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REGULATORY ACCESS TO CONTAMINATED SITES: SOME NEW TWISTS TO AN OLD TALE

ROGER D. SCHWENKE*

I. INTRODUCTION

It has become more and more frequent for governmental agencies and private parties to request access to a piece of property in connection with environmental assessments. It would seem that this is a reasonable process, yet many questions have developed regarding the implementation of statutes and rules authorizing such access. These materials attempt to examine both federal and state statutory provisions, and to offer some observations about the current status of state and federal law.

Until the decision by the Seventh Circuit Court of Appeals last year in *United States v. Tarkowski*,¹ at least in access requests predicated on the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),² there was very little expectation that the Environmental Protection Agency ("EPA") would be obligated to offer any but the most minimal explanation of why it needed access to a particular site, what it planned to do with or on the site after access was given, and how long the agency or its contractors might be there. However, as discussed further below, at least in some instances the EPA will now be expected to offer at least some justification, and maybe even more than that.

After looking at the apparent site access expectations and procedures in the CERCLA setting, when contrasted to those in most other environmental contamination situations, a limited examination will then be made of "takings" law, to determine if some asserted rights of entry could amount to a taking.

Obviously, it is reasonable for governmental agencies to request access, and that need serves as the foundation for the federal CERCLA statutory access provisions, as well as similar provisions in comparable

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¹ 248 F.3d 596 (7th Cir. 2001).

² Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75 (1994).

state statutes. The EPA, in addition to the statutory provisions discussed below, has published an EPA guidance document with respect to CERCLA site access.³ The EPA takes a very strict and strong interpretation of its right to demand access, and in the author's experience, will offer very few assurances to the landowner as a part of that process. A copy of the "Standard" EPA form of "Consent" is in the guidance document, and also included as an Exhibit A to these materials.⁴ By way of contrast, these materials also include, as Exhibit B, a private party site access document, which the author believes contains a more "rational and reasonable" approach to the various issues that should be considered when access is sought.

Many landowners also probably believe that when an agency demanding access goes too far, they are protected by their right to assert a claim of there being a "taking" of their property. However, as will be seen from examination of these materials, that right and opportunity is very limited. For parties caught up in federal enforcement of CERCLA, through some new provisions that are beginning to appear in CERCLA settlement consent decrees, the right may become even more limited. Finally, access issues and the (hopefully) reasonable approach taken in their demands for access by state and federal regulatory agencies also now need to be evaluated in light of the conditions precedent for a landowner to be able to assert an innocent landowner defense, a contiguous property defense, or to receive prospective purchaser protection, subsequent to the late 2001 enactment of the Small Business Liability Relief and Brownfields Revitalization Act,⁵ signed into law by President Bush on

³ These are attached to these materials as "Appendix A." They also can be obtained off of the EPA web pages at <http://es.epa.gov/oeca/osre/870605.html>, and are identified as OSWER Directive #9829.2 (June 5, 1987), Entry and Continued Access Under CERCLA, United States Environmental Protection Agency Office of Enforcement and Compliance Monitoring (last visited Jan. 20, 2002).

⁴ This term has been put in quotes because the author of this Article believes that there is very little real voluntary "consent" associated with many such documents received by EPA. As will be evident in many comments throughout this Article, the author believes that EPA (and the Department of Justice in its efforts to enforce such agreements) should recognize that "a material distinction exists between a consent form freely entered into and an agreement entered into that contemplates activities on Plaintiff's property which, but for [the agency's] statutory authority to force entry, Plaintiffs would not have allowed. This element of required acquiescence is at the heart of the concept of occupation." *Juliano v. Montgomery-Ostego-Schoharie Solid Waste*, 983 F. Supp. 319, 329 (N.D.N.Y. 1997) (citing *Yee v. City of Escondido*, 503 U.S. 519 (1992)).

⁵ Pub. L. No. 107-118, 115 Stat. 2356 (2002).

January 11, 2002. Under the terms of Title II, "Brownfields Revitalization and Environmental Restoration," Subtitle B, "Brownfields Liability Clarifications," Sections 221-223, in order to retain protection from contamination emanating from contiguous property, to qualify as an exempted "bona fide prospective purchaser," or to retain "innocent landowner" status, the landowner now is obligated to provide "full cooperation, assistance, and [facility] access to persons that are authorized to conduct response actions . . . at [the] facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action . . . at the facility)."⁶

Although early cases indicated that there were some questions concerning the EPA's authority to enter private property to conduct investigations or for remediation,⁷ the Superfund Amendments and

