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TECHNOLOGY, POLLUTION CONTROL, AND EPA ACCESS TO COMMERCIAL PROPERTY: A CONSTITUTIONAL AND POLICY FRAMEWORK

Robert M. Andersen*

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* Deputy General Counsel, National Science Foundation, and formerly Deputy Regional Counsel, United States Environmental Protection Agency, Region V; B.S. 1972, University of Iowa; M.P.A. 1986, Harvard University; J.D. 1976, University of Iowa. The views expressed are solely those of the author. No official support or endorsement by the Environmental Protection Agency or the National Science Foundation is intended or should be inferred. The author gratefully acknowledges the advice and assistance given to him by attorneys John A. Hamill and Michael J. Walker during the preparation of this Article.
I. INTRODUCTION AND OVERVIEW OF CONSTITUTIONAL CONSTRAINTS ON EPA ACCESS

Twentieth century technology has produced a wake of air, water, and terrestrial pollution in the United States.\(^1\) Ironically, the nation

also relies heavily upon technology and engineering to provide cures for these seemingly intractable environmental problems.² Efforts by the United States Environmental Protection Agency (EPA) to mount technological counterattacks against pollution problems created by technology are often stalled at the entrance gates of commercial property. For example, industry often refuses to voluntarily grant the access that EPA needs to investigate pollution problems, design Best Available Technology (BAT) permits to eliminate discharges of pollutants to waterways, or engineer technological remedies at hazardous waste sites.³ Lengthy and costly litigation often results, fore­stalling the work of pollution abatement.

The purpose of this Article is to examine the constitutional, statu­tory, and policy considerations inherent in the access issue. Access refers broadly to any governmental presence on or near commercial property for the purpose of fulfilling EPA’s statutory duties. Although Agency access to inspect and investigate possible violations of pollution laws will be examined in some detail, the primary goal of the Article is the development of a coherent policy framework for those situations in which access is necessary to implement technolo­gical cures of known environmental hazards.

Naturally, fourth amendment privacy issues and EPA’s enabling statutes dominate the terrain upon which EPA access policy must be grounded.⁴ Any governmental intrusion on private property that

² For example, both the Clean Air Act and the Clean Water Act rely heavily upon technology-forcing provisions to bring air emissions and effluent discharges under control. See, e.g., 42 U.S.C. §§ 7411(h)(1), 7502(b) (1982); 33 U.S.C. §§ 1311(b)(1)(A), (1)(B), (2)(A), (2)(E) (1982). Many commentators have criticized this technology-based approach. This Article is predicated upon the assumption that, despite the drawbacks of this approach, it will continue to be utilized in the foreseeable future. See Bonine, The Evolution of "Technology Forcing" in the Clean Air Act, BNA Env't. Rep., Monograph No. 21 (1975); Kramer, Economics, Technology and the Clean Air Amendment of 1970: The First Six Years, 6 ECOLOGY L.Q. 161 (1976); Note, Technology-Based Emission and Effluent Standards and the Achievement of Ambient Environmental Objectives, 91 YALE L.J. 792 (1982). The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) is an example of a statute that is remedial by nature, and requires engineering and technological responses at existing hazardous waste sites. See 42 U.S.C. §§ 9601–9657 (1982). For an early overview of the technology developed to control hazardous waste, see GENERAL ELECTRIC, SOLID WASTE MANAGEMENT TECHNOLOGY ASSESSMENT (1975); G. MASTERS, INTRODUCTION TO ENVIRONMENTAL SCIENCE AND TECHNOLOGY (1974). For modern approaches to reducing pollution produced by technology, see D. SAROKIN, CUTTING CHEMICAL WASTES (1987).

³ Each of these three issues will be dealt with in some detail. For a discussion of BAT permits, see infra notes 186–90, 228–37 and accompanying text; for a description of access needed for compliance investigations, see infra notes 31–89 and accompanying text; and for an analysis of access to hazardous waste sites, see infra notes 251–312 and accompanying text.

⁴ See U.S. Const. amend. IV. All of the major environmental statutes authorize EPA access
constitutes a “search” under the fourth amendment triggers serious privacy considerations. Sustaining such governmental intrusion against constitutional challenges largely depends upon the soundness of the Agency’s statutory authorization for entry and access.

The federal courts in recent years have reviewed three major EPA cases in which technological capability, statutory access authority, and constitutional considerations were inextricably wed. These cases will be used as vehicles for surveying existing law and policy governing EPA access, with a focus upon constitutional restraints, and as springboards for the development of recommendations to improve the existing policy framework.

In the first of these cases, *Dow Chemical Co. v. United States*, the Supreme Court examined advanced technology as a tool for gaining “access” to commercial property. EPA used sophisticated aerial photography techniques to obtain information regarding Dow’s compliance with the Clean Air Act at Dow’s Midland, Michigan facility. This controversial and problematic case illustrates many of


Fortunately, Congress authorized EPA to “enter” facilities under each of these statutes and precluded litigation that is inevitable when a statute uses only ambiguous terms such as “observe,” “monitor,” “access,” or “inspect.” See, e.g., Midwest Growers Coop. v. Kirkemo, 533 F.2d 455 (9th Cir. 1976) (right to inspect records does not imply right of entry, since records can be reviewed elsewhere). *In re Kulp Foundry, Inc.*, 691 F.2d 1125 (3d Cir. 1982) (OSHA does not authorize Secretary of Labor to inspect employer’s records and files in conjunction with a physical inspection of employer’s plant).
the threshold privacy considerations triggered by technology-aided access to commercial property, including: what constitutes a fourth amendment search; when may the agency proceed without obtaining a warrant; and what measures should be taken to protect proprietary information or trade secrets uncovered by the Agency during access? 8

EPA uses access not only to determine whether a company is in compliance with the law, but also to fulfill its charge of participating in the design and implementation of technological fixes for pollution problems. Such was the case of Mobil Oil Corp. v. EPA,9 in which the Agency sought access to Mobil Oil’s petroleum refinery near Joliet, Illinois, in order to develop a BAT permit under the Clean Water Act.10 The Mobil case deserves detailed analysis because it illustrates the constitutional, statutory, and policy considerations inherent in access for the purpose of designing an environmental remedy on commercial property.11

Technological considerations became the paramount driving force behind governmental demands for access in Outboard Marine Corp. v. Thomas.12 This seminal case illustrates all of the issues EPA faces in engineering and conducting cleanups on private land under hazardous waste laws. In the OMC litigation, EPA sought access to the company’s property adjacent to Waukegan Harbor, Illinois, a body of water highly contaminated with polychlorinated biphenyls (PCBs) allegedly discharged by OMC.13 EPA intended to engineer and design a “remedial action” on OMC’s commercial property under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund).14 In OMC, the courts faced constitutional and policy considerations under the fifth amendment taking and due process clauses, as well as statutory authorization

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8 See infra notes 31–97 and accompanying text.
10 Id. at 1189.
11 See infra notes 179–250 and accompanying text.
12 610 F. Supp. 1234 (N.D. Ill.), rev’d, 773 F.2d 883 (7th Cir. 1985), judgment vacated and remanded, 479 U.S. 1002 (1986).
13 610 F. Supp. at 1236-37. This Article deals exclusively with access, inspections, and cleanups effectuated by the federal government. Many state authorities have concurrent responsibility for implementing and enforcing the environmental statutes cited supra note 4. Except under the SDWA, 42 U.S.C. § 300j-4(b)(2) (1982), EPA is not required to notify state officials before it exercises its own entry and access authority, even in those states where EPA has delegated environmental programs or granted the state “primacy.” In practice, EPA and state environmental officials communicate regularly concerning local pollution problems and attempt to cooperate in taking effective and cost-efficient action at local facilities.
and fourth amendment search and seizure questions.\textsuperscript{15} The Super­
fund Amendment and Reauthorization Act of 1986 addressed all of
the key statutory problems surfaced in the OMC litigation,\textsuperscript{16} leaving
only the fifth amendment questions unresolved.

Several organizing strands are woven into the fabric of this Arti­
cle's legal and policy analysis. Foremost is the continuum of escalat­
ing privacy and property rights implicated as we examine govern­
mental actions that are progressively more intrusive. Those actions
form a parallel continuum, starting with governmental observations
performed without entering commercial property, to compliance in­
spections of short durations on commercial property, to long-term
governmental presences on commercial property to design and ef­
fectuate remedial actions. Constitutionally permissible actions along
these tracks encounter procedural and substantive hurdles designed
to protect privacy and property rights. Warrantless activity is per­
missible only if no "search" has taken place on commercial property,
or if one of the narrow exceptions to the warrant requirements of
the fourth amendment exists. For many entries and inspections on
commercial property, a warrant supported by administrative "prob­
able cause" is required before the government can act. As govern­
mental regulatory action intensifies in duration and intrusiveness,
property rights may be impaired, implicating the fifth amendment
taking clause and possibly requiring compensation.

A simple diagram displays how these parallel tracks correlate the
level of constitutional scrutiny with the intensity of EPA activities
on private property. The diagram also lays bare the organizational
skeleton of this Article, which proceeds from a consideration of
nonintrusive off-site inspection activities to outright seizure of prop­
erty interests to effectuate cleanup.

All along these continuums, technology wears many guises. Janus­
faced, technology may play, in the same drama, both a principal role
as a source of pollution and as a means for rectifying serious health
hazards. Technology is also cast in a number of supporting roles,
often serving as the means for detecting violations or forming the
basis for privacy claims when commercial property contains tech­
nologies that are trade secrets.

It is hoped that a series of guidelines will emerge from this analysis
that can be utilized to structure an effective, fair, and uniform policy
for EPA access to commercial property. Resolution of these access

\textsuperscript{15} See infra notes 259–361 and accompanying text.
issues is a prerequisite to EPA’s entering a new stage of effectiveness in its pollution control efforts.

II. ACCESS POLICY UNDER THE FOURTH AMENDMENT FOR MINIMALLY INTRUSIVE EPA INSPECTION ACTIVITIES

The fourth amendment provides for “people to be secure in their persons, houses, papers and effects against unreasonable searches . . . and no warrant shall issue but upon probable cause.”17 Few other areas of law have demanded more attention of the United States judiciary than this provision. It is therefore essential, from the outset, to narrow the focus of this discussion to only those locations on the fourth amendment map that are most germane to the EPA access issue.

The government’s reasons for conducting a search may be differentiated in two ways: (1) separating civil (administrative) searches of business premises from criminal searches; and (2) distinguishing searches for the sake of determining compliance with statutes from searches related to other governmental ends, such as designing technological controls. A third useful distinction is between access obtained pursuant to a warrant and access gained without a warrant. These relevant subcategories of fourth amendment consideration may be easily mapped in a three-dimensional space, which compart-

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17 U.S. CONST. amend. IV.
mentalizes the constitutional issues into eight subgroups. This Article is concerned primarily with civil (administrative) searches of business premises, conducted with and without warrants, for both compliance and remedial purposes. The category that illustrates all of the access issues under both the fourth and fifth amendments is that of administrative searches, with warrants, for the purpose of designing and constructing environmental remedies.

A. Threshold Issues: Circumstances Which Trigger Fourth Amendment Protection for Commercial Property Owners

1. Corporate and Commercial Owners as Persons Under the Fourth Amendment

While the Constitution constrains many governmental activities on commercial property, EPA may work on or near commercial property in some circumstances without reference to those constraints. The express language of the fourth amendment protects "people" and secures them against unreasonable searches of their "persons, houses, papers and effects."19 In 1967, in the landmark Supreme Court cases of Camara v. Municipal Court20 and See v. City of Seattle,21 the Court held that fourth amendment protection against unreasonable searches applies, at least in part, when a governmental agency conducts an administrative search of a commercial facility. A long line of cases has also equated corporate entities with people, and analogized businesses and commercial property with homes, in determining whether the fourth amendment protection attaches at all.22

Traditionally, however, courts have afforded less privacy protection to commercial property, because the commercial owner's privacy interest "differs significantly from the sanctity accorded an individual's home."23 In fact, there are conditions under which the privacy

18 See Appendix.
19 U.S. Const. amend. IV.
21 387 U.S. 541 (1967). In rendering its decisions in Camara the Supreme Court overruled its previous decision in Frank v. Maryland, 359 U.S. 360 (1959), which held that regulatory or administrative searches were distinguishable from criminal searches, and therefore were not subject to the fourth amendment.
22 See, e.g., Boyd v. United States, 116 U.S. 616 (1886) (extending fourth amendment protection to the business setting).
interest in a commercial setting is deemed so inconsequential that no fourth amendment protection attaches. The most important of these conditions is when no "search" has taken place.

2. The Existence of a "Search" as the Trigger for Fourth Amendment Protection

"Search" is a term of art with special constitutional significance. Until 1967, the Supreme Court had interpreted the fourth amendment as primarily protective of property and required that physical trespass be proven as a prerequisite to finding that a search had occurred.24 The Supreme Court dramatically modified this concept in the case of Katz v. United States,25 which emphasized that the fourth amendment, on its face, protects people, not property, and established a two-pronged test for determining if a search has occurred.26 First, the person claiming the fourth amendment protection must prove that he or she had an actual, or subjective, expectation of privacy in the area intruded upon by the government.27 Second, that actual or subjective expectation must be one that society would deem reasonable.28

The Katz test protects an individual's actual or subjective privacy interest when that interest is reasonable. It is a formulation of yet another judicial balancing test, comparing the government's need for intrusion with the reasonableness of a citizen's desire to be free of governmental encroachment on privacy interests. While many scholars criticize the Katz test as being insufficiently protective of important privacy interests,29 the Supreme Court seems unprepared to abandon Katz's fundamental principles.30

more situations than private homes); United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy.").


26 Id. at 361 (Harlan, J., concurring). Justice Harlan's formulation has become the accepted test for a legal search. See also Smith v. Maryland, 442 U.S. 735, 740 (1979); Rakas v. Illinios, 439 U.S. 128, 139-40 (1978).

27 389 U.S. at 361 (Harlan, J., concurring); see also Smith v. Maryland, 442 U.S. at 740 (citing with approval Katz, 389 U.S. at 361 (Harlan, J., concurring)).

28 Id.


The federal courts recently examined the question of when a search occurs while deciding the constitutionality of an EPA aerial inspection. In doing so, the courts established the foundation for EPA's policies governing searches which cause minimal intrusions on private property.

B. Proceeding Without a Warrant and Expectations of Privacy: the Dow Overflight Case

In Dow Chemical Co. v. United States, a sharply divided Supreme Court recently held that EPA's aerial surveillance and photography of a chemical manufacturing plant did not constitute a search under the fourth amendment. A majority of five Justices reached this conclusion in a problematic opinion which failed to explicitly apply the Katz test, an approach that drew strong criticism from the four dissenting Justices. To understand this important decision, an analyst must carefully draw the facts of the case from the distinct district, appellate, and Supreme Court opinions.

In 1977, EPA began an investigation of Dow Chemical's Midland, Michigan, plant to determine whether emissions from two coal-fired powerhouses exceeded federal air quality standards under the Clean Air Act. An on-site inspection of Dow's power plants was conducted by EPA on September 9, 1977. EPA later requested and received from Dow schematic drawings depicting the physical layout of the powerhouses, as well as the boilers and turbines within the powerhouses. When EPA called Dow and requested a second inspection for the purpose of taking photographs of the plant, the Agency was refused entry.

Rather than securing a warrant, the Agency contracted with Abrams Aerial Survey Corporation to take detailed aerial photo-

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32 Dow, 476 U.S. at 247 (Powell, J., concurring in part and dissenting in part).

33 Id. at 229–30, 240–44; 749 F.2d at 309–10; 536 F. Supp. at 1357.


35 Dow Chem. Co. v. United States, 749 F.2d at 310.

36 Id.

37 Id.
graphs of the Dow facility. EPA's stated purposes for the aerial surveillance were the creation of visual documentation of smokestack emissions and the attainment of perspective on the layout of the plant. EPA directed the contractor to take pictures of certain locations from certain angles, and advised the contractor of the times emissions would be most visible. The overflight was performed on February 7, 1978. The resulting photographs contained vivid detail and resolution. When Dow learned of the overflight from sources other than EPA, the company filed suit in federal district court seeking declaratory judgment and injunctive relief.

The district court held that EPA violated Dow's fourth amendment right to be free from unreasonable searches. The Sixth Circuit Court of Appeals reversed the district court's decision under a Katz analysis. Ordinarily, as noted by the Sixth Circuit, a right of privacy exists only where there are "objective manifestations of [a] claimed privacy expectation." The court found no such manifestations relative to flights over Dow's property.

The Supreme Court majority reviewed the same facts, and without explicitly invoking the Katz test, concluded that no search had occurred. The majority viewed its principal task as deciding whether the industrial property between plants more resembled an "open field" or curtilage—property adjacent to private homes—for purposes of fourth amendment analysis. Ultimately, they concluded that the property EPA had photographed was more like an open field, and therefore held that Dow's expectations of privacy were unsupportable.

The appellate court's analysis is more cogent and illuminating on the fourth amendment issue than the Supreme Court's search for analogous precedent, such as the open field doctrine. Tactically, the Supreme Court majority opinion embraced the conclusion that no "objective manifestation of the claimed privacy expectation" exists...

