.

B. *The Evidentiary Quandary*

Since the Act permits a decision of the Variance Board to be based exclusively upon evidence obtained in three minutes of any hour,[71] there was no opportunity for Western to verify or challenge what the enforcement officer actually saw on June 4. Further, the Variance Board refused to accept the evidence gathered on dates other than the date of the Division inspection. Without an opportunity to monitor the State test and simultaneously make its own readings, a company under investigation is at an insurmountable disadvantage. Thus, the entire case of the Division rested upon the unsubstantiated and unverified testimony of a single individual of an observation lasting no more than ten minutes. In these circumstances, the sole defense remaining to Western was to impeach the expert witness by challenging his qualifications or the manner in which he conducted the test.[72] Since the witness' qualifications were validated by his certification and his method of testing was unverified by other witnesses, the burden resting upon Western was very heavy. It is no exaggeration to suggest, as did the court of appeals, that Western was absolutely foreclosed from negating the testimony of the Division.

Counsel for Western claimed that the investigatory and notice procedure followed in this case was not unlike a motorist receiving notice that he had violated a traffic ordinance by receiving a citation in the mail 2 weeks after the alleged violation had

[71] COLO. REV. STAT. ANN. § 66-29-5(2)(a) (Supp. 1967), *as amended*, COLO. REV. STAT. ANN. § 66-31-9 (Supp. 1971).

[72] Apparently Western was unable to prove the nature of its emissions on June 4 by submitting evidence of the amount of alfalfa processed, the day's fuel consumption, or other records of the day's operations. Testing in this manner is not specifically authorized by statute, and it is questionable whether records of operations on that day or a similar day would even begin to withstand a challenge based upon evidence gathered in an actual physical inspection on June 4. Any attempt to simulate the actual conditions existing as of June 4 would probably be doomed to countless variables such as wind direction and speed, time of day, amount of alfalfa processed, etc.

occurred.[73] The Division argued that the "only way a company can stay in continuous compliance with the Pollution Control laws is to constantly monitor its own emissions."[74] The Division reasoned that since the law required Western to be in compliance, it should have known of any 3-minute interval when it was not in compliance. In answer, Western argued, "By the same logic, a driver of a car should be able to recall and to specifically testify as to what speed he was driving at a particular time on a day two weeks in the past."[75] Moreover, any role Western might have attempted at constantly monitoring its emissions would have been seriously undermined by the fact that its own experts were not certified.

The procedure used against Western was not unlike an ex parte investigation by an administrative hearing board where evidence is collected without notice being given. In such instances, courts have held that the aggrieved party was deprived of his right, under due process of law, to refute, test, or explain the opposing party's evidence.[76] Basic fairness dictates that Western should have been entitled to a "reasonable" opportunity to refute the Division's evidence. Even assuming there was a violation on June 4, there should have been some way Western could have known sooner that it was committing such a violation. In addition, the 2-week delay, in itself, seems inconsistent with the Act's manifest intention to curb air pollution. By its remissiveness in failing to notify Western immediately, the Division itself may have contributed to a continuing violation of the Air Pollution Control Act.

C. *An Evidentiary Analogy*

Since the evidence in cases like this is continually dissipating into the atmosphere, a comparison may be made to the evidence sought when a blood-alcohol test is administered. With the passage of time, the intoxicating effect of alcohol in the blood diminishes as does the evidence of pollutants in the sky. The efficacy of the blood test depends upon its being made in close proximity to the time of the offense. Similarly, the probative value of an air pollution test depends upon a close proximity in time to the al-

[73] Respondent's Brief in Opposition to Certiorari at 14, Air Pollution Variance Bd. v. Western Alfalfa Corp., 94 S. Ct. 2114 (1974).

[74] Brief for Air Pollution Variance Board for Certiorari as Amicus Curiae at 15-16, Air Pollution Variance Bd. v. Western Alfalfa Corp., 94 S. Ct. 2114 (1974).

[75] Brief for Respondent in Opposition to Certiorari at 14, Air Pollution Variance Bd. v. Western Alfalfa Corp., 94 S. Ct. 2114 (1974).

[76] English v. City of Long Beach, 35 Cal. 2d 155, 217 P.2d 22 (1950).

leged violation. In the blood test cases, it has been held that the accused party "should be entitled to a reasonable opportunity to attempt to procure a timely sample. . . . [T]o refuse him such reasonable opportunity is to deny him the only opportunity he has to defend against the charge."[77] If denied the opportunity upon request to see his own doctor, "it may be said that the [defendant has been] denied the essentials of governmental fair play."[78] In the same manner, a party suspected of an air pollution violation should have the benefit of his own timely witness. To deny him that witness is to curtail his only opportunity to effectively rebut the evidence gathered against him.