⁶ 42 U.S.C. § 9601(a)(40)(E) (2002). The Act requires EPA by regulation, no later than two years after the enactment of the new statute, to establish standards and practices for the purpose of specifying what will satisfy the "all appropriate inquiries" requirement to qualify as an "innocent landowner." Section 101(35), subparagraph (B), as amended by Section 223 of the Small Business Liability Relief and Brownfields Revitalization Act. The "contiguous properties" defense added by Section 221 authorizes (but does not require) EPA to issue assurances that no enforcement action would be initiated against qualifying entities or persons, and to grant cost recovery and contribution protection for those entities and persons. 42 U.S.C. § 9607(q)(3). The access, land use compliance and institutional control assurances, necessary to qualify for these two sections' protections (as well as for the Bona Fide Prospective Purchaser status created by Section 222) are not specified in the Act as subjects that the EPA must consider in this policy development and rule promulgation. However, in the author's opinion these issues and related the EPA guidance and policy, including the EPA Entry and Access Guidance attached to this Article, should be reexamined. Perhaps in this process the EPA could reconsider and potentially revise some of the strictness of the original guidance, in light of the issues raised here, plus the added requirements interpreted through the *Tarkowski* decision. The EPA has already announced that as a part of its implementation of the new Act, the EPA's enforcement office, the Department of Justice, and states will likely develop policy statements explaining how they interpret the law's new liability changes, and specifically the relief provided to landowners, prospective purchasers and contiguous landowners. Inside EPA's Superfund Report, Vol. XVI, No. 1 (Jan. 7, 2002), at 3.

⁷ A major impetus for the SARA changes to confirm the agency access right was the decision of the Seventh Circuit in *Outboard Marine Corporation v. Thomas*, 773 F.2d 883 (7th Cir. 1985), *vacated and remanded in light of amendment of §9604*, 479 U.S. 1002 (1986). The case involved an effort by EPA to gain access for site remediation at a high priority location in Illinois. As noted in the opinion, EPA conceded that the source of its authority to enter for actual construction was unclear, observing that "Congress, possibly through oversight, neglected to provide a right of entry for this purpose." *Id.* at

Reauthorization Act of 1986⁸ eliminated any doubt about the Agency authority. Section 104(e)(1)⁹ was amended and added to CERCLA through the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), to provide that entry to property was permitted for *"determining the need for response, or choosing or taking any response action under this title, or otherwise enforcing the provisions of this title."*¹⁰

The statutory provisions added by SARA also established a standard for when access could be sought, and defined the extent of property that could be entered. The EPA is authorized to exercise entry authority "if there is a reasonable basis to believe there may be a release or

889. The Court determined that EPA's then-existing statutory authority "to enter to inspect and obtain samples, gather information, and inspect records [was] limited to the hazardous substance itself," the Section [104(e)(1)] "does not provide authority for taking subsurface samples to determine what construction can be supported or for the other things the EPA seeks to accomplish as preliminary to construction." *Id.* at 889-90. At least in non-emergency situations, the EPA, under 104(e), does not have an "open ended right to enter" where EPA pleased [specifically on private tracts which are not themselves alleged to be part of the hazard]; the Court added that this right "may be what EPA needs and does not have," but further observed that "[o]nly Congress, not we, can supply that power." *Id.* at 890. The Supreme Court, in its remand, noted that the lower court holding that § 9604(e) did not authorize EPA to enter a waste site to effect response activities was reversed "in light of the amendment of [§ 9604(e)] expressly to authorize EPA to enter such sites. *Id.*

Despite the vacation and remand by the U. S. Supreme Court, the observations of Circuit Judge Wood, over 15 years ago, also bear on the issue addressed in this Article of when an access intrusion can go so far that it amounts to a compensable taking:

EPA argues, never mind, we have an open ended right to enter where we please to fulfill any of our obligations to the public and the bill should be sent by the private owner not to us but to the government in care of the Tucker Act. Then if we were authorized to enter as we claim, says the EPA, and if in fact what we did actually amounted to a taking, then you, the owner, may recover any damages incurred. Otherwise, thank you very much for the several months' use of your land.

Regardless of the noble purposes of the EPA, at least in nonemergency situations, that procedural approach strains our usual constitutional concepts.

773 Fed. 2d at 890 (emphasis added).

⁸ Pub. L. No. 99-499, 100 Stat. 1613 (1986).

⁹ No attempt is made in these materials always to give the parallel Title 42, United States Code, provisions, which correspond to the CERCLA Sections noted. However, for the reader's reference, they can be located, respectively, at 42 U.S.C. § 9604(e) and 9613(h).