38 Id.
39 Id.
40 Id.
42 Id.
43 Id.
44 Id. at 1375.
46 Id. at 312 (quoting Dow, 536 F. Supp. at 1364).
48 Id. at 239.
49 See infra notes 56–66 and accompanying text.
50 476 U.S. at 236–39.
isted, a conclusion that the Sixth Circuit reached explicitly.\textsuperscript{51} In requiring that Dow clearly demonstrate its intent to be free from aerial surveillance under the \textit{Katz} test, the Sixth Circuit held that:

\[\text{[The reasonable expectation of privacy test] determines whether there was a Fourth Amendment "search" at all and focuses on whether the human relationships that normally exist at the place inspected are based on intimacy, confidentiality, trust or solitude and hence give rise to a "reasonable" expectation of privacy . . . .} \]

\[\text{The objective manifestations of a privacy expectation must be in some place and an expectation to be free from a certain kind of intrusion . . . .} \]

\[Dow \text{ did not take any precautions against aerial intrusions, even though the plant was near an airport . . . .} \textsuperscript{52}\]

The court contrasted the lack of preventative measures against aerial search with the elaborate precautions Dow took to be free from ground-level intrusions.\textsuperscript{53} Dow made no claim that business was actually transacted in the open space between plants photographed by EPA. While Dow asserted that photographs of the manufacturing equipment and conduits revealed trade secrets, the company failed to specify or describe the actual trade secrets or confidential information endangered. Under those circumstances, the Sixth Circuit was not convinced that preventative measures, short of covering the whole complex, were unavailable.\textsuperscript{54} Thus, the court found that the overflight observation of spaces outside Dow's buildings failed to constitute a search.\textsuperscript{55}

The range of privacy expectations that can reasonably be evoked by an individual's location and business surroundings was probably what prompted the Supreme Court to focus on the "open field" and "curtilage" doctrines in an effort to find analogous fourth amendment precedent. The Supreme Court initially articulated the "open field" exception to the need for warrants in \textit{Hester v. United States},\textsuperscript{56} where a warrantless search of a field was allowed because the property was open to public view.\textsuperscript{57} The Supreme Court expanded the


\textsuperscript{52} 749 F.2d at 311-12.

\textsuperscript{53} Id. at 312-13.

\textsuperscript{54} Id. But see Dow, 476 U.S. at 241 & n.1 (Powell, J., concurring in part and dissenting in part).

\textsuperscript{55} 749 F.2d at 313.

\textsuperscript{56} 265 U.S. 57 (1924).

\textsuperscript{57} Id. at 59.
doctrine in the environmental context, by concluding in *Air Pollution Variance Board v. Western Alfalfa Corp.* that privately owned lands were also "open fields" as long as the public was able to enter. In a similar vein, courts have found that pollutants discharged into a public waterway have been "abandoned to . . . public exposure." Consequently, when governmental officers sample the effluent from a public waterway, no fourth amendment search or seizure occurs.

The *Dow* majority, however, recognized that the industrial property photographed by EPA was in some respects neither open nor a field. Nevertheless, the Court concluded that the privacy expectations triggered by such industrial space were more analogous to those engendered by open fields than by curtilage to private homes.

In refusing to create an "industrial curtilage" doctrine, the majority, as well as the Sixth Circuit, emphasized the differences in the expectations of privacy that an owner of commercial property enjoys compared with that afforded an individual in the sanctity of the property surrounding his or her home. Courts have traditionally considered certain areas outside homes or dwellings as part of the dwelling for fourth amendment purposes. Previous cases had found that the fourth amendment applies to the search of smokehouses located within a fenced yard and to a search of a honeysuckle patch situated within a fence 150 feet from a home. The appellate court in *Dow* summarily dismissed the notion that the curtilage doctrine should be applied to a 2000-acre manufacturing facility consisting of numerous covered buildings, with manufacturing equipment and piping between buildings.

A final pivotal issue in the case was the role of various trade secret laws in assessing Dow's claims of expectations of privacy. The Su-

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59 Id. at 865.
61 Id. at 1308–09.
63 Id. at 239.
65 United States v. Van Dyke, 643 F.2d 992 (4th Cir. 1981); Robertson v. United States, 165 F.2d 752 (6th Cir. 1948).
66 749 F.2d at 314.
Dow never specified what, if any, trade secrets were observable by aerial photographic means similar to those used by EPA. Both the Supreme Court majority and the circuit court stated that no precautions were taken to prevent observation of any secrets from the air, although the dissenting Justices noted that Dow considered the costs of enclosing the entire area financially prohibitive and unwise from a safety perspective.

The Dow majority concluded that trade secret laws and Dow’s procedures were irrelevant to a fourth amendment analysis, since those laws and procedures were designed to prevent piracy of trade secrets by competitors of Dow, and not to stop inspections or observation by the United States government for environmental compliance purposes. Indeed, the Clean Air Act anticipates that EPA will occasionally obtain proprietary information during the course of investigations and inspections. Both the Clean Air Act and Agency regulations contain explicit provisions for protecting trade secrets once in the hands of the government.

Whatever privacy expectations Dow had relative to protecting putative trade secrets from discovery during overflights by competitors, it seems reasonably clear that those expectations did not extend to the government. Nevertheless, the dissenting Justices and the district court, citing the various trade secret laws, concluded that society recognized legitimate interests in preserving the privacy of Dow’s open-air plants. Leapfrogging the question of whether Dow had demonstrated any actual or subjective expectations of privacy from aerial surveillance, the dissent concluded that Dow’s asserted expectations were “reasonable” because they had been affirmed by society in the form of trade secret laws.

Commentators have roundly criticized the Supreme Court’s reasoning in the Dow case. Both the majority and the dissent gloss...
over important issues, leaving the viability of aerial photographic surveillance in a clouded state pending further judicial clarification. The majority opinion is most clearly flawed for its failure to explicitly follow the Sixth Circuit’s lead and apply the Katz test.\textsuperscript{76} The majority’s examination of the open field and curtilage doctrines proved a poor substitute for the Katz analysis.

The majority’s careless analysis also trivialized very real privacy concerns. Statements in dicta could be construed as retrenchment on well-established fourth amendment doctrine. For example, the Justices emphasized that the government was not physically present on Dow property—a statement that disturbed the dissent and commentators because trespass had long been repudiated as a prerequisite to showing a fourth amendment violation.\textsuperscript{77} Moreover, in unnecessarily down-playing the intrusive nature of the photographic technology used by EPA compared with other state-of-the-art surveillance technology,\textsuperscript{78} the majority appeared to enter murky analytical waters where constitutional protection directly depends upon the precise government surveillance technology used.\textsuperscript{79} This approach is clearly unwise unless coupled with a rigorous application of the Katz expectation of privacy test and an examination of the reasonableness of the intrusion under the circumstances of the case.

The dissent’s reasoning was equally bankrupt. While trade secret laws are arguably relevant to the fourth amendment calculus, they are not dispositive. Dow did not demonstrate to any court that specific trade secrets, proprietary information, or business relationships would be compromised by EPA’s flyover. The dissent should not have assumed that Dow had a reasonable expectation of privacy in the open areas between industrial complexes without evidence of some business information, association, or relationship in that area capable of being compromised by flyover. Unfortunately, because the Dow case was decided on cross-motions for summary judgment,\textsuperscript{80} the record contains nothing more than Dow’s bald assertion that trade secrets and proprietary information were observable from the air.\textsuperscript{81}


\textsuperscript{76} See supra notes 50–55 and accompanying text.


\textsuperscript{78} 476 U.S. at 238.

\textsuperscript{79} Id. at 238–39.

\textsuperscript{80} Id. at 230.

\textsuperscript{81} Id. at 247.
Under the circumstances, the dissent could not logically reach the conclusion that it did under the expectation of privacy doctrine. An assessment of Dow's expectation of privacy is impossible without first determining the identity, size, and location of objects capable of revealing trade secrets when observed from the air. Only then could the dissent assess whether Dow's failure to take preventative measures, short of enclosing the entire plant, was reasonable. For instance, the facts may have suggested that a simple tarp could have prevented disclosure of some proprietary information.

Moreover, a factual conclusion that Dow did all it could to prevent aerial observation of trade secrets begins, rather than concludes, the expectation of privacy analysis. The trade secret laws do not prohibit photographs per se taken by private citizens, let alone by the government. Rather, the laws only prohibit photography taken with an intent to appropriate and use trade secrets. The dissent thus ignored the critical issue of what expectations of privacy could be engendered by a law that prohibits unfair use of photographs by competitors, but says nothing about governmental use of even admittedly proprietary information obtained during an overflight.

The approach and reasoning of the circuit court in Dow are preferable to either the Supreme Court majority or dissenting opinions. More important than the ultimate result in the Dow case, however, are certain policy implications for EPA actions that can be derived from the opinions.

C. Policy Implications of the Dow Case

1. Scope of the EPA Investigative and Inspection Authority

In Dow, the Supreme Court unanimously held that EPA's investigatory and inspection authority in section 114 of the Clean Air Act encompassed aerial photography, even though that technique is not expressly listed in the Act. In sweeping language that strengthens entry and access programs under all of EPA's statutes, the Dow Court held that Congress gave EPA broad investigatory and enforcement authority without "spelling out precisely how this authority was to be exercised in all the myriad circumstances that might

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83 476 U.S. at 234, 244 & n.8.
arise in monitoring matters relating to clean air and water standards."  

Commercial enterprises will, therefore, find it extremely difficult to successfully litigate claims that specified investigation techniques are beyond the scope of EPA's various statutory authorities. Even though section 114(a) of the Clean Air Act simply provides for a "right of entry to, upon, or through any premises," the Supreme Court said that the section expanded, not restricted, EPA's general powers to investigate. EPA needed no explicit authority to employ methods of observation commonly available to the public. Regulatory and enforcement authorities generally carry along "all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted." In this vein, the Court noted that

When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission. Aerial observation authority, for example, is not usually expressly extended to police for traffic control, but it could hardly be thought necessary for a legislative body to tell police that aerial observation could be employed for traffic control of a metropolitan area, or to expressly authorize police to send messages to ground highway patrols that a particular over-the-road truck was traveling in excess of 55 miles per hour. Common sense and ordinary human experience teach that traffic violators are apprehended by observation.

Less clear than EPA's statutory authority to use a wide range of investigative techniques is the issue of whether or not it is wise policy to employ high-technology electronic surveillance in ordinary inspection cases.

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84 Id. at 233; see also Public Serv. Co. of Indiana v. EPA, 509 F. Supp. 720 (S.D. Ind. 1981) (section 114 authorizes the taking of photographs at emission sources in another context), aff'd, 682 F.2d 626 (7th Cir. 1982), cert. denied, 459 U.S. 1127 (1983).
86 476 U.S. at 234.
87 Id.
88 Id. at 233.
89 Id. Industry has unsuccessfully challenged EPA's entry and inspection authority under the Clean Air Act, especially the scope of the Agency activities while on commercial property. See, e.g., Bunker Hill Co. Lead and Zinc Smelter v. EPA, 658 F.2d 1280 (9th Cir. 1981); Public Serv. Co. of Indiana v. EPA, 509 F. Supp. 720 (S.D. Ind. 1981), aff'd, 682 F.2d 626 (7th Cir. 1982), cert. denied, 459 U.S. 1127 (1983). Others have gone further and asserted that administrative warrants authorize entry but not the right to search. Bunker Ltd. Partnership v. United States, Civ. No. 85-2133 (D. Idaho 1985), stay pending appeal denied.
2. High Technology, the Fourth Amendment, and Electronic Surveillance

EPA's use of electronic surveillance has withstood its first important legal test. However, sound policy considerations may dictate that the Agency not utilize such techniques in all situations simply because it is legal.

The Dow Court found that the sophisticated technology used to obtain the extreme detail of the photographs did not violate the fourth amendment under the "enhanced viewing" doctrine.\textsuperscript{90} Several previous cases held that enhanced viewing of the interior of a home impairs a legitimate expectation of privacy.\textsuperscript{91} The Sixth Circuit in Dow correctly noted that the Ninth Circuit decision in United States v. Allen\textsuperscript{92} was closer to the point than cases focusing on residential areas.\textsuperscript{93} In Allen, the court held that enlarged aerial photographs of commercial buildings and grounds which showed details of drug smuggling operations were not searches under the fourth amendment. The court observed that the case did not present "privacy expectation[s] associated with the interior of residences or other structures."\textsuperscript{94} In Dow, the Supreme Court went to great lengths to emphasize that EPA did not use satellite technology or other leading-edge photographic capability,\textsuperscript{95} a fact that the dissent found wholly irrelevant.\textsuperscript{96} Thus, the courts have yet to definitely dispose of the legal issues surrounding EPA's use of electronic surveillance.

Regardless of the legality of the flyover, the American public is hesitant to condone the use of sensory-enhancing technology by the government to monitor the activities of citizens and businesses. Witness the enormous degree of safeguards now required before a wiretap can be utilized by the federal government pursuant to the Omnibus Crime Control and Safe Streets Act of 1968.\textsuperscript{97} Electronic

\textsuperscript{90} 476 U.S. at 238–39.  
\textsuperscript{91} For example, in United States v. Taborda, 635 F.2d 131, 138–39 (2d Cir. 1980), the court held that looking into a dwelling window using a telescopic lens invades fourth amendment privacy interests.  
\textsuperscript{92} 633 F.2d 1282 (9th Cir. 1980).  
\textsuperscript{93} 749 F.2d at 314 n.2.  
\textsuperscript{94} 633 F.2d at 1289.  
\textsuperscript{95} 476 U.S. at 238.  
\textsuperscript{96} Id. at 251 (Powell, J., dissenting).  
surveillance, whether audio or visual, poses unusually severe threats to the privacy values protected by the fourth amendment. EPA would be well advised to adopt a policy that circumscribes the use of aerial photography and other sensory enhancement techniques to those cases that clearly require such extraordinary means.

As a rough guide, such methods should only be used when (1) other avenues of inspection or access are inadequate to meet valid governmental purposes; (2) serious environmental violations are suspected; (3) statutory and regulatory safeguards, designed to protect business trade secrets obtained, either purposefully or unintentionally, are vigorously followed; and (4) obtaining an ex parte warrant is infeasible. The circumstances in *Dow* failed to meet either factor (1) or (4) of these guidelines, suggesting that EPA probably could have avoided at least part of the delay and consumption of Agency resources had it obtained an ex parte warrant. In fact, the Agency never used the photographs in any subsequent enforcement proceeding.

These suggested criteria are, however, clearly inappropriate for those circumstances where advanced technology can be utilized without compromising trade secrets or other privacy interests. For example, the newly developed LIDAR detection system is a form of radar capable of detecting and measuring particular air emissions. This system, which may be used at night when traditional detection

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98 *LIDAR: Selective Long-Distance Detection of Atmospheric Pollution*, Laser Application Center (CAL), Swiss Federal Institute of Tech., Switzerland (EPFL) 1987.
methods fail, reveals no trade secrets and operates on emissions abandoned into the ambient air. No logical or constitutional reasons exist to require EPA to obtain a warrant to use LIDAR to detect emissions in "plain view."

The Dow case illustrates other legal and policy considerations that are relevant to deciding when EPA should inspect, monitor, or enter commercial property without first obtaining a warrant. The next section deals with warrantless governmental activities that, unlike the Dow overflight, are clearly subject to the fourth amendment because a search has taken place.

D. Gaining Access Without a Warrant Under the Pervasively Regulated Business Exception to the Warrant Requirement

EPA is seldom able to investigate, inspect, or remedy a problem at a commercial site without physically entering the property. Except in certain carefully defined classes of cases, warrantless physical searches or inspections are unreasonable and thus violate the fourth amendment.

Nevertheless, traditional criminal law exceptions to the warrant requirement apply to administrative searches as well. By far the most important exception covers inspections or searches conducted pursuant to consent of the property owner. Other exceptions developed in criminal law cases include searches incident to valid arrests, seizure of items in plain view, border searches, and searches in exigent circumstances or emergencies that preclude obtaining a warrant. Because EPA often relies on consent of the


103 Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit of fleeing felon). The case of Balelo v. Baldridge, 724 F.2d 753 (9th Cir. 1982), may signify a trend toward recognizing an additional exception to the warrant requirement. In Balelo, the court held that officials at the Department of Commerce, which had granted a permit to a group allowing the group to capture porpoises, did not need a warrant to board the group’s boat and observe the capture. Governmental presence was deemed a “permit condition” rather than a search. Id. at 764–67. This case could have far-reaching implications for warrantless access to insure compliance with NPDES and RCRA permits under the clean water and hazardous waste laws. See infra notes 105–45 and accompanying text.
property owner for access, the consent exception will be discussed in some detail later in the Article.\(^{104}\) Most of the other exceptions to the warrant requirement are inapplicable to the bulk of the Agency access situations that are the focus of this discussion.