D. *A Secret Investigation*

In essence, what was conducted by the Division on June 4 was a secret investigation. It has been held in cases under the fourth amendment that "[s]ecret searches have never been a part of our system of government. . . . [T]he secret search is such an extraordinary procedure under the Fourth Amendment that basic decency and the prohibition against unreasonable searches and seizures embodied in that Amendment require that prompt and adequate notice after the search must be given to [the enforced parties]."[79] While the type of investigation conducted at Western is not proscribed by the fourth amendment, the rationale underlying the notice requirements is still directly applicable. In either case it makes no difference to the aggrieved party whether the inspection is termed a search or simply an inspection. What is important is that timely notice be given after the inspection has been made. "[T]o delay notice to the subject of the search for a substantial period of time because it might hamper an investigation is in our view well beyond the bounds of the Constitution."[80] By delaying notice of the investigation at Western's plant the Division seriously impaired Western's defense, perhaps suppressing evidence that would have "cleared" Western.

> [L]aw enforcement agencies also have a responsibility to protect as well as to prosecute; . . . when in the exercise of their power to arrest, the police deprive the arrested person of the opportunity to obtain evidence that might establish his innocence, they are suppressing it just as effectively as if it did exist and they withheld it;

[77] *In re* Newbern, 175 Cal. App. 2d 862, 866, 1 Cal. Rptr. 80, 83 (1959).

[78] *Id.*

[79] United States v. Whitaker, 343 F. Supp. 358, 368 (E.D. Pa. 1972).

[80] *Id.* at 369.

> . . . evidence should be equally available to prove innocence as well as guilt . . . .[81]

CONCLUSION

The purpose of this comment is not to propose a detailed outline of the manner and timing of what would constitute adequate notice to a party being investigated for possible violation of the Air Pollution Control Act, but only to emphasize that the 2-week delay in the present case was too long under any circumstance. It is not urged that notice must be given prior to or at the same time as the Division conducts a test, but only within a reasonably short period of time thereafter so as not to deprive the party of his right to a fair trial.

Counsel for the Division has argued that surprise is a crucial element in conducting tests of this kind, and that notice would unnecessarily restrict the prosecution of air pollution violations.[82] Contrary to this assumption is the fact that most violations which the Division cites are the consequence of a malfunction in the mechanical operation of a plant which, unless corrected, tend to be of a continuing nature.[83] Surprise therefore plays little role in the day-to-day enforcement of the Air Pollution Control Act.

The requirement of notice in this context does not mean that such notice is required in other regulatory contexts. "There is a tendency to think that there is and should be one type of procedure and review for all administrative agencies. This is a great mistake founded on insufficient understanding of the field of administrative law."[84] What constitutes adequate due process in each situation depends upon "the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case."[85] When visual opacity readings are made, notice should be a requisite element of the procedure envisioned by law. Without notice, the rights of the affected parties are seriously impaired. The fact that this evidence is, by its nature, continually dissipat-

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[81] 78 A.L.R.2d 906 (1961). For a full discussion of this point see the cases collected at Annot., 78 A.L.R.2d 905 (1961).

[82] Brief for Petitioner for Certiorari at 9, Air Pollution Variance Bd. v. Western Alfalfa Corp., 94 S. Ct. 2114 (1974).

[83] Interview with John Spiegel, Air Pollution Control Specialist, Stationary Sources Section, Air Pollution Control Division, Colorado State Department of Health, in Denver, December 17, 1973.

[84] Crow v. Industrial Comm'n, 104 Utah 333, 343, 140 P.2d 321, 325 (1943) (Wolfe, C.J., concurring specially.)

[85] Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246 (1944).

ing, renders the notice element crucial to a fair investigation.

Administrative agencies are instruments of power. They represent the possibility of great public good, but also the possibility of public evil.[86] The procedure under which the State Health Department is now permitted to enforce air pollution regulations in the State of Colorado has inherent potential for great abuse. The statute does not require notice in all situations. Without notice, accused parties after an inspection may be left with the impression they have been raided by government agents. Instead of promoting an atmosphere of cooperation, the current procedure nurtures a climate in which distrust and antagonism can readily develop.

Fair play must be assigned an active role in the daily enforcement of the air pollution regulations. While it is necessary to protect the quality of the environment and particularly the air we breathe, we must guard against the unfettered zeal of administrative agencies. Such zeal, unchecked, could easily transgress the rudimentary safeguards guaranteed by due process of law.

Leland P. Anderson

[86] Bikle, *Safeguarding Private Interest in Administrative Procedure*, 25 WASH. U.L.Q. 321, 339 (1940).