The "pervasively regulated business" exception to the warrant requirement is, however, important to structuring EPA access policy. The philosophy behind this exception was stated by the United States Supreme Court in *Marshall v. Barlow's, Inc.*:\(^{105}\)

Certain industries have such a history of government oversight that no reasonable expectation of privacy [citing *Katz v. United States*, 389 U.S. 347 (1967)] could exist for a proprietor over the stock of such an enterprise. Liquor . . . and firearms . . . are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of government regulation.\(^{106}\)

The Court reasoned that property owners who voluntarily engage in federally licensed and heavily regulated industries, in effect, consent to the restrictions placed on them.\(^{107}\)

The *Dow* majority did not reach this issue, although the dissenting Justices and the district court found that EPA's authority to regulate the chemical industry under the Clean Air Act did not justify a warrantless search.\(^{108}\) The district court held that the Clean Air Act inspection scheme under section 114 was more akin to the general regulatory authority given to OSHA and dealt with in the *Barlow's* case.\(^{109}\) The argument was not reconsidered by the circuit court,\(^{110}\)

\(^{104}\) See *Katz v. United States*, 389 U.S. 347, 357 & n.19 (1967) and authorities cited therein. Warrantless searches conducted pursuant to consent are discussed in detail, infra notes 146–52 and accompanying text. Administrative and criminal warrants are governed by many of the same principles. See Donovan v. Hackney, Inc., 769 F.2d 650 (10th Cir. 1985); Donovan v. Mosher Steel Co., 791 F.2d 1535 (11th Cir. 1986). The level of probable cause required is an important difference. See infra notes 160–69 and accompanying text. Moreover, Federal Rule of Criminal Procedure 41 has special requirements for criminal warrants.


\(^{107}\) *436 U.S. at 313.


\(^{109}\) 536 F. Supp. at 1361.

\(^{110}\) *749 F.2d 307, 311 & n.1 (6th Cir. 1984).*
although the dissent in the Supreme Court flatly concluded that the pervasive regulation doctrine was inapplicable.\textsuperscript{111}

Several factors support the district court's conclusion. The regulatory inspection scheme allowed to proceed without warrants in previous cases targeted single industries—liquor\textsuperscript{112} and firearm sales.\textsuperscript{113} The Clean Air Act applies to all sources of air pollution emissions. A finding that the Clean Air Act and its attendant regulations constitute a pervasive regulation of industry would be tantamount to giving EPA the authority to enter any source of air emissions without a warrant. Moreover, the Clean Air Act does not contain a pervasive licensing or regulatory scheme similar to those governing firearms, liquor sales, or mine operation.\textsuperscript{114} The ordinary emission source is probably not subject to sufficient numbers of regular or periodic inspections under the Clean Air Act to alter the source owner's expectations of privacy. However, the applicability of the doctrine to other environmental programs requires further analysis. In developing the pervasively regulated business exception, early Supreme Court cases emphasized that industries long subject to close supervision and inspection fell under the exception. That analysis led some to believe that only long-standing statutory and regulatory schemes could qualify as "pervasive regulations."

Such beliefs were dispelled when the Supreme Court began emphasizing "a predictable and guided federal regulatory presence"\textsuperscript{115} as a prerequisite to warrantless business searches, leaving the door open to arguments that the pervasive regulation exception applies in other environmental contexts. In Donovan v. Dewey,\textsuperscript{116} the Court stressed the nature of the regulatory scheme over its historical legitimacy.

Under appellee's view, new or emerging industries, including ones such as the nuclear power industry that pose enormous potential safety and health problems, could never be subject to warrantless searches even under the most carefully structured inspection program simply because of the recent vintage of regulation. . . .

\textsuperscript{111} 476 U.S. at 245–46. The Barlow's Court, in dicta, implied that the Clean Air Act did not envision warrantless searches, except pursuant to consent. The Court noted that the Act granted authority for EPA to obtain a court order when entry is refused. 436 U.S. at 321 & n.18.

\textsuperscript{112} Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).


\textsuperscript{115} Id.

\textsuperscript{116} Id.
The Fourth Amendment's central concept of reasonableness will not tolerate such arbitrary results.117

The clear implication from this statement, as well as the Supreme Court holdings in previous cases,118 is that warrantless searches could be utilized under select environmental regulatory schemes, even though they were only recently promulgated. Several of the recently enacted environmental statutes are designed to meet urgent health and safety concerns and to broadly regulate specific targeted emerging industries.

For example, the Resource Conservation and Recovery Act (RCRA),119 together with its attendant regulations,120 provides one of the most comprehensive regulatory programs ever attempted, and is designed to ensure proper treatment, storage, and disposal of hazardous waste.121 At least three entities in the emerging industries of hazardous waste management—treatment, storage, and disposal facilities—are probably governed by "pervasive regulation." These facilities are subject to a manifest system designed to generate a "cradle to grave" paper trail which traces hazardous waste from the site of generation to proper treatment and storage locations.122 Moreover, treatment, storage, and disposal facilities must obtain a permit from EPA, or the states to which the program has been delegated, in order to operate.123 Most importantly, EPA regulates nearly every aspect of hazardous waste landfills, from design of the facilities to their operation.124

Thus, hazardous waste landfill operators probably meet the early Supreme Court tests governing the "pervasive regulation" exception to the warrant requirement. Treatment and storage facilities, as

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117 Id. at 606.
121 See supra note 119.
123 Id. § 6925. EPA has approved adequate state plans designed to implement solid waste management programs, including the permit process, under RCRA pursuant to 42 U.S.C. §§ 6926, 6946–47 (1982). States with approved programs may access commercial facilities and conduct inspections in the same manner as EPA. 42 U.S.C. § 6927(a) (1982). See QUARLES, supra note 119, at chs. 7–8.
discrete industries concerned with hazardous waste only, arguably fall within the exception as well.

This conclusion is somewhat less clearcut under the Supreme Court's most recent pronouncements on the exception in New York v. Burger. In that case, the Supreme Court upheld warrantless searches of vehicle dismantling businesses under a New York statute that authorized police officers and other officials to examine motor vehicles, parts, and records on commercial property during regular business hours. Although not an environmental case, Burger established a three-pronged test that has broad implications for environmental entry and inspection programs based on warrantless searches under the pervasively regulated business exception.

For such searches to be constitutionally reasonable, there must be a "substantial government interest" that guides the inspection scheme; the warrantless inspections must be "necessary to further the regulatory scheme;" and the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. This final prong means that the program must adequately advise the owner of the property that the search is being made pursuant to the law and has a properly defined scope limiting the discretion of the inspecting officers.

RCRA clearly meets the first two prongs of this test. The government's interest in controlling hazardous and toxic chemicals is precisely the type of substantial governmental interest that the Supreme Court has identified as acceptable in the "pervasively regulated business" lines of cases. The number of inspections required each year, together with the need for some surprise visits, make warrantless searches a necessary part of an effective RCRA entry and inspection scheme.

The third prong of the test is more problematic. Like other environmental laws, the RCRA entry and inspection scheme clearly notifies hazardous waste treatment, storage, and disposal facilities that the search is being conducted pursuant to law. The scope of the

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126 Id. at 708.
127 Id. at 702.
128 Id.
RCRA search, however, may be very broad—perhaps insufficiently limited in time, place, and scope to pass the third prong that the Burger Court derived from its previous decision in United States v. Biswell. Conclusive resolution of this potential bar to EPA use of the exception must await judicial decisions in the environmental area. The better view, bolstered by the reasoning of the Supreme Court cases taken as a whole, is that the Agency may search hazardous waste treatment, storage, and disposal facilities under the pervasively regulated business exception to the warrant requirement.

Since nearly any industrial concern is capable of generating hazardous waste, generator facilities probably would not fall within the exception based on the early Supreme Court decisions. Similarly, common carriers and others in the business of transporting many items, including hazardous waste, would likely fall outside the exception.

Arguments that certain hazardous waste facilities are pervasively regulated apply with even greater persuasive force to the pesticide industry. Federal pesticide regulation dates back to 1947, with the current statutory version entitled the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). That Act requires the registration or licensing of all pesticides. Thus, pesticide manufacturers probably fall into the same category of pervasively regulated businesses as firearm and liquor sales did in Colonnade and Biswell.

Less persuasive arguments could be made in two additional environmental fields. In 1976, the Toxic Substances Control Act (TSCA) was enacted with the view toward establishing a comprehensive program of federal regulatory control of the manufacture and use of toxic chemicals. TSCA was an attempt to effectively deal with a myriad of chemicals already in the stream of commerce, and to control the manufacture of new toxic chemicals each year. Under TSCA, the manufacture of new chemicals must submit a "pre-manufacturing notice" to EPA before production commences. EPA regulates chemicals already on the market by requiring manufactur-

133 Id. § 136a.
ers to test existing chemical substances for adverse health and environmental effects. EPA may restrict or ban the manufacture, use, storage, and disposal of a chemical if it "presents or will present an unreasonable risk of injury to the health or environment." As with RCRA regulations targeting all generators of hazardous waste, however, these regulations reach so many and such varied industries that it is unlikely that a court would find that the "pervasive regulation" exception to the warrant requirement applied. While the chemical industry is the leading manufacturer and storer of toxic chemicals, the industry itself is far from homogeneous, being comprised of such diverse business enterprises as pharmaceuticals and petrochemicals. In addition, the Agency has made only limited use of its regulation-promulgating authority under TSCA. Therefore, it is unlikely that the courts would find a pervasive EPA regulatory presence in the chemical industry by virtue of TSCA. An important exception to this generalization is the small segment of the chemical industry that manufactures polychlorinated biphenyls (PCBs), which TSCA expressly governs. PCBs are also one of the few chemicals that are subject to comprehensive EPA regulations promulgated under TSCA.

An intriguing possibility, one the courts have not considered, is whether or not certain industries subjected simultaneously to numerous environmental statutes and regulatory frameworks are "pervasively regulated" by EPA to such an extent that little or no fourth amendment privacy rights attach. For example, certain chemical industries are governed simultaneously by numerous environmental provisions, potentially including TSCA, FIFRA, RCRA, and even the Clean Water and Clean Air Acts. Although it has never been argued, this approach appears to be consistent with the theory underlying the "pervasively regulated" exception to the warrant requirement. That is, when an entrepreneur embarks upon a simultaneously regulated business, he voluntarily chooses to subject himself to the full arsenal of governmental regulation.

136 Id. § 2603.
137 Id. § 2605.
138 Id. § 2605(c).
140 Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978). Such industries are subject to a multiplicity of civil and judicial enforcement provisions as well. The problem with urging that simultaneous multiple regulation provides a pervasive regulatory presence is that it may prove too much. If we do not limit our analysis to environmental regulation, it is hard to imagine an American industry which is not pervasively regulated when the full range of governmental
Businesses that must obtain EPA or state environmental permits—such as dischargers under the Clean Water Act NPDES permit system or RCRA landfill operators—are forms of licensed industries that initially gave rise to the pervasively regulated business exception. EPA's warrantless search of such operators' properties is probably sustainable. More importantly, EPA may draft permits which obviate the need for warrants by conditioning receipt of the permit on the operator's granting EPA reasonable access to conduct inspections and other compliance-related activities without the need for a warrant.

The potential usefulness of the pervasively regulated business exception varies from one statutory access program to another. A court determining whether an industry is pervasively regulated must first look at two factors: the nature of the industry to be inspected and the Agency's statutory and regulatory authority to gain entry and conduct inspection or remedial activities and to regulate in general.

Two environmental statutes—the Clean Air Act and the Noise Control Act—provide for the regulation of a broad group of industries, similar to OSHA, and the courts are likely to find warrantless searches under these statutes unconstitutional. Many of the industries regulated under four other EPA enabling statutes—FFRA, RCRA, TSCA, and the Safe Drinking Water Act—belong to well-defined industrial subgroups that the federal government has intensively regulated. Therefore, a court might sustain as constitutional EPA's warrantless search of a pesticide manufacturing facility, a hazardous waste dump site, a plant producing PCBs, or a private source of drinking water.

Other statutory regimens, such as the Clean Water Act's NPDES permit requirements for discharges to the nation's waterways, may authorize warrantless access to permittee property based on conditions specified in the permit. An NPDES permit may constitute

presence is accounted for, from antitrust to zoning. See Note, Rationalizing Administrative Searches, 77 Mich. L. Rev. 1291, 1298 (1979).

The National Pollutant Discharge Elimination System (NPDES) of permits is established by the Clean Water Act, 42 U.S.C. § 1342 (1982), and attendant regulations. See 40 C.F.R. § 120 (1988). Access to permittee property to monitor compliance with the permit may become a recognized exception to the warrant requirement. See supra notes 99–103 and accompanying text.


Id. §§ 4901–18 (1988).

a type of business "license" under the pervasively regulated business doctrine.

The applicability of the pervasively regulated business doctrine to EPA searches will remain uncertain, however, until the courts have applied the tripartite Burger test to various environmental inspection and entry statutes.\textsuperscript{145} Policy considerations dictate that the Agency proceed with care and forethought before conducting warrantless searches even when an exception to the warrant requirement applies and statutory authority is clear.

\textbf{E. Policy Implications of Relying on Consent or Otherwise Conducting a Search Without a Warrant}

In performing routine environmental inspections, EPA's preferred method of gaining access is to obtain consent, obviating the need to obtain a warrant. Consent validates the search if permission is given "freely and voluntarily" by an individual in possession of the property or otherwise authorized to give consent.\textsuperscript{146}

Ordinarily, Agency officials should not simply present themselves at industrial property and assume consent will be given. This risks the possibility that entry will be refused. Faced with such refusal,\textsuperscript{145} See supra notes 125–30 and accompanying text. Even if a court found that a warrantless search is unconstitutional under these statutes, it is possible that the Agency's strategic utilization of the argument in warrant cases would cause the courts to consider the level of privacy expectation that can reasonably attach to such commercial enterprises. Thus, greater deference to EPA's assertions of administrative probable cause under a warrant, or reliance on broadly worded affidavits supporting search warrants, might be a collateral benefit to use of this argument.

\textsuperscript{146} Only a brief summary of the enormous body of doctrine which governs consent can be presented here. Most of it is derived from criminal law cases. Voluntariness is judged on the totality of the circumstances, including the nature of the search and the characteristics of the person who consented. Schneckloth v. Bustamonte, 412 U.S. 218, 226–29 (1973). Corporate officials are considered "sophisticated," and unlikely to be coerced into granting consent to search. See, e.g., Davis v. United States, 328 U.S. 582, 593–94 (1946); United States v. Wassertell, 641 F.2d 704, 707 (9th Cir. 1981); United States v. O'Looney, 544 F.2d 385, 388 (9th Cir. 1976). Some courts have intimated that the requirements for valid consent are somewhat reduced in the administrative search context. Davis, 328 U.S. at 593–94; United States v. Thriftmart, Inc., 429 F.2d 1006, 1009 (9th Cir. 1970). Valid consent cannot be the result of misrepresentation, coercion, intimidation, deceit, fraud, or trickery. See Gouled v. United States, 255 U.S. 298, 306 (1921). Use of force, in any way, ordinarily vitiates the consent. A person in possession of property may give consent even if he or she is not the owner. United States v. Matlock, 415 U.S. 164, 170 (1974). This means the lessee usually has the sole right to consent to search. Chapman v. United States, 365 U.S. 610, 616–18 (1961). If the property is abandoned, the owner or lessor may consent to the search. Abel v. United States, 362 U.S. 217, 225 (1960). Ordinarily, an employee's consent is binding on the employer. United States v. Buettner-Tanusch, 646 F.2d 759, 764–65 (2d Cir.), cert. denied, 454 U.S. 830 (1981).
the official has several unpleasant alternatives. The inspector can simply abandon the attempt to inspect. Alternatively, he or she can assert that EPA has the right to conduct a warrantless search, and attempt to force his or her way onto the property.\textsuperscript{147} Finally, the inspector may leave the premises and return with a warrant and a United States Marshal to aid in gaining entry.\textsuperscript{148}

Property owners may exercise the power, if not the right, to temporarily frustrate warrantless entry attempts. Frustrated attempts to gain access by way of consent cost the government thousands of dollars, especially in environmental programs where large numbers of searches are conducted daily. If the Agency intends to rely on consent to enter a particular property, it should obtain the consent, if possible, in writing, before going to the facility. Naturally, such preparatory measures are inappropriate where a surprise inspection is necessary or desirable. However, the government should strongly consider obtaining an ex parte warrant even in those circumstances.\textsuperscript{149}

EPA should ordinarily secure a warrant when it intends to conduct an inspection of some duration, or whenever officials must remain on the property for an extended period of time. A consenting owner may attempt to revoke consent after EPA has entered and begun its inspection activities. While the legal validity of such revocations is subject to debate,\textsuperscript{150} as a practical matter the official may be forced to leave the premises and assert his rights in a legal forum.\textsuperscript{151} Substantial investments of EPA officials' time and analytical effort should not be predicated on the legal vagaries of what constitutes valid consent or valid withdrawal of consent. The conservative and

\textsuperscript{147} See infra notes 151–53 and accompanying text regarding the use of self-help to gain access.

\textsuperscript{148} See infra notes 154–77 and accompanying text regarding general warrant requirements.

\textsuperscript{149} See infra notes 217–24 and accompanying text regarding the Agency's use of ex parte warrants.

\textsuperscript{150} Courts have differing views of consent revocation and the effectiveness of attempts to revoke consent. Compare Mason v. Pulliam, 557 F.2d 426 (5th Cir. 1977) and United States v. Homburg, 546 F.2d 1350 (9th Cir. 1977) (ruling consent is revocable and revocation is legally effective to restrain governmental action) with United States v. Hezbrun, 723 F.2d 773 (11th Cir. 1984), United States v. Haynie, 637 F.2d 227 (4th Cir. 1980) and United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973) (viewing consent given in some instances to be irrevocable, and viewing attempted revocation as inoperative). The possibility that consent may be revoked is a reason why EPA will sometimes obtain a warrant rather than ask for an occupant's consent. The problems resulting from revoked consent are legally andlogistically unacceptable.

\textsuperscript{151} The official has the option of seeking a warrant or instituting an action for declaratory or injunctive relief.
prudent approach in such circumstances is to obtain an ex parte warrant.

The foregoing discussions of search pursuant to consent and the pervasively regulated business exception to the warrant rule indicate that a major element of EPA access policy and strategy could be centered upon warrantless inspections and searches. While such a policy is legally tenable, EPA should not embrace it without a good deal of forethought and planning. If, for example, the Agency plans to make regular or predictable inspections of hazardous waste disposal facilities or pesticide manufacturing plants, EPA should prepare judicial test cases to establish that such enterprises are pervasively regulated. Establishing such a limited legal precedent, however, does not ensure the cooperation of all commercial owners or clear the way for unfettered use of the exception. The Agency would also have to establish that an EPA official has authority to use force to effectuate warrantless search rights. Unless self-help—the privileged use of reasonable physical force to effectuate the entry and to preclude interference—is available, such a right to "warrantless" entry is wholly illusory.

Unfortunately, the Supreme Court, rather than establishing a firm right of self-help to effectuate warrantless entry, has intimated that the Agency must obtain a warrant or file a plenary suit for an injunction requiring the possessor to allow government personnel to enter if entry is refused. Nevertheless, it is paradoxical for EPA to possess a warrantless right to enter property but be forced to resort to the judiciary to enforce that right. If a United States Marshal or deputy accompanies Agency personnel exercising warrantless entry rights, self-help for entry is theoretically available. However, it is extremely unlikely that a busy Marshal would lend such assistance unless EPA had a warrant in hand confirming the legality of the proposed entry and post-entry activities.

152 See See v. City of Seattle, 387 U.S. 541, 546 (1967); Donovan v. Dewey, 452 U.S. 594, 596 (1981). Perhaps the Court had not analyzed the matter thoroughly. The Dewey decision intimated that self-help by forcible entry was not available under the statute analyzed, even though the statute provided for warrantless entry. 452 U.S. at 596-97. The result seems anomalous since the identical entry right, when confirmed by a warrant and served with the aid of a U.S. Marshal, could be exercised with reasonable force and self-help. The statute's warrantless entry provision seems to have added nothing to the already existing exception to the warrant requirement for entry pursuant to consent. In Marshall v. Barlow's, Inc., 436 U.S. 307, 321-22 & n.18 (1978) the Supreme Court also implied that the Clean Air Act required EPA to resort to the federal courts if entry was refused. An early commentator on Barlow's flatly concluded that EPA's authorization statutes did not provide for self-help or forced entry. Martin, EPA and Administrative Inspections, 7 FLA. ST. U.L. REV. 123, 134-37 (1979).
Currently, in the absence of a clear authorization to use self-help, a warrantless search attempt based upon the “pervasively regulated” business exception is little more than a search pursuant to consent. If the industrial property is fenced, or access is limited in some other way, the property owner faced with an inspector without a warrant may have the power, if not the legal authority, to turn the inspector away.

Broad-based use of consent and the pervasively regulated business exception to the warrant requirement create programmatic problems. Judicial pronouncements that clearly establish the use of self-help and authorize warrantless searches of various industries would strengthen these access tools. In the meantime, EPA should rely upon searches pursuant to consent only in appropriate circumstances, or upon the pervasively regulated business exception to the warrant requirement, only if one of several conditions is present: (1) regulation of the industry in question has become routine, and the commercial operator expects and cooperates in periodic inspections; (2) access as a practical matter cannot be restrained or prevented by a property owner not consenting to the search (such as an over-flight, walking through unfenced property, observing from off-property); (3) the search will be of short duration and it is unlikely that consent will be refused; or (4) exigencies exist that make proceeding without an ex parte warrant necessary or desirable.

III. CONSTITUTIONAL AND POLICY CONSIDERATIONS OF EPA ACCESS FOR THE PURPOSE OF DESIGNING TECHNOLOGICAL CONTROLS FOR COMMERCIAL PROPERTY

Practical as well as policy considerations illustrate the potential problems of conducting even a short-duration inspection without a warrant. Warrantless searches are much more likely to produce delays, induce costly litigation, and perhaps render the search a nullity. Regardless of the strength of EPA’s argument in favor of a warrantless search, the Agency runs a much greater risk, acting without a warrant, that a court will find a fourth amendment violation and render the fruits of the search unusable in a compliance, enforcement, or rulemaking proceeding. The entire investment in an inspection effort, including EPA inspectors’ time, laboratory anal-

ysis, and test results, may hang in the balance if the Agency relies upon a warrantless inspection.

A. Proceeding With a Warrant Under the Fourth Amendment: The Probable Cause and Reasonableness Requirements

Access for the purposes of designing technology-based pollution control permits, or for implementing remedial measures, intrudes more substantially upon commercial interests than an inspection does. EPA is present on the property for longer periods than is required for the ordinary inspection. Therefore, when EPA utilizes its entry authority to address pollution control problems by attempting to engineer a technological cure, the Agency should usually arm itself with a warrant to avoid constitutional problems, delays, disruption, or possible withdrawal of consent.

Simply stated, a warrant is a judicial confirmation of an official's authority to act in pursuit of statutory or other legal goals. A warrant shields the official directed to complete the action from legal liability when acting pursuant to the dictates of the warrant. Any warrant sought by EPA will confirm the pre-existing rights of an Agency official to enter the target premises and to perform specified activities there. Most EPA administrative warrants verify the official's authority to enter private premises and conduct post-entry activities such as inspections, sampling, or remedial activities.

In a sense, the statutory right of entry or its equivalent gives EPA officials a "right to a warrant" whether or not the fourth amendment requires one for the proposed activity. This feature is important because it prevents prolonged litigation in the event that the owner or occupier of the targeted premises asserts some claim. The warrant procedure interposes a neutral judicial arbitrator between the official claiming to have authority to act and the private citizen who will suffer the intrusion upon his property or privacy.


\[155\] See, e.g., See v. City of Seattle, 387 U.S. 541 (1967); Bunker Hill Co. v. EPA, 658 F.2d 1280 (9th Cir. 1981); Midwest Growers Coop. v. Kirkemo, 533 F.2d 455 (9th Cir. 1976); see also infra note 321 and accompanying text.

\[156\] See United States v. Ross, 456 U.S. 798 (1982); Offices of Lakeside Non-Ferrous Metals, Inc. v. United States, 679 F.2d 778 (9th Cir. 1982); Forro Precision, Inc. v. IBM, 673 F.2d 1045 (9th Cir. 1982). Each mentions the loss of immunity when no warrant is held by the governmental official. Properly utilized, the warrant rules from Barlow's are a genuine aid and benefit to officials engaged in entry and post-access activities pursuant to a substantive right or power conferred by statute or common law. Viewed in that manner, an official has a "right" to such a warrant when a relevant statute grants a right of entry upon his agency. The official is entitled to the immunity and protection that a warrant affords.
interests. A warrant only obligates the target to allow the search; he or she need not otherwise facilitate the search or other post-entry activities. Nevertheless, administrative warrants are not limited to searches or seizures, but are capable of authorizing many forms of activity on commercial property.

Most of the recent Supreme Court decisions governing administrative access to commercial property have dealt with the constitutionality of warrantless administrative searches. Judicial guidelines for searches conducted pursuant to administrative warrants must therefore be derived from older Supreme Court cases, the interstitial statements made in recent Supreme Court cases dealing with warrantless administrative searches, and lower court decisions. The reasonableness of the government's actions remains the ultimate constitutional standard.

In addressing the requirements for probable cause and warrants under the fourth amendment, courts often examine the access provisions of the statutes being relied upon by the government. For example, the Supreme Court in 1946 held that the requirement of probable cause is satisfied "by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the [objects of the search] are relevant to the inquiry." The Court in later years gradually moved to linking the probable cause issue to the existence of an authorizing statute and the overall reasonableness of the search.

Eventually, in 1978, the Supreme Court decided the seminal case of *Marshall v. Barlow's, Inc.*, which involved the constitutionality of inspection provisions contained in the Occupational Safety and Health Administration's (OSHA) authorization act. The Court

163 Id. at 320 (citing *Camara*, 387 U.S. at 538). *Barlow's* is the descendant of a number of cases, the most notable of which are *Camara* and *See v. City of Seattle*, 387 U.S. 541 (1967),
struck down the OSHA statute, but only to the extent to which the law purported to authorize OSHA inspectors to use self-help to enter commercial facilities in the teeth of an occupant's objection and to proceed with warrantless inspections. The Court affirmed OSHA's authority to enter premises. In doing so, however, the Court imposed a warrant requirement through its interpretation of the fourth amendment. Because OSHA regulates nearly all commercial operations and does not "pervasively regulate" any particular industry, the Court found no constitutionally acceptable exception to the warrant requirement. Therefore, it ruled OSHA had to first obtain a judicially issued warrant or its functional equivalent.

In a major decision highlighting the differences between criminal and administrative searches, the Court discussed the elements that a federal agency must show to obtain a civil or "administrative" warrant for compliance investigations. The Court held that an administrative agency had to show either: (1) that reasonable cause existed to believe that a violation or other circumstance targeted by statute had occurred or was occurring at the facility to be entered; or (2) that the facility to be entered was identified and selected by the Agency based on an administrative plan or scheme for entries prepared before the warrant was applied for, and that the plan or strategy was derived from "neutral sources." The Court did not require that the "plan" or "scheme" itself be "neutral" or random, only that the basis for the plan be "neutral."

decided the same day. For an excellent discussion of these cases in the environmental law context, see Case Note, Administrative Inspections from Above: Dow Chemical Co. v. United States, 106 S. Ct. 1819 (1986), 56 U. CIN. L. REV. 361, 372-74 (1987). Justice White wrote all of these opinions. Some believe Camara portrays the struggle by the Court to articulate an acceptable analytical basis for administrative warrant cases, finally resulting in Barlow's. The rationale of the earlier cases should not be overlooked, but they must be interpreted in light of Justice White's Barlow's opinion. Also, one must recognize that during the last two weeks of May 1978, the Supreme Court handed down the Barlow's opinion and Zurcher v. Stanford Daily, 436 U.S. 547 (1978), authored by Justice White, as well as Michigan v. Tyler, 436 U.S. 499 (1978). This is significant because it shows that all three cases involved the in-depth consideration of warrant problems by the same nine justices in the same term. The results, therefore, of those decisions must be regarded as thoroughly considered by the same Court.

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165 Id. at 315-20.
166 Id. at 323-25.
167 Id. at 320-22.
168 Id. Some courts identify in Barlow's a supposed third basis, consisting of a showing that there exist, for a particular facility, "reasonable legislative or administrative standards for conducting an . . . inspection" and that these have been satisfied. See, e.g., United States v. New Orleans Pub. Serv., Inc., 723 F.2d 422 (5th Cir. 1984). This test is only a subset of, or
The Barlow's Court emphatically stated that the fourth amendment "criminal probable cause" was inapplicable:

> Probable cause in the criminal law sense is not required. For purposes of an administrative search . . . probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied."\(^{169}\)

The Barlow's Court further explained that a warrant based on probable cause would "provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria."\(^{170}\)

Many environmental statutes contain provisions expressly authorizing the EPA Administrator and his or her "authorized representatives" to enter a facility and to conduct inspections or remedial activities after entry without explicitly requiring a warrant.\(^{171}\) No one has yet successfully challenged EPA's statutory authority on the constitutional grounds raised in Barlow's, or succeeded in interposing that case's administrative warrant requirements upon EPA activities. Litigants have urged crabbed interpretations of the statutory language itself. For example, companies have asserted, with mixed success, that "authorized representatives" of EPA, referred to in several environmental statutes, means only federal officials. Therefore, industry contends that EPA may not contract with a private company to conduct inspections for EPA.\(^{172}\)

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a matter subsumed by, the "administrative scheme" basis for warrant issuance and is not an independent requirement.

\(^{169}\) 436 U.S. at 320. Commentators may argue that the Barlow's statement about probable cause did not imply that the fourth amendment's probable cause language was \textit{inapplicable} to administrative warrants, and that it only attached to criminal warrants under Federal Rule of Criminal Procedure 41 or warrants where the predominant institutional purpose is to seek evidence of criminal rather than merely "illegal" activity. Some argue that the Court did not really say that, but instead meant that while the "probable cause" language in the fourth amendment does in fact apply, the meaning of "probable cause" was diluted to a level of "reasonable cause" or "administrative cause." In practical effect, the result is the same. \textit{See} New York v. Burger, 482 U.S. 691 (1987).

\(^{170}\) 436 U.S. at 323.

\(^{171}\) \textit{See supra} note 4.

While not conceding the point, EPA conducts its inspection programs as if the administrative warrant rules announced in Barlow's applied in most instances to EPA under various environmental statutes. By properly refusing to concede that Barlow's controls EPA's rights under all the different statutes it administers, the Agency retains the flexibility of asserting that a warrantless search is valid in appropriate cases.

An EPA official conducting a search, with or without a warrant, is asserting a statutory right to be on the premises. That right cannot be conditioned by the owner or operator insisting that EPA officials sign secrecy agreements, waivers of liability, voluntary restrictions on access, or hold harmless agreements. While the Department of Justice will not allow EPA officials to enter such agreements, inspectors often wear protective gear or split samples at the request of the owner.

EPA’s reasons for ordinarily following Barlow’s warrant principles are practical. It is easier and more cost-effective to obtain a warrant than it is to litigate. Furthermore, EPA officials clearly have the right to obtain warrants provided for in the Barlow’s decision even if in a particular case or under a particular statute they might not be constitutionally required to do so. Since warrants afford substantial legal protection to governmental officials from private suits for damages, sound policy suggests that they are good insurance policies, obtainable ex parte.

One important element links the Barlow’s decision with its predecessor and successor judicial decisions regarding the constitutionality of administrative search activity. All three eras emphasize the crucial role that the statutory authorization plays in the constitutional analysis. While the Supreme Court decisions after Barlow’s may be criticized for allowing Congress to, in effect, partially control what is considered constitutionally reasonable, statutory interpretation of the precise statute involved remains the key to any administrative search case. Many similarities in environmental access provisions exist. Therefore, the detailed examination of the Clean Air Act, Clean Water Act, and Superfund access authorities contained in this Article will illustrate most of the relevant constitutional,

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173 One decision indicates that EPA is required to observe the Barlow’s ruling. Public Serv. Co. of Indiana v. EPA, 509 F. Supp. 720 (S.D. Ind. 1981).
174 See supra notes 4, 88–89 and accompanying text.
175 See supra notes 154–59 and accompanying text.
176 Id.
177 See supra note 4.
statutory, and policy considerations governing EPA access pursuant to a warrant.

B. Illustrative Case of Proceeding With a Warrant: Mobil Oil Corp. v. EPA

Technology is at the very heart of the Clean Water Act’s programs to reduce or eliminate water pollution discharges from our nation’s point sources. By July 1, 1977, all point source dischargers, except publicly owned treatment facilities, were to have achieved compliance with designated effluent limitations through the installation of the “best practicable technology currently available” (BPT). Such dischargers were then to install the “best available technology economically achievable” (BAT) to control the release of toxicants and other pollutants no later than July 1, 1983. Attainment of these technological requirements was designed to move industry closer to the ultimate goal of the Clean Water Act, which is “to restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”

The history of EPA’s attempt to develop BPT and BAT effluent limitations is scarred by lengthy delays; much of industry did not meet the 1977 deadline for compliance with BPT, let alone the 1983 deadline for BAT. Congress grossly underestimated the sheer volume of information that was required for the Agency to make an intelligent evaluation of what constituted BPT or BAT for numerous industrial categories, including oil refineries. The Mobil litigation was sparked by efforts of EPA’s regional office in Chicago to gain information about oil refinery waste streams that might be useful in the development of BAT limitations for toxic discharges.

180 “Point source” is a specific point of origin of a discharge containing a pollutant and is distinguished from such non-point sources of pollution as surface water runoff after a rainstorm. See 33 U.S.C.A. § 1362(14) (West 1986 & Supp. 1989).
182 Id. § 1311(b)(2)(A).
183 Id. § 1251.
184 Kalur, Will Judicial Error Allow Industrial Point Sources to Avoid BPT and Perhaps BAT Later? A Story of Good Intentions, Bad Dictum, and Ugly Ecology, 7 Ecology L.Q. 955–88 (1979). This article examines in detail the history, judicial approval, and application of BPT variance regulations and argues that congressional action is required to prevent further delays in pollution control.
185 See id.
Mobil Oil Corporation operates a typical petroleum refinery in Channahon, Illinois, near the Des Plaines River, a navigable water. Mobil Oil channels its internal process and waste streams from its refinery to a facility that treats the waste prior to discharge. That facility operates under a National Pollutant Discharge Elimination System (NPDES) permit issued to Mobil by the Illinois EPA. Mobil's permit limits the amount of conventional pollutants that it may discharge into the Des Plaines River, and requires Mobil to monitor the amount of pollutants it dumps into the river by regularly testing samples from the refinery's waste streams "taken at a point representative of discharge" into the river.

EPA requested access to the facility for the purpose of obtaining information that might later be used in the development of effluent limitations for toxicants that require the application of BAT, and to monitor Mobil Oil's compliance status. BAT sometimes requires the design and installation of technological controls on individual process equipment within the plant. Therefore, EPA sought information about the existence of toxic pollutants in Mobil's internal waste streams, prior to the point of treatment, in furtherance of EPA's obligation to promulgate BAT limitations.

Mobil granted EPA permission to take samples of the treated waste stream at the point of discharge, but refused to allow sampling of its internal process waste streams. EPA obtained an ex parte administrative warrant from a federal magistrate, and subsequently conducted an inspection and sampling program at the Mobil site. Mobil's efforts before a magistrate to quash the warrant were unsuccessful, as were its efforts to overturn the magistrate's decision in the federal district court. Mobil then appealed to the Seventh Circuit Court of Appeals, raising a number of challenges to EPA's statutory authority to sample internal waste streams.

Mobil directed two surgical strikes at the broad statutory provisions upon which EPA based its authority to enter and sample waste streams.

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186 Mobil Oil Corp. v. EPA, 716 F.2d 1187, 1188 (7th Cir. 1983), cert. denied, 466 U.S. 980 (1984).
187 Id. Illinois has been delegated the authority to administer the NPDES permit program. Id.
188 Id.
189 See id. at 1188, 1190.
190 Id. at 1190.
191 Id. at 1188.
192 Id.
First, Mobil claimed that the term "effluent," as used in the statute, referred only to the waste stream that was treated and eventually discharged into the Des Plaines River. Second, because Mobil's permit required it to sample the treated effluent at the point of discharge, the company asserted that EPA was limited to sampling only at that point, based on the final sentence of Clean Water Act section 308. At the lower court level, Mobil also raised a constitutional challenge to EPA's actions insisting that the search was unreasonable under the fourth amendment.
The Court of Appeals easily disposed of these arguments, brushing aside the fourth amendment question. Implicitly finding that the Barlow's criteria were met, the court held that a traditional balancing of governmental interests against Mobil's interest in preventing the intrusion supported the reasonableness of the search. In strongly worded language, the court stated that it had difficulty in finding any substantial industrial interest whatsoever in preventing the search.

It appears, then, that the only interest Mobil could possibly have in preventing EPA officials from sampling its untreated wastewater is that Mobil might want to keep the EPA in the dark as much as possible about what pollutants are present in the water it dumps into the Des Plaines River and about how efficient its treatment processes are at cleaning its wastewater of pollutants.

The Court of Appeals also noted that the sampling program was only a minor disruption of daily corporate activity. Although the Supreme Court refused to grant Mobil's request for review of the decision, the Dow overflight case leaves little doubt that the high court would have upheld the Mobil decision against a fourth amendment challenge. The dissent in Dow condemned the overflight as unconstitutionally unreasonable primarily because it was performed without a warrant; a unanimous Court, however, found that the overflight was authorized by the Clean Air Act, even though the statute did not expressly mention aerial photography. Therefore, it is unlikely that even the Dow minority would have found problems in Mobil since EPA obtained a warrant.

The Court of Appeals similarly rejected Mobil's statutory arguments, which seemed to run contrary to the express language and intent of the access provisions of the statute. The court emphasized, as the Agency did, that section 308 allowed effluents to be sampled "at such locations, at such intervals, and in such manner as the Administrator shall prescribe." The regulations implementing section 308 inspections also undercut Mobil's argument that EPA could

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197 716 F.2d at 1190.
198 Id.
199 Id. The disruption issue is extremely important to access policy and will be dealt with infra notes 258-59, 268-83, 327-61 and accompanying text.
202 Id. at 234, 244 n.8; see also supra notes 31-82 and accompanying text.
sample only at the "end-of-the-pipe" discharge point. Regulations in effect at the time of the inspection provided that "the permittee shall allow the Director [of the EPA program] . . . to . . . sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the appropriate Act, any substances or parameters at any location." 204

Similarly, the court found untenable Mobil's effort to define effluent in such a way as to exclude internal waste streams. 205 The term "effluent" is not defined in the Clean Water Act or in the implementing regulations. The courts will give an undefined statutory term its plain and ordinary meaning whenever possible. 206 The ordinary meaning of effluent, and the one adopted by both EPA and the court, is "something that flows out." 207 Thus, the untreated waste streams that flowed from Mobil Oil's production processes were "effluents" within the meaning of the Act. The court's decision in this regard reflects the great deference that is accorded an agency's interpretation of a statute which it administers. 208

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204 40 C.F.R. § 122.7(i)(4) (1982) (emphasis added).
205 Mobil argued in its brief that the definition of effluent should be extrapolated from the definition of "effluent limitation" contained in section 502(11), and thus be limited to that which is "discharged from point sources into navigable waters." Brief for Appellant at 3, Mobil Oil Corp. v. EPA, 716 F.2d 1187 (7th Cir. 1983) (No. 83-1047). That interpretation of the definitional section of the Act is unsupportable when viewed in light of the express statutory language of section 308, which indicates that sampling of effluent may take place at "such locations" as the Administrator shall prescribe. 33 U.S.C. § 1318 (1982). If Mobil's position were adopted, the phrase "at such location" would be superfluous since the only possible sampling location would be at the discharge point. Mobil's claim is similar to an assertion that the term "automotive exhaust" must be defined solely by reference to the phrase "exhaust pipe." Obviously, exhaust is created by an engine and constitutes exhaust prior to its discharge from the automobile at the end of the pipe. Moreover, much can be learned about the control of automotive exhaust by analyzing its temperature, chemical composition, and other physical properties before it reaches the end of the pipe and is discharged to the ambient air. An analogous conclusion with respect to effluent is reached in Mobil. See 716 F.2d 1187, 1190 (7th Cir. 1983).
207 See Mobil, 716 F.2d at 1189.
208 See id. at 1189-90. The Supreme Court has held that great deference must be given EPA's interpretation of Clean Water Act provisions, such as the Agency's interpretation of the term "effluent." See, e.g., E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 134-36 (1977). Any ambiguity in the statute must be resolved in favor of the Agency's interpretation. See id. The Supreme Court has recognized EPA's unique experience and expertise in administering this complex and technical statute. Thus, if the Agency's interpretation is reasonable, the courts must accept it. See, e.g., id.; Train v. Natural Resources Defense Council, 421 U.S. 60, 87 (1975); Udall v. Tallman, 380 U.S. 1, 16 (1965); Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); Norwegian Nitrogen Prod. Co.
C. Implications of the Mobil Case for Clean Water Act
Enforcement and Compliance Policy

1. Enforcement of the Clean Water Act

EPA's Clean Water Act enforcement program depends upon vigorous and expansive access and inspection activities. The Clean Water Act's provisions are broadly designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Congress therefore enacted a comprehensive compliance and enforcement scheme in furtherance of this goal. The Act empowers EPA to (1) prevent or respond to spills of pollutants; (2) fund construction and improvement of sewage treatment facilities; and (3) control industrial point source discharges. Section 308 grants the only entry and inspection authority that EPA can utilize to meet these various obligations. Mobil's interpretation would make EPA's compliance and enforcement programs impossible to implement.

The Supreme Court unanimously rejected similar attempts to narrow EPA's access and inspection authority under the Clean Air Act in the Dow overflight case. The Court warned the business community that EPA's investigatory and enforcement authorities in both clean air and clean water matters were to be interpreted broadly, and that Congress was not required to "precisely spell out" how access authority was to be exercised in myriad commercial settings.

v. United States, 288 U.S. 294 (1933) (deference given to administrative practice even though only justified after court challenge). An illustrative case similar to Mobil is National Wildlife Federation v. Gorsuch, 530 F. Supp. 1291, 1311 (D.D.C. 1982). The issue in that case was whether low dissolved oxygen levels and waters supersaturated with oxygen discharged from a dam/reservoir facility to navigable waters are additions of "pollutants" to navigable waters and thereby requires an NPDES permit. EPA determined that these discharges were not point sources of pollution. The district court disagreed but, the circuit court reversed and held that EPA's interpretation of the Act was entitled to great deference. 693 F.2d 156, 166-70 (D.C. Cir. 1982). The court concluded that its inquiry is a limited one where an agency's construction neither contradicts the language of the implementing statute nor frustrates congressional policy. Id. at 171. "The agency's [decision] must be upheld if, in light of the appropriate degree of deference, it is sufficiently reasonable, even if it is not the only reasonable one or even the reading the Court would have reached on its own." Id. (emphasis added).


Id. §§ 1251-1376.

See Dow Chem. Co. v. United States, 476 U.S. 227 (1986); see also supra notes 31–82 and accompanying text.

476 U.S. at 233.
The narrow interpretations urged by Mobil would do vastly more damage to enforcement efforts under the Clean Water Act than the prohibition on warrantless overflights would have done to Clean Air Act enforcement efforts. Such interpretations would negate and render meaningless many critical enforcement provisions of the Clean Water Act, in clear contravention of well-established principles of statutory construction. Statutes must be read as a whole.\textsuperscript{213} For example, section 308's access and inspection provisions explicitly apply to spills of oil or hazardous substances governed by section 311 of the Act.\textsuperscript{214} In conducting the spill prevention and countermeasure program pursuant to section 311 of the Act, EPA must be able to enter premises and sample effluents immediately to react effectively when a spill occurs. Under Mobil's reading of section 308, this would be impossible. EPA would be under a duty to first require the owner to sample the effluent before collecting a sample itself. Such delay in the Agency's response to a spill situation obviously contravenes section 311's language and intent.

Similarly, the Agency must respond without delay to willful violations of the Clean Water Act. Under such circumstances, the Agency must have the ability under section 308 to obtain effluent data without prior recourse to owners or operators.\textsuperscript{215} The need to avoid delay and prevent concealment of evidence has led the courts to sustain EPA's reliance on ex parte warrants for administrative searches. As stated by the court in \textit{United States v. Stauffer Chemical Co.}:\textsuperscript{216} "an affected business had the opportunity for an adversary hearing . . . it could temporarily shift its plant into compliance . . . only to return to polluting after termination of the inspection. Such activity would undermine EPA's enforcement power."\textsuperscript{217} Courts have gone so far as to uphold ex parte warrants even where surprise is nonessential to the success of the inspection.\textsuperscript{218}

By the same token, ex parte applications may not be turned into adversarial contests by allowing target companies to intervene.\textsuperscript{219}

\textsuperscript{215} See id. § 1319.
\textsuperscript{217} Id. at 749-50.
\textsuperscript{218} See, e.g., Bunker Hill Co. Lead and Zinc Smelter v. EPA, 658 F.2d 1280, 1285 (9th Cir. 1981); Stoddard Lumber Co. v. Marshall, 627 F.2d 984 (9th Cir. 1980) (agency need not demonstrate that surprise is necessary before ex parte warrant issues).
Ex parte proceedings to obtain warrants are consistent with procedural and substantive due process, although challenges based on the due process clause are common.\textsuperscript{220}

Tactically, defense lawyers look for opportunities to assert that their clients should be entitled to contest the issuance of ex parte warrants, hoping to turn warrant applications into wholesale adversarial proceedings and buying their clients valuable time.\textsuperscript{221} The Supreme Court’s decision in \textit{Zurcher v. Stanford Daily}\textsuperscript{222} now stands in the defense lawyers’ path. The Court endorsed the use of warrants to obtain documents and to proceed with searches of premises believed to contain evidence, even though the occupant of the premise was not a suspect.\textsuperscript{223} The Court indicated its strong preference for warrants granted ex parte over the adversarial proceedings that a request for a subpoena would entail.\textsuperscript{224}

Other unreasonable and unnecessary burdens would be placed on Agency efforts to enforce the Clean Water Act had Mobil’s view prevailed. A crinkled interpretation of the term “effluent” would render other provisions of the Clean Water Act nonsensical. For instance, in section 402(b)(8) of the Act, the term effluent refers to pollutants being discharged to a publicly owned treatment works intervention by other parties). It has also been ruled that it is not within a magistrate’s discretion to allow a non-party to intervene in Agency warrant application proceedings commenced ex parte. The court in \textit{S.D. Warren} stated that “an adversary proceeding . . . could only result in an unreasonable and unnecessary burden.” 481 F. Supp. at 495.

\textsuperscript{220} See \textit{Bunker Hill}, 658 F.2d at 1285; see also \textit{B & B Chern. Co. v. EPA}, 806 F.2d 987 (11th Cir. 1986). If ex parte proceeding in this context were ruled unconstitutional, then hitherto well-established constitutionality of the ex parte criminal warrant proceedings under Federal Rule of Criminal Procedure 41 would be undermined.

\textsuperscript{221} Id. at 560.

\textsuperscript{222} 436 U.S. 547 (1978).


The district court in \textit{Outboard Marine Corp. v. Thomas}, 610 F. Supp. 1234 (N.D. Ill.), rev’d, 773 F.2d 883 (7th Cir. 1985), straightforwardly rejected arguments that due process and other constitutional provisions required adversarial proceedings in CERCLA cases. It “assumed” arguendo that the administrative warrant issued there did involve a constitutional “taking,” but went on to rule that because “just compensation” need not precede any such taking, see \textit{Ruckelshaus v. Monsanto Co.}, 467 U.S. 986 (1984), and because the Tucker Act United States Claims Court remedies, see 28 U.S.C. §§ 1346, 1491 (1982), would be available to the warrant respondent for anything the warrant validly authorized, no “due process” substantive requirement was violated by \textit{ex parte} warrant issuance. The \textit{Riverside} decision displays the correctness of that view. The APA in 5 U.S.C. § 704 (1982 & Supp. V 1987) requires that there be no other adequate remedy in a court before a deprivation such as a taking may be subjected to “early” judicial review under the APA.
(POTW), rather than to a navigable water.\textsuperscript{225} Effluents which are introduced into a POTW by an industrial user of the POTW are not considered "point source discharges" within the meaning of that term. Nonetheless, section 402(b)(9) specifically requires that industrial dischargers to POTWs comply with section 308 of the Act.\textsuperscript{226} In addition, section 308 expressly provides for inspections, monitoring, and sampling as necessary to develop pretreatment standards pursuant to section 307.\textsuperscript{227} Pretreatment also refers to discharges to POTWs, not navigable waters. Obviously, a dogmatic insistence that "effluent" be narrowly defined as a point source discharge to navigable waters is diametrically opposed to these sections of the Act.

2. Permits, Technology, and EPA Access Policy

The most important policy underpinning for a broad construction of EPA's access and sampling authority under the Clean Water Act is the technology-forcing nature of the Act. As stated previously, section 308 specifically states that the purpose of the inspection and sampling authority is to "carry out the objectives of this [Act], including but not limited to . . . developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this [Act]."\textsuperscript{228}

Sampling of internal waste streams is essential to the development of technology-based effluent limitations and other pollution control requirements contained in NPDES permits issued under section 402 of the Act.\textsuperscript{229} Pursuant to sections 301 and 304 of the Act, EPA must establish effluent limitations that are achievable through the application of the best available technology economically achievable (BAT) for a given category or class of dischargers.\textsuperscript{230}

The Agency must consider several factors set out in section 304 of the Act in determining what constitutes BAT for the control of pollution discharges from a particular facility or class of industrial facilities. These factors include the age of the equipment and facilities involved, the process employed, and the engineering requirements of designing various types of control technologies.\textsuperscript{231} In addition,
EPA also must consider the total cost of the technology in relation to the effluent reduction achievable by the application of such technology.\textsuperscript{232} This requires a thorough evaluation of the cost and efficiency of the treatment technology to be employed. Therefore, in developing BAT effluent limitation guidelines, EPA must study internal waste streams to ascertain what types of treatment units are needed and what the most efficient placement of the treatment units is.\textsuperscript{233}

To evaluate the degree of pollutant reduction achievable by the system, EPA must know what goes into a treatment system. In some instances, it may be more practical and economical to treat pollutants in an isolated internal waste stream than to wait until that stream has combined with other waste streams prior to ultimate discharge to a navigable water.

In addition to developing national effluent limitations guidelines, the NPDES permitting agency also has the authority to impose additional permit conditions necessary to achieve compliance with the requirements of the Act at a particular plant.\textsuperscript{234} EPA uses this authority where national effluent limitations do not address pollutant problems unique to a given facility or group of facilities.

For example, toxicants diluted or combined with uncontaminated cooling water or other process wastes can remain undetected at the ultimate point of discharge. Dilution occurs when the volume of the final effluent at the discharge point is so great that a particular pollutant is present in concentrations which, while below the detection levels of the analytical testing equipment and procedures, may still represent a significant level of pollution. In addition, the complexity of final effluent streams at the ultimate discharge point may be such that a toxic pollutant will not be discovered using standard analytical methods. Thus, the masked pollutant may escape detection and be discharged directly to the environment. Congress has given EPA broad authority to sample \textit{internal} effluents in order to effectively address such situations and thereby prevent pollutants from being discharged.\textsuperscript{235} Naturally, a cramped definition of effluent would severely undercut EPA’s ability to develop plant-specific permit conditions.

\textsuperscript{232} Id.
\textsuperscript{233} See id.
\textsuperscript{234} Id. § 1342(a)(1)–(a)(2) (1982).
\textsuperscript{235} See Mobil Oil Corp. v. EPA, 716 F.2d 1187, 1190–91 (7th Cir. 1983), \textit{cert. denied}, 466 U.S. 980 (1984).
The policy considerations supporting unfettered access to commercial property under the Clean Water Act are tempered somewhat by countervailing privacy concerns. These countervailing concerns can be met, without unnecessarily curtailing access, by implementation of rigorous procedural safeguards for commercial interests.

D. Privacy Interests and Countervailing Policy Considerations of Broad Access

Industrial trade secrets constitute the most substantial privacy interests that must be accounted for when performing the fourth amendment balancing of the government’s need for entry and inspection and industry’s right to be free of untoward intrusion. Once in possession of process information, effluent data, or chemical formulae which are not protected by copyright or patent law, a competitor is often capable of duplicating the trade secrets of others in the same industry, without incurring the associated research and development costs. Reverse engineering and outright piracy may impede economic growth resulting from innovation and competition. Therefore, the government must prevent unnecessary disclosures of trade secrets from becoming a by-product of EPA access to commercial property.

To protect these valid interests, EPA has promulgated comprehensive regulations designed to prevent public disclosure of confidential business information (CBI) obtained by the Agency. The rules include special provisions governing information obtained under specific environmental statutes. State agencies and contractors working under delegation agreements or contractual obligations are

236 For a discussion of the trade secret issue raised in the context of Clean Air Act compliance, see supra notes 71–82 and accompanying text.
239 40 C.F.R. §§ 2.302–311 (1988) contains special rules for information obtained under the Clean Water Act, the Safe Drinking Water Act, RCRA/CERCLA, FIFRA, and TSCA, as well as other statutes.
bound by the same duties relative to nondisclosure of CBI.\textsuperscript{240} The most elaborate and protective regulatory framework governs CBI submitted by chemical manufacturers pursuant to TSCA.\textsuperscript{241} Willful violations of provisions designed to prevent disclosure of CBI are potentially punishable by criminal prosecution.\textsuperscript{242}

EPA can prevent these legitimate privacy interests from becoming major impediments to an effective access policy only by adhering to CBI procedures. The Agency must consistently afford industry the right to assert a claim of confidentiality with respect to information obtained during inspection and sampling programs, and always follow the regulatory procedures for classifying the information as confidential or nonconfidential. Assiduous compliance with existing CBI regulations is good policy. It prevents industry from building the case that release of trade secrets and proprietary information to the government is tantamount to release to competitors or the public. It also protects legitimate privacy interests in safeguarding trade secrets and preserving research and development investments.

One problematic issue remains. If "emission data" under the Clean Air Act or "effluent data" under the Clean Water Act are defined broadly, as the Mobil court suggests, potential trade secret issues arise.\textsuperscript{243} For example, the Clean Water Act requires that all "effluent data" be made public\textsuperscript{244} so that citizens are apprised of the pollutants that may reach the waterways, and thus may effectively participate in public hearings and other proceedings that lead to the issuance of NPDES permits, effluent guidelines, and water quality standards.\textsuperscript{245}

The litigation involving EPA's attempt to obtain information regarding certain chemical processes and waste streams at Dow's Midland, Michigan, facility highlighted these issues. EPA sought access to assist the State of Michigan in the development of a BAT permit.\textsuperscript{246} Dow asserted that existing CBI protection for "effluent data" was inadequate, and that release of information regarding certain chemical catalysts would jeopardize its competitive position.\textsuperscript{247}

\textsuperscript{240} 40 C.F.R. § 2.211(d) (1988).
\textsuperscript{241} Id. § 2.306. See generally id. §§ 2.201–311, 720.80–.95.
\textsuperscript{243} See Mobil Oil Corp. v. EPA, 716 F.2d 1187, 1190–91 (7th Cir. 1983), cert. denied, 466 U.S. 980 (1984).
\textsuperscript{244} 33 U.S.C. § 1318(b) (1982) (supplier of records, reports, or information may claim confidentiality for trade secrets; however, effluent data must be made public); 40 C.F.R. § 2.302(e) (1988).
\textsuperscript{245} 33 U.S.C. § 1342(b)(3) (1982).
\textsuperscript{247} Id.
The *Dow* litigation was settled, after years of negotiation, with an elaborate judicial consent decree that established a mechanism for prompt judicial review of any adverse Agency determination on the CBI issue. Under the consent decree, EPA obtained the process information it needed, and preserved the regulatory process for making final confidentiality determinations. However, the dilemma created by making select emission or effluent data, that would ordinarily be CBI, available to the public under the environmental law was not resolved. The public's legitimate interest in knowing what pollutants may enter the environment collides with industry's legitimate interest in safeguarding research and development by keeping trade secrets confidential. The government's primary interest in the information is satisfied as long as the information is available to it and state agencies charged with developing permits, water quality standards, effluent limitations, and similar requirements. Thus, a statutory amendment, allowing the government to obtain access and to use narrowly defined categories of confidential effluent or emission data without releasing such information to the public, is justified.

The CBI regulations already attempt to lessen the impact of this dilemma by exempting from public disclosure certain "effluent data," such as research and development information and new product information, beyond the extent necessary to "disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation." A statutory amendment, patterned after this regulatory exemption, that prohibits public disclosure of effluent data already determined by EPA to be confidential business information, would resolve the current inconsistency in the law. Presumably, the Agency could serve adequately as the public's representative in determining what controls are dictated by the undisclosed effluent data.

IV. EPA ACCESS FOR THE PURPOSE OF ADDRESSING ENVIRONMENTAL THREATS AT HAZARDOUS WASTE SITES; A BRAVE NEW WORLD OF CONSTITUTIONAL, STATUTORY, AND POLICY CONCERNS

A. Introduction

Toxic substance and hazardous waste control has recently captured the attention of the public. Estimates of the number of waste disposal

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248 *Id.*

249 *Id.*

sites posing substantial threats to public health and the environment range from one to several thousand of the nearly hundred thousand existing waste disposal sites. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund),251 as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA),252 is an attempt to address the nation's hazardous waste problem.

CERCLA initially established a $1.6 billion response fund, 87.6% of which was financed by taxes on petrochemical feedstocks, with the remainder supplied by the federal treasury.253 The fund is used primarily to underwrite the cost of EPA “responses” to those hazardous waste sites that are not being adequately addressed by “responsible parties.”254 CERCLA authorizes the federal government to bring suit against parties owning waste facilities to recover the costs of cleanup and to collect damages for the destruction of governmental owned natural resources.255

Response is defined in CERCLA as “remove, removal, remedy or remedial action . . . [including] enforcement activities related thereto.”256 “Remedial actions” or “remedies” are response actions consistent with a permanent cleanup of the site;257 “removal” includes such short-term actions as are necessary to clean up or remove hazardous substances, to monitor, assess, and evaluate a release, to dispose of removed material, or to prevent, minimize, or mitigate damage to the public or to the environment.258

Both removal and remedy are defined broadly to give the Agency the ability to respond to threats from hazardous waste sites, and to design and utilize temporary and permanent measures to abate those threats. CERCLA is unique among environmental statutes because its entire thrust is to remedy pre-existing environmental hazards through the application of engineering and technology. Most other environmental legislation focuses on prevention of environmental

254 Id. §§ 9601(25), 9607 (1982 & Supp. V 1987). This Article focuses upon those situations where the relevant state agency is not taking the lead in the cleanup activities, and does not deal with state enforcement against potentially responsible parties.
255 Id. § 9607(a)–(e).
256 Id. § 9601(a).
257 Id. § 9601(25).
258 Id. § 9601(23).
259 Id. § 9601(24).
degradation before it occurs. While those acts contain enforcement or remedial provisions, CERCLA's landscape is dominated by these concerns.

Because CERCLA is remedial in nature, implementation of the Act raises a plethora of issues regarding EPA access to commercial property for purposes of designing and engineering a response to the hazards present. The typical CERCLA cleanup or response action presumably will require access of a longer duration, and cause substantially more disruption than the usual inspection or sampling visit, consequently raising graver fourth amendment privacy questions. Thus, the government needs sound statutory grounds to support its presence on commercial property for Superfund activity. Moreover, because the response may interfere with the free use and ownership rights in property, the Agency faces other potential constitutional barriers posed by the fifth amendment's taking and due process clauses.

The litigation that accompanied EPA's efforts to gain access to Outboard Marine Corporation (OMC) property in order to decontaminate Waukegan Harbor on Lake Michigan in Illinois illustrates each of these constitutional, statutory, and policy issues. The litigation proved critical to the evolution of EPA access policy under the Superfund law. The federal courts' inability to deal quickly and adequately with these access questions ultimately prompted Congress to enact measures which substantially clarified and strengthened EPA's statutory authority to enter commercial property and conduct cleanups of hazardous waste sites. The primary issues remaining in the wake of the OMC litigation and the Superfund Amendments and Reauthorization Act involve reconciling EPA response actions with the fifth amendment prohibition against uncompensated takings of private property for public use. Satisfactory resolution of those issues may dictate whether or not CERCLA's noble goals are achievable.

B. The Seminal Case of Outboard Marine Corp. v. Thomas

The OMC case was a microcosm of the nightmare confronting the nation in its efforts to decontaminate the ravages of hazardous pollution created during the first century of substantial industrial prog-

260 Id.
ress. The case presented many of the typical conditions confronting EPA when attempting to render a site harmless: long-standing accumulations of chemical contamination resistant to treatment or removal; potentially responsible parties unwilling to voluntarily conduct cleanups because of the enormous cost involved; difficulty in conclusively proving imminent environmental or health dangers due to a number of factors including causation, latency period of the harmful effects of the chemical, and synergistic effects of other chemicals; years of litigation; and little actual cleanup ultimately accomplished.261

1. Background Facts of the OMC Case

OMC owns a major industrial complex on property near Waukegan Harbor on Lake Michigan in Illinois. OMC's corporate headquarters is located at the site, where the company manufactures outboard motors, lawn mowers, and industrial turf care machinery.262 EPA charged that, over a span of twenty years, OMC's unauthorized discharges of polychlorinated biphenyls (PCBs) from its facility had resulted in the contamination of a drainage ditch that is a tributary to Waukegan Harbor and Lake Michigan.263 The PCB contamination is located both on property owned by OMC (the drainage ditch and a parking lot) and property not owned by OMC (Upper Waukegan Harbor, Slip No. 3 of Waukegan Harbor, and Lake Michigan).264

Waukegan Harbor, a navigable body of water, is used by several industries and recreational facilities for docking. EPA estimates that approximately 1.1 million pounds of PCBs are contained in the site, which ranked 82nd of the initial 541 sites on the National Priority List (NPL) of hazardous waste sites in need of cleanup action.265 Waukegan Harbor was the number one priority CERCLA site in the State of Illinois.266

EPA spent seven years of protracted discovery and litigation in an effort to force OMC to clean up the PCB contamination. In 1984, EPA sought to voluntarily dismiss its suit against OMC and, pursuant to section 104 of CERCLA, conduct its own remedial action,

261 Id.
262 Outboard Marine, 773 F.2d at 885.
263 Outboard Marine, 610 F. Supp. at 1236.
264 Id.
266 Outboard Marine, 773 F.2d at 884–85.
with a view to later suing the responsible parties for the government’s costs of cleanup pursuant to section 107 of the Act.\textsuperscript{267}

Naturally, the first step in EPA’s remedial process was to gain access to OMC’s property in order to conduct field investigations necessary to design a remedy. The Agency sought permission from OMC to conduct a “walk-through” of the OMC property, survey the site, set markers, and collect up to twenty-three soil borings to determine the ground’s weight-bearing capacity.\textsuperscript{268} EPA labelled these preliminary response activities Phase 1.\textsuperscript{269} Sixteen EPA officials, using seven automobiles, were to conduct the initial inspection. The surveying would require three people and a van; the soil borings about seventeen officials and sixteen vehicles.\textsuperscript{270} Approximately 1,000 square feet of parking area would be needed for the equipment. EPA estimated that the task would take a maximum of seventy days.\textsuperscript{271}

Phase 2 of EPA proposed response action constituted the implementation and construction portion of EPA’s remedial plan, requiring the dredging or excavation of thousands of cubic yards of PCB sediments from the harbor, north ditch, and OMC parking lot, and transporting the material to OMC’s harbor-front property for years of treatment in lagoons and other facilities constructed by EPA.\textsuperscript{272} The residue from the treatment process would be permanently housed in a “containment cell” to be built on OMC property. EPA estimated that construction would take three and one-half years, and the facilities would occupy six acres of OMC’s parking lot.\textsuperscript{273}

When permission was refused to conduct the Phase 1 operation, EPA obtained an ex parte warrant from a federal magistrate.\textsuperscript{274} OMC sought to quash the warrant on several grounds, and to enjoin EPA from proceeding with Phase 1 activities.\textsuperscript{275}

2. Issues Raised by OMC

OMC based its judicial challenge to EPA access on two constitutional arguments: (1) that Phase 1 and Phase 2 activities on its

\textsuperscript{267} See id. at 885 (citing 42 U.S.C. §§ 9604, 9607 (1982)).
\textsuperscript{268} Id.
\textsuperscript{269} Id.
\textsuperscript{270} Id.
\textsuperscript{271} Id.
\textsuperscript{272} Id. at 885–86.
\textsuperscript{273} Id.
\textsuperscript{274} Id. at 886–87.
\textsuperscript{275} See id.
property were an uncompensated taking of its property and a deprivation of property without due process of law, both in contravention of the fifth amendment to the United States Constitution; and (2) that the ex parte issuance of the warrant violated the fourth amendment, because it allegedly was issued without probable cause.276

Underlying these claims were several fundamental unresolved issues concerning EPA's access authority under CERCLA. The primary question was whether or not the Act, prior to the amendments of 1986, authorized access to facilitate response actions contemplated by the government.277 Secondarily, OMC charged that even if EPA did have access authority, the Agency was unauthorized to undertake the remedy, because EPA had not been expressly empowered to condemn property to effectuate a cleanup.278 Finally, OMC asserted that since EPA's "taking" was unauthorized, OMC could not resort to the Tucker Act to obtain the compensation required under the fifth amendment.279

The district court denied OMC's request for a preliminary injunction quashing the warrant based on the fifth amendment, holding that, if EPA's actions were adjudicated to be a taking, the corporation could subsequently resort to the Tucker Act for compensation.280 The court also found that EPA's ex parte warrant was supported by probable cause and was otherwise consistent with the fourth amendment.281 Finally, the court found that OMC was not entitled to an injunction because it had not shown a substantial likelihood of succeeding on the merits of its fifth amendment due process claim.282

The Seventh Circuit reversed the district court decision based upon what the court of appeals perceived as a lack of any provision in CERCLA authorizing access.283 As has been illustrated in other contexts,284 if a court finds a search statutorily unauthorized, it necessarily also finds a fourth amendment violation, assuming the

276 *Outboard Marine*, 610 F. Supp. at 1238; U.S. Const. amends. IV, V.
277 See *Outboard Marine*, 773 F.2d at 886.
278 See *Outboard Marine*, 610 F. Supp. at 1238.
279 See id. at 1239. The relevant Tucker Act provisions are found at 28 U.S.C. §§ 1346, 1491 (1982).
280 See *Outboard Marine*, 610 F. Supp. at 1244.
281 See id.
282 Id. at 1245.
283 *Outboard Marine*, 773 F.2d at 890–91.
284 The Seventh Circuit did not address the validity of the Phase I activities since a search conducted in the absence of statutory authorization is presumptively unreasonable.
court in fact reaches the issue at all. Thus, the reach of EPA’s access authority under CERCLA is the key inquiry to both OMC decisions.

3. CERCLA’s Entry and Access Provisions

EPA based its application for a warrant upon sections 104(a), 104(b), and 104(c) as they appeared in the original Superfund law. Section 104(b) was the provision most closely associated with the type of response action anticipated by Phase 1 of the OMC plan:

(b) Whenever the President is authorized to act pursuant to subsection (a) of this section, or whenever the President has reason to believe that a release has occurred or is about to occur, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring, he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

The highlighted portions of this section clearly authorize the Agency, acting on behalf of the President, to conduct the surveying, soil testing, and other design work in preparation for actual construction in Phase 2. The Seventh Circuit found the failure of the provision to explicitly grant entry and access to be fatal to EPA’s ex parte warrant.

Far more persuasive than the circuit court’s analysis is the district court’s finding that a right of entry is implicit in section 104(b). Congress, intending the government to undertake “planning . . . engineering, architectural, and other studies or investigations as . . . necessary . . . to direct response actions,” certainly also intended that the Agency have access to the property where such engineering and investigation takes place. The courts will go to some lengths

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286 Id. § 9604(b) (emphasis added).
287 Outboard Marine, 773 F.2d at 890.
to avoid the absurd result rendered if EPA has the right to construct containment cells and other pollution abatement structures, but no right to enter the property upon which the structure is to be constructed. It is a basic principle of statutory construction that an agency’s grant of power carries with it the right to use all means and instrumentalities necessary to the beneficial exercise of the agency’s expressly conferred powers. The courts have generally held that administrative agencies have implied power to take actions that enable them to fulfill the tasks entrusted to the government by statute.291

This interpretation is consonant with both the legislative history of CERCLA and the Agency’s own interpretation of its authorizing statute, which should be accorded great deference by the courts. Moreover, the district court’s opinion in OMC is consistent with recent environmental decisions by the Supreme Court, most notably the Dow overflight case, analyzed previously, in which the Court inferred specific inspection capabilities from the broad access and inspection authority given to EPA under the Clean Air Act. Support for the district court’s decision is also provided by section 104(a)(1), which authorizes the government to respond to releases of hazardous wastes, arrange for the removal of the waste, and take other remedial action. This authorization undeniably grants to the

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290 See Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 631 (1973) (laws must be construed as a whole; courts must give provisions of a statute the “most harmonious comprehensive meaning possible”).

291 See, e.g., Blackie’s House of Beef, Inc. v. Castillo, 659 F.2d 1211, 1222 (D.C. Cir. 1981) (INS right to enter commercial premises with warrant to investigate potential violations of immigration laws derived from general statutory power to locate illegal aliens), cert. denied, 455 U.S. 940 (1982); United States v. Euge, 444 U.S. 707, 711 (1980) (even though tax code did not explicitly authorize IRS to summon an individual to produce certain kinds of evidence, such authority “is necessary for the effective exercise of Service’s enforcement responsibilities”); Lovgren v. Byrne, 787 F.2d 857, 866 (3d Cir. 1986) (authority to inspect vessels without warrant implicitly authorizes warrantless dock inspections).

292 Congress intended a mechanism to “get on immediately with the business of cleaning up the thousands of hazardous waste sites which dot this country.” 126 Cong. Rec. H 31964 (daily ed. Dec. 3, 1980) (statement of Rep. Florio) (emphasis added). It was further intended that cleanup actions be initiated immediately without the need to await administrative and judicial determinations of liability. See S. REP. No. 848, 96th Cong., 2d Sess. 11-12, 22, 56, 62 (1980).


294 See supra notes 83–89 and accompanying text.


Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an
Agency broad power to take action to decontaminate sites. Gaining access to commercial property could either be interpreted as a "response measure" in itself, or implicit in the response actions that are specified elsewhere in the statute, and which are meaningless without the power of entry and access. Thus, Congress intended that EPA promptly and flexibly respond to environmental hazards, without the delays inherent in litigating the reasonableness of EPA’s determinations.296

Ironically, section 104(e), which specifically grants access in certain circumstances, originally did not explicitly grant access for the purpose of conducting response actions:

(e)(1) For purposes of assisting in determining the need for response to a release under this subchapter or enforcing the provisions of this subchapter, any person who stores, treats or disposes of, or where necessary to ascertain facts not available at the facility where such hazardous substances are located, who generates, transports, or otherwise handles or has handled, hazardous substances shall, upon request of any officer, employee, or representative of the President, duly designated by the Pres-

imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment, unless the President determines that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party.

Id. 296 In discussing section 104 of CERCLA, the Senate Committee on Environmental and Public Works stated that:

[t]he paramount purpose of this section is the protection of the public health, welfare and the environment. It is recognized that government response will often be necessary prior to receipt of evidence which conclusively establishes the substances or materials released or the origin of their release, discharge or disposal. Because delay will often exacerbate an already serious situation, the bill authorizes the President to respond when a substantial threat of release may exist. This standard is intended to be a flexible one and holds that it is preferable to err on the side of protecting public health, welfare and the environment in administering the response authority of the Fund.


The courts have also emphasized the congressional intent that the federal government be given the ability to effectuate a “prompt and effective response to problems of national magnitude resulting from hazardous waste disposal [and therefore, CERCLA is not to be narrowly interpreted so as to] frustrate the government’s ability to respond promptly and effectively. United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).
ident, or upon request of any duly designated officer, employee, or representative of a State, where appropriate, furnish information relating to such substances and permit such person at all reasonable times to have access to, and to copy all records relating to such substances. For the purposes specified in the preceding sentence, such officers, employees, or representatives are authorized —

(A) to enter at reasonable times any establishment or other place where such hazardous substances are or have been generated, stored, treated, or disposed of, or transported from;

(B) to inspect and obtain samples from any person of any such substances and samples of any containers or labeling for such substances. Each such inspection shall be commenced and completed with reasonable promptness. If the officer, employee, or representative obtains any samples, prior to leaving the premises, he shall give to the owner, operator, or person in charge a receipt describing the sample obtained. 297

This confusing section is at once expansive and narrow. The powers contained in subsections (A) and (B) to enter and to inspect and obtain samples are ostensibly for the purpose of enforcing CERCLA. However, qualifying language in subsections (A) and (B) makes such an interpretation impossible. Most importantly, subsection (B) authorizes inspections and sampling “of any such substance and samples of any containers or labeling,” referring only to hazardous substances on the site. Furthermore, the body of the provisions clearly is directed at obtaining information from records or documents at hazardous waste sites. Therefore, neither the district court nor the appeals court was willing to give section 104(e) the broad interpretation, allowing Phase 1 preliminary construction activities, that EPA advocated. 298

Many attribute Congress’s initial failure to include a more explicit provision authorizing access to conduct response activities to the haste with which Congress forged a compromise CERCLA bill at the end of the 1980 legislative term. 299 Perhaps Congress felt that

298 Outboard Marine Corp. v. Thomas, 773 F.2d 883, 889 (7th Cir. 1985); Outboard Marine Corp. v. Thomas, 610 F. Supp. 1234, 1242 (N.D. Ill. 1985).
299 The usual procedure would have called for a conference committee to work out a bill acceptable to both houses. Instead, the House agreed to adopt the amended Senate bill in its entirety. As a result, there is no conference report and little legislative history on the Act, other than the floor debates preceding the adoption of the final bill by the Senate on November 28, 1980, and by the House on December 2, 1980, and the legislative histories of the original House and Senate bills (H.R. 7020 and S. 1486, respectively). Because Representative Florio was a sponsor of CERCLA, his remarks during the floor debate are given particular weight.
the expansive response authority given to the Agency made a separate access provision unnecessary, since the ability to gain access is implied in those provisions.\(^\text{300}\)

In light of its decision in *Dow*, the Supreme Court almost certainly would have overturned the appellate court’s decision had the *OMC* case been heard.\(^\text{301}\) However, because ambiguities and problems in the statutory access provisions were exposed by the *OMC* case and other actions, Congress shored up CERCLA’s inspection and access provisions. This congressional action mooted the access issues raised in *OMC* for future cleanup efforts.\(^\text{302}\) The Superfund Amendments and Reauthorization Act of 1986 (SARA) explicitly grants EPA authority to enter private property for a broad range of purposes including “where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this subchapter.”\(^\text{303}\) The term “response action” was also broadened to include enforcement measures.\(^\text{304}\)

Attempting to close other loopholes regarding CERCLA’s access and response provisions exposed by the *OMC* litigation, Congress

\(^{300}\) See United States v. Chem-Dyne, 572 F. Supp. 802, 807 (S.D. Ohio 1983) (“[S]tatements of the legislation’s sponsor are properly accorded substantial weight in interpreting the statute.”). For a legislative history of the gradual evolution of the access provision now contained in the SARA Amendments, see S. REP. No. 11, Senate Comm. on Environment and Public Works, (March 8, 1985), and two bills that did not become law, the proposed Superfund Amendments of 1985, § 104(e)(1)–(2) (December 10, 1985), and the proposed Superfund Improvement Act, § 120(1)(B) (Sept. 25, 1985).

\(^{301}\) See supra notes 285–96 and accompanying text.

\(^{302}\) See supra notes 83–89 and accompanying text.

\(^{303}\) See Outboard Marine Corp. v. Thomas, 479 U.S. 1002 (1986), vacating judgment and remanding 773 F.2d 883 (7th Cir. 1985) (case remanded for reconsideration in light of SARA).


\(^{305}\) Id. § 9601(25). The expanded authority to enter commercial and other property states, in full, that:

Any officer, employee, or representative described in paragraph (1) is authorized to enter at reasonable times any of the following:

(A) Any vessel, facility, establishment, or other place or property where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from.

(B) Any vessel, facility, establishment, or other place or property from which or to which a hazardous substance or pollutant or contaminant has been or may have been released.

(C) Any vessel, facility, establishment, or other place or property where such release is or may be threatened.

(D) Any vessel, facility, establishment, or other place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this subchapter.

also expanded EPA's authority to inspect, take samples, and obtain documentary information.\textsuperscript{305} Thus, SARA, in one bold stroke, eliminated much of the ambiguity and many of the problems inherent in the CERCLA access provisions.

SARA clarified EPA's statutory authority to gain access to commercial property and to conduct response actions under CERCLA. While Congress again failed to include express authority for EPA to proceed without a warrant, EPA could assert that the SARA language anticipates both warrantless entry and entry pursuant to warrant.\textsuperscript{306} For policy reasons discussed previously,\textsuperscript{307} EPA ordinarily wants to obtain a warrant or institute alternative procedures, such as a plenary suit for access, prior to entry in situations in which access will be for an extended period of time.

4. Alternate Means of Gaining Access for Superfund Responses

a. \textit{Unilateral Agency Orders as Substitute for Warrant}

In SARA, Congress went further than simply giving EPA clear authority to enter commercial or other property to conduct the full range of CERCLA response and enforcement activities. The Act also established an \textit{in personam}, non-adjudicative, order mechanism that ostensibly allows the President, working through EPA officials, to issue compliance orders when access is refused.\textsuperscript{308} Congress intended such orders to be enforceable in court, and sought to punish noncompliance with reasonable orders by fines of up to $25,000 for each day of noncompliance.\textsuperscript{309}

Entry pursuant to a unilateral EPA order is not the legal equivalent of entry pursuant to an administrative warrant issued by a neutral and independent judicial officer. If the owner, operator, or possessor of commercial property is entitled under the fourth amendment to insist upon the presentation of a judicially issued warrant before entry is effectuated, that person may not be penalized for "disobeying" or refusing to honor a unilateral administrative order.

\textsuperscript{305} 42 U.S.C.A. § 9604(e)(2)-(4) (West Supp. 1988).
\textsuperscript{306} See supra notes 99–177 and accompanying text.
\textsuperscript{307} See supra notes 152–53 and accompanying text.
\textsuperscript{308} 42 U.S.C. § 9604(e)(5) (Supp. IV 1986).
\textsuperscript{309} Id. § 9604(e)(5)(B).
allowing entry. Moreover, if an owner or possessor acquiesces in EPA’s compliance order and allows EPA to enter, that person could later allege that consent to entry was coerced by EPA’s show of force, was involuntary, or was legally ineffective. Therefore, the EPA order provision in SARA is of dubious constitutional validity, unless warrantless searches are authorized by SARA, or one of the judicially developed exceptions to the warrant requirement is present.

b. Renewable Warrants and Plenary Judicial Action Before Access or Response

Unless EPA wants to test its authority to proceed without a warrant, the Agency should ordinarily obtain an administrative warrant, rather than rely on its SARA order authority, before proceeding with costly and time-consuming response actions under CERCLA and SARA. In fact, in light of the extraordinary nature of Superfund response actions, the Agency should probably consider alternatives to a warrant when it initiates response actions that will require lengthy stays on commercial property and are likely to raise complex legal issues.

Unlike most criminal warrants, an administrative warrant need not be limited in duration. A neutral judicial officer, however, is unlikely to issue a warrant, even under Superfund, for an unlimited period of time. Typically, a magistrate imposes time limits sufficient to allow concrete actions to be completed. This causes problems in Superfund cases because the scope of EPA’s response actions may not be known or knowable from the outset. In such cases the warrant may be issued incrementally or renewed periodically according to timetables established by the magistrate. Renewed warrants or in-

310 Supreme Court doctrine prohibits the government from forcing individuals to choose between exercising a constitutional right and then suffering penalty as a result, or not exercising that right. See, e.g., Zobel v. Williams, 457 U.S. 55, 78–81 (1982).

311 See supra note 146.

312 If the government is authorized to proceed without a warrant, the owner or possessor of the property has no fourth amendment right to insist upon one. Therefore, the order and subsequent penalty would not penalize the exercise of a constitutional right in those cases.

313 See supra notes 99–153 and accompanying text.

314 See infra notes 315–21 and accompanying text.

315 See FED. R. CRIM. P. 41.

316 Most judges would view such action as an abuse of judicial discretion and potentially violative of the fourth amendment requirements, including the “reasonable search” constraints on scope and duration.
crementally issued warrants seem to be the best balance between the desire for streamlined procedures and the need for periodic judicial review of the circumstances as a means of protecting the rights of commercial property owners or those in possession.

EPA also has the option of seeking declaratory judgment on access, constitutional taking, or other issues instead of, or in addition to, obtaining a warrant. \(^{317}\) Proceeding under the All Writs Act is yet another option. \(^{318}\) Some form of plenary court action designed to clarify EPA's authority prior to EPA's obtaining access may be preferable in extreme cases where governmental presence on the property will be long-standing or permanent. \(^{319}\)

SARA explicitly preserved all of the various EPA access options—with or without a warrant, pursuant to SARA's statutory access or order provisions, or via plenary judicial action—by including a "disclaimer of exclusivity" provision in the amendment:

OTHER AUTHORITY. Nothing in this subsection shall preclude the President from securing access or obtaining information in any other lawful manner. \(^{320}\)

This provision precludes the legal argument, used successfully in other contexts, that Congress, by stating some access options explicitly in SARA, meant to exclude other legal means of accomplishing the same entry and access. \(^{321}\)

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\(^{318}\) 28 U.S.C. § 1651 (1982). A judge may also issue an All Writs order to aid in the execution of a prior warrant. See United States v. New York Tel. Co., 434 U.S. 159, 175 n.23 (1977); but see Plum Creek Lumber Co. v. Hutton, 608 F.2d 1283, 1289-90 (9th Cir. 1979).

\(^{319}\) See infra notes 348-61 and accompanying text.


\(^{321}\) See, e.g., *In re Kulp Foundry, Inc.*, 691 F.2d 1125, 1131-32 (3d Cir. 1982); Interstate Commerce Comm'n v. Peninsula Shippers Ass'n, 789 F.2d 1401, 1403 (9th Cir. 1986). The better rule allows a judge to issue an administrative warrant if the statute in question confers a substantive entry right without restricting the methods an agency may use to obtain access. See, e.g., Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211, 1219 (D.C. Cir. 1981); Bunker Hill Co. Lead and Zinc Smelter v. EPA, 658 F.2d 1286, 1285 (9th Cir. 1981); Midwest Growers Coop. v. Kirkemo, 533 F.2d 455, 462 (9th Cir. 1976). The nonexclusivity provision also strengthens EPA's position that it can proceed without a warrant. At least one unsuccessful attempt has already been made to restrict EPA access options under SARA. See United States v. Charles George Trucking Co., 682 F. Supp. 1260 (D. Mass. 1988) (court upheld EPA access options under SARA).
C. Fourth and Fifth Amendment Restraints on EPA Response Actions

1. Revisiting Fourth Amendment Implications for Response Action, Post-SARA

The OMC litigation is as significant for the issues that it failed to resolve as it is for the issues directly addressed. The district court briefly analyzed the emerging constitutional issues. However, because of the procedural context of the case in the lower court, the trial court’s analysis was not dispositive. Because the Seventh Circuit Court of Appeals found CERCLA’s response provisions devoid of authorization for entry or access, the court never reached the difficult constitutional issues. Nevertheless, fourth and fifth amendment issues are lurking, ready to be raised whenever EPA attempts response action at a hazardous waste site.

Whatever formulation of the fourth amendment test is utilized, it is clear that the commercial privacy interests it is designed to protect fall on a continuum. As analyzed previously, governmental actions that do not require EPA officials to be physically present on commercial property may not even trigger fourth amendment concerns. On-site inspections, information gathering, and sampling programs authorized by statute are significant enough intrusions ordinarily to require a warrant. If not required, EPA may find it advisable to seek a warrant anyway for practical or policy reasons.

Governmental presences of longer duration—for example, to execute the Phase 1 EPA response at the OMC site—clearly require that government pay close attention to the valid privacy interests

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322 OMC’s complaint sought a preliminary injunction. Because no fact-finding hearing had been convened, the court was required to assume that all well-pleaded allegations in the complaint were true. Therefore, for the purposes of ruling on OMC’s motion, the court assumed that the Phase 1 activities were a “taking” requiring “just compensation” and that EPA’s activities entailed a deprivation of property sufficient to trigger the due process clause of the fifth amendment. Outboard Marine Corp. v. Thomas, 610 F. Supp. 1234, 1236, 1239-40, 1244-45 (N.D. Ill.), rev’d, 773 F.2d 883 (7th Cir. 1985), vacated and remanded, 479 U.S. 1002 (1986).
323 See Outboard Marine Corp. v. Thomas, 773 F.2d 883, 888-91 (7th Cir. 1985).
324 See supra notes 67-76 and accompanying text.
325 The more disruptive an agency action and the longer its duration, the greater the degree of fourth amendment scrutiny triggered. In addition, at a critical point, fifth amendment concerns are implicated. See supra notes 15-17 and accompanying text.
326 See supra notes 15-28 and accompanying text.
327 See supra notes 71-104 and accompanying text.
328 See supra notes 145-53 and accompanying text.
of the commercial property owner. With the recent strengthening of the CERCLA access provisions by SARA, it is unlikely that a court would find response activities constitutionally unreasonable under the fourth amendment. The courts might, however, hold that a Barlow's warrant is required. Ex parte warrant procedures, or other plenary judicial actions, should be invoked in most instances. Moreover, as administrative activity on private property increases in intensity and duration, fourth amendment and policy analysis begins to bleed into other constitutional arteries, notably fifth amendment concerns for uncompensated takings and deprivations of due process. Finally, EPA responses requiring permanent construction on private property raise all of the above-stated issues, as well as the question of adequate compensation.

2. Response Actions Analyzed Under the Takings Clause

At some level of governmental interference with the exercise of private property rights, the fifth amendment's prohibition against the taking of property without just compensation is implicated. That prohibition prevents the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The taking clause originally was intended to prevent the government from confiscating property from one private individual and giving it to another. If no valid state or federal purpose could be shown for the governmental action in question, a prohibited taking had occurred. Thus, the Supreme Court has uniformly required the government to pass the threshold test of showing a legitimate

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329 U.S. CONST. amend. V. See supra notes 15–17 and accompanying text.
332 See generally TRIBE, supra note 330, at 588–89.
333 Id. at 589.
public purpose in the activity being challenged as a taking. Over the last century, however, the Court has eroded the public purpose test, reflecting an ever-widening view of legitimate governmental interests in regulating private property. Without question, the federal government's activities in conservation, environmental protection, and public health and safety, as codified in the nation's environmental laws, are directed at valid public purposes.

Permissible governmental action, admittedly designed to promote valid public environmental and health interests, may still be deemed a taking requiring just compensation. For example, if the government takes title from a private owner of land to expand the offices of the Environmental Protection Agency, the taking clause would require that the owner be compensated, because such a physical takeover would totally destroy the private owner's enjoyment of and right to use the land. A taking also occurs if the government so tightly or completely controls a person's use of property that its value is virtually destroyed.

Less clear, however, is how far the government can "regulate" or interfere with the private use of land for valid public purpose without effecting a taking that requires compensating the owner. Nearly every governmental action has an impact on the private use and enjoyment of property. As Justice Holmes stated in 1922, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Determining how far is "too far" has plagued the Court ever since, and few general principles have emerged beyond the public purpose test. For over a century the Court has engaged in a case-by-case

334 Id. at 588–613.
335 See id. at 589–91.
337 See Tribe, supra note 330, § 9-3, at 593.
338 See id. at 592–93.
339 See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-14 (1922); Tribe, supra note 330, at 593.
341 See generally Tribe, supra note 330, § 9-2, at 591.
342 Pennsylvania Coal, 260 U.S. at 415.
factual analysis, leaving in its wake some inexplicable decisions and many confused lawyers.\textsuperscript{343} In the 1978 case of \textit{Penn Central Transportation Co. v. New York City},\textsuperscript{344} the Supreme Court reaffirmed its commitment to "essentially ad hoc, factual inquiries" in "regulatory" taking cases, and to a case-by-case balancing of public and private interests.\textsuperscript{345} The Court did little to alter this approach in three 1987 cases.\textsuperscript{346} Such balancing requires consideration of the character of the governmental action, its economic impact, and its interference with investment-backed expectations.\textsuperscript{347} According to Professor Tribe, the upshot of recent Supreme Court doctrine is that the Court is unlikely to find that a governmental regulatory action constitutes a taking if

\begin{enumerate}
\item[(1)] it advances some public interest, but also
\item[(2)] falls short of destroying any classically recognized element of the bundle of property rights, 
\item[(3)] leaves much of the commercial value of the property untouched, and
\item[(4)] includes at least some reciprocity of benefit . . . .\textsuperscript{348}
\end{enumerate}

A general guide for takings analysis for CERCLA response actions emerges from an application of these factors to the proposed \textit{OMC} Phase 1 and 2 activities.

Even substantial intrusions on private property for the purpose of \textit{inspecting, sampling, and designing} an Agency-engineered

\textsuperscript{343} See Tribe, supra note 330, at 595–96.
\textsuperscript{344} 438 U.S. 104 (1978).
\textsuperscript{345} Id. at 124.
\textsuperscript{346} Three important decisions in 1987 indicate that the Supreme Court is still wedded to an ad hoc, case-by-case assessment of the facts in taking cases. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 (1987) (Coastal Commission decision conditioning approval of rebuilding permit on beach property owner's granting an easement for \textit{lateral} access across private property to public beaches held a taking because condition did not rationally relate to valid public purpose); First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 321 (1987) ("temporary" regulatory takings are compensable); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (mere enactment of statute that requires 50 percent of the coal beneath certain structures be kept in place to provide surface support held not a taking). For a preliminary analysis of these cases, see Tribe, supra note 330, § 9-4, at 595–99 & nn.2, 13.
\textsuperscript{347} Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); see also YMCA v. United States, 395 U.S. 85, 93 (1969) (occupation of and damage to building by soldiers attempting to quell riot held not a taking).
cleanup are not compensible takings. CERCLA actions are by their nature regulatory, and designed to protect the public health. Unlike construction, such intrusions are transitory. While the Phase 1 operation in OMC could last several months, and cause inconvenience to OMC and its employees, the nature of the Agency’s anticipated activities on the site indicates that they would have had minor economic impact on the company.

Regulatory actions that reduce the economic value of certain private property, even to zero, have been upheld, as long as the actions taken protect the public from some public nuisance or harm generated by the property owner. In *Miller v. Schoene*, the Supreme Court unanimously upheld a state statute that gave officials the authority to order landowners, and, in the absence of compliance, to undertake action themselves, to destroy healthy cedar trees to avoid the possibility of transmitting a disease to adjoining apple orchards. The federal courts reached similar results in a long line of cases in which governmental actions abating “noxious” uses of private land have not been deemed takings. CERCLA response actions might well be considered responses to nuisances or other potentially harmful situations either created or tolerated by the landowner. To the extent this line of cases controls, no taking, triggering compensation, will be found.

CERCLA prohibits off-site transport of hazardous substances unless EPA determines that off-site storage and treatment are more cost effective than on-site remedies. For this reason, on-site construction such as that contemplated in Phase 2 of the OMC response action is not exceptional. Most EPA on-site responses to releases of hazardous wastes will result in economic benefit to the property owners and to the public at large. Once the hazardous waste is under control, or the land decontaminated, the property’s title is cleared.

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353 See supra notes 272–73 and accompanying text.
and market value increased. As stated by the Supreme Court, "if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured on the whole, to compensate the landowner . . . would be to grant him a special bounty."354

Phase 1 planning and design activities conducted on uncontaminated property owned by "innocent" third parties perhaps do not fall as clearly within this benefit doctrine as does the OMC case. Nevertheless, the transitory nature of the intrusion, coupled with the health and safety purposes underlying those activities should shield Agency actions from a taking determination. For example, the government may have to declare an easement to pass through an innocent party's property to gain access to the hazardous waste sites. Finally, there seems to be no doctrinal barrier to planning and conducting cleanups on abandoned waste sites, primary targets of CERCLA's response provisions, because in such instances there are no private ownership interests to protect.355

The analysis is more problematic for governmental "physical invasions" that are permanent in nature. Thus, construction and other permanent response activities may be on different constitutional footing from less onerous governmental responses. Recently, the Supreme Court has developed a per se taking rule for extreme forms of governmental action. In Loretto v. Manhattan Teleprompter,356 the Court held that "a permanent physical occupation authorized by the government is a taking without regard to the public interests that it may serve."357 Most of the Agency's CERCLA response actions escape the sweeping net cast by this test. Whether or not EPA construction of a "permanent" structure on private property is per se a taking under Loretto is problematic.

EPA's activities under Phase 2 of the OMC plan are perhaps the outer reach of Agency response activities. During Phase 2 the Agency intended to dredge PCB sediment from the harbor, north ditch, and OMC parking lot, and then transport the materials to the OMC harbor front property for years of treatment in lagoons and

357 Id. at 426. This case has been severely criticized. See Tribe, supra note 330, § 9-5, at 602–04 & n.32. Professor Tribe notes, however, that the per se Loretto rule may be narrowed by FCC v. Florida Power Corp., 480 U.S. 245 (1987). See Tribe, supra note 330, § 9-5, at 604 & n.32.
other facilities to be constructed by EPA. The residue after treat­
ment was to be permanently housed in a fifteen-foot-high “contain­
ment cell” to be built on six acres of OMC property not contaminated
by PCBs.358

Several factors indicate that these responses are unlikely to be
considered “permanent occupations” within the reach of the Loretto
doctrine. First and most importantly, if EPA did not become the
titleholder of the land or the containment cells in question, the
Loretto doctrine might not be invoked. Secondly, the Supreme Court
has had a tendency in recent years to distinguish between govern­
mental regulatory action taken to protect health and welfare and
governmental acquisition of property for proprietary reasons.359
Thus, the Court views construction of a governmental office very
differently from building a hazardous waste containment cell on
private property.

However, the fact that the permanent containment cell is to be
located on OMC’s uncontaminated parking lot foreshadows even
more perplexing constitutional dilemmas. For example, what if EPA
chose uncontaminated private property owned by an “innocent”
third party for the location of the permanent structure, rather than
an entity potentially responsible for the health hazard? Objections
by such parties to bearing an inordinate portion of society’s costs for
the cleanup would probably persuade the court that a taking had
occurred, and that compensation was in order.360

Prior to the recent amendments to CERCLA, a third party prop­
erty owner might have successfully maintained that EPA had no
condemnation authority under Superfund. SARA, however, resolved
this collateral issue. If the Agency finds it necessary to condemn
property in order to effectuate a cleanup, it now has explicit statu­
mary authority to do so.361

358 Outboard Marine Corp. v. Thomas, 773 F.2d 883, 885 (7th Cir. 1985), cert. granted, 479

for uniquely public functions often held takings) with YMCA v. United States, 395 U.S. 85,
93 (1969) (regulatory actions taken to protect public health and safety are uncompensable).
For a general discussion of takings and the police power, see Sax, Takings, Private Property
and Public Rights, 81 YALE L.J. 149 (1971); Sax, Takings and the Police Power, 74 YALE

360 Such “why me” questions are at the very heart of the taking question. Comment, The
Hazardous Waste Abatement Liability of Innocent Landowners: A Constitutional Analysis,

361 42 U.S.C.A. § 9604(j) (West Supp. 1989). The executive branch, however, may be
reluctant to use this authority. See infra note 370.
3. Analysis Under the Due Process Clause

The fifth amendment prohibits the federal government from de­priving a person of life, liberty, or property without due process of law.362 Due process analysis typically proceeds in two phases: deter­mining whether a governmental action materially affects life, liberty, or property; and, if it does, determining what form of procedural safeguards are reasonable and appropriate.

Of the three constitutional interests protected under the due pro­cess clause, the courts generally afford property rights the least amount of protection. Due process therefore ordinarily does not require a judicial hearing before seizure of property.363 The Supreme Court has held that “[i]t is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.”364 Accordingly, EPA response actions, short of permanent construction on private property, raise few due process concerns. Any process due a potentially responsible party is ordinarily provided after the cleanup is complete and the government initiates a cost recovery action in federal court.365 Re­sponse actions that are in essence investigations or inspections pur­suant to warrants are not subject to challenge because the procedure for obtaining the warrant constitutes all the process due the affected landowner.366

In those circumstances in which the Agency constructs permanent on-site treatment or containment facilities on private property, the due process clause is satisfied through the landowner’s ability to assert that a taking has occurred in a Court of Claims action for compensation under the Tucker Act.367 These claims should not be permitted to delay EPA’s response action at the site:

Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign

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362 U.S. CONST. amend. V.
367 28 U.S.C. §§ 1346(a), 1491 (1982). The Tucker Act procedure is clearly available under CERCLA contrary to OMC’s assertions. A party is presumed to have a possible Tucker Act remedy, unless Congress has manifested an unambiguous intention to withdraw that remedy.
subsequent to the taking . . . . The Fifth Amendment does not
require that compensation precede the taking. 368

Finally, EPA generally may initiate a declaratory judgment action,
or similar proceeding in federal court, if a response is remedial in
nature, and requires an extended presence or the construction of
permanent structures. 369 These actions afford private landowners an
additional measure of due process.

From the foregoing discussion, it is easy to discern that the pri-
mary burdens posed by commercial assertions of fifth amendment
claims are not ones of substance, but rather of procedure and timing.
Ascertaining which types of response actions require compensation
or due process procedures will take years. 370 Preliminary decisions
under SARA have already sustained EPA's access and response
authority against takings challenges. 371 Efforts to clean up hazardous
waste sites cannot await definitive judicial resolution of these issues.
Therefore, the Agency should adopt the policy that no response
action on a potentially responsible party's property constitutes a
taking or violates due process. EPA should further insist that takings
and due process questions be addressed in Tucker Act proceedings
which do not delay cleanup activities.

V. CONCLUSION

Some of EPA's past access policies and practices under traditional
environmental statutes are ill-suited for the modern demands of
hazardous waste management. While consensual searches, and other
warrantless procedures, may have worked well for certain inspec-
tions, they are ineffective or impractical for long-term remedial ac-
tions on commercial property.

369 See supra notes 317–21 and accompanying text. To facilitate access, the Agency may also
rely on a writ of assistance under the All Writs Act, 28 U.S.C. § 1651 (1982).
370 On March 16, 1988, President Reagan issued an executive order that established numer-
ous procedural barriers to executive branch actions that might constitute takings. Exec. Order
No. 12,630, 3 C.F.R. 554 (1988). This order could further slow national progress in decontam-
inating hazardous waste sites. The lack of cases brought, or defended, by the Department of
Justice concerning condemnation and taking issues evidences the Reagan Administration's
unfortunate reluctance to use the full authority provided by SARA, as advocated herein.
371 United States v. Fisher, 864 F.2d 434 (7th Cir. 1988) (no taking found); United States v.
hazardous waste site and adjacent land held not to be a taking); Hendler v. United States, 11
Cl. Ct. 91 (1986) (property owner's motion for summary judgment denied and government's
motion for summary judgment granted in part and denied in part).
When the government enters private property for the purpose of technologically abating threats from pollution, its intrusion is more substantial, and of a longer duration, than typical inspection visits. Technology is the driving force behind the development of a policy that relies on ex parte warrants or other court proceedings for obtaining access. The need to design and implement technology-based controls is also driving the Agency toward confrontations with commercial interests, drawn along fourth and fifth amendment lines.

A new era of Agency access policy is predicated upon the resolution of these issues. Congress, by enacting SARA, and the Supreme Court, in handing down the Dow decision, have strengthened EPA authority to enter commercial property, conduct inspections, and perform remedial actions. In doing so, they have also fortified EPA's assertions that such activities are constitutionally reasonable, at least when proceeding with an ex parte warrant. The courts have already partially resolved the question of whether extended EPA visits to commercial property for remedial purposes are constitutionally reasonable in favor of EPA, and have also turned aside the first judicial challenges to EPA response activities under the taking clause. Only Supreme Court decisions involving a variety of CERCLA response actions can dispositively clarify key fifth amendment issues concerning taking and due process requirements. Of critical importance to the resolution of those issues will be the scope of the intrusion to the private property, the duration of the intrusion, and whether or not the response is confined to contaminated sites or extends to uncontaminated property owned by innocent third parties.

Timely and adequate resolution of all of these issues will determine whether EPA's efforts to abate pollution will be stalled temporarily, or permanently, at the gates of commercial property.
APPENDIX

The civil/criminal dichotomy may be plotted on the x axis, the warrant/warrantless search distinction plotted on the y axis, and the difference between searches for the purpose of investigation and compliance and searches designed to facilitate remedial action noted on the z axis.

When traced out in three dimensions, four types of searches with warrants occupy the "first floor" of fourth amendment space, and four types of searches without warrants occupy the "second floor." It is also convenient to separate the space vertically with a plane between criminal and civil searches.

The eight categories include:
1. civil search, without warrant, for compliance purposes.
2. civil search, without warrant, for remedial purposes.
3. criminal search, without warrant, for compliance purposes.
4. criminal search, without warrant, for remedial purposes.
5. civil search, with warrant, for compliance purposes.
6. civil search, with warrant, for remedial purposes.
7. criminal search, with warrant, for compliance purposes.
8. criminal search, with warrant, for remedial purposes.
Some commentators have criticized the categories drawn here, particularly the civil/criminal distinction. See Note, *Rationalizing Administrative Searches*, 77 Mich. L. Rev. 1291, 1310–11 (1979) (endorsing home/business distinction). The categories used here do not necessarily indicate philosophical or constitutional fissures, but rather focus attention upon the two areas most important to EPA access policy, categories 5 and 6.