¹⁰ Superfund Amendments and Reauthorization Act § 104(m).

threat of release of a hazardous substance or pollutant or contaminant.”¹¹ Based on the legislative history, it appears that the SARA amendments did not require that there be an actual release or threatened release, on the property to be entered, before the EPA could have a right of entry.¹²

At least prior to their recent construction in *Tarkowski*, the statutory provisions on their face purported to authorize entry to take place in any location where hazardous substances may be located, or where they may have been generated, stored, treated, disposed of, or transported from; any place a hazardous substance has or may have been released; any place which is or may be threatened by the release of a hazardous substance; or any place where entry is needed to determine the need for response or the appropriate response, or to effectuate a response action under CERCLA.¹³ Another provision added by SARA, § 104(e)(1), clarifies that the EPA is authorized to enter any place or property adjacent to the place or properties described previously. It would be perhaps an epitome of understatement to suggest that this grant of entry authority is quite broad. Despite the breadth of this provision, the recent opinion in *Tarkowski* suggests that, even with the requirement of reasonable basis being “easily satisfied” since there is nothing in Section 104(e)(1) about the magnitude of contamination, some evaluation of the extent of disruption to be caused by access and remediation may now be required:

But this makes it all the more important to consider whether the agency’s proposed *action* is unreasonable (arbitrary and capricious). The EPA may be reasonable, although we doubt it, in wanting to conduct additional tests on Tarkowski’s property—that would depend in part on how disruptive the tests would be to Tarkowski’s use of the property. Cf. *United States v. Fisher*, supra, 864 F.2d at 438. But given what the agency now knows or has reason to know, which is that the property although unsightly is not a site or source of even a slight environmental hazard, for it to want to go ahead and rip up the property without

¹¹ *Id.*

¹² The House Energy and Commerce draft legislation at one point contained such a limitation. See H.R. REP. NO. 99-253, pt. 1, at 158 (1985). This limitation, however, was deleted prior to introduction on the bill for floor debate. Contrast H.R. 2817, 99th Cong., 1st Sess., 131 Cong. Rec., H. 10857 (Dec. 4, 1985).

¹³ 42 U.S.C. § 9604(e)(3) (1994).

completing its inspection *bespeaks a precipitance that would be warranted only by emergency conditions*. The EPA assures us that it won't undertake any drastic remedial action until it completes new tests. But, if so, why is it not seeking merely an order to allow it to go onto the property to conduct tests that would not unreasonably interfere with Tarkowski's use and enjoyment of his property? The agency is adamant in the assertion of a right to carry out remedial action whatever the test results are, or indeed before completing or for that matter beginning any further tests.

We do not know whether Tarkowski's angry neighbors exert a malign influence over the local office of the EPA, but *it is to protect citizens against arbitrary and overreaching actions by government bureaucrats that courts are empowered to prevent arbitrary and capricious interferences with property rights. It is unreasonable for the EPA to insist on a judicial carte blanche to embark on drastic remedial action in advance of obtaining any rational basis for believing there is any danger to the environment that would warrant such action.*¹⁴

II. CASE LAW INTERPRETATION OF FEDERAL STATUTES

Following is a summary of the case law interpreting these CERCLA and SARA statutory provisions. Subject to the potential for some change as a result of the *Tarkowski* decision, several themes run through these cases:

- (1) A property owner need not have generated the hazardous substances to be held liable under Section 9607(a).
- (2) The "imminent and substantial endangerment" language of Section 9606(a) is not limited to emergency situations. While the risk of harm must be imminent, the harm itself need not be.

¹⁴ United States v. Tarkowski, 248 F.3d 596, 599-600 (7th Cir. 2001) (emphasis added).

- (3) A court *must issue* an injunction when the EPA or State agency has “a reasonable basis to believe” there may be a threat of release of a hazardous substance.
- (4) When consent is not granted to entry authorized by Section 9604(e)(3), the U.S. can either obtain an order of entry and then go to the federal court for a court order to comply or proceed directly to federal court to obtain an original court order enjoining interference with an authorized request entry.
- (5) If the EPA elects to proceed to federal court seeking a motion for immediate access, on the basis of the statutory provisions in 42 U.S.C. § 9604(e), it must establish five facts or legal conclusions:
 - (a) The entry the EPA seeks is for one of the categories authorized by subsections (e)(2), (3) or (4) of 42 U.S.C. Section 9604;¹⁵ and

¹⁵ 42 U.S.C. § 9604(e) reads, in pertinent part, as follows:

- (2) Access to information. Any officer, employee, or representative described in paragraph (1) may require any person who has or may have information relevant to any of the following to furnish, upon reasonable notice, information or documents relating to such matter:
 - (A) The identification, nature, and quantity of materials which have been or are generated, treated, stored, or disposed of at a vessel or facility or transported to a vessel or facility.
 - (B) The nature or extent of a release or threatened release of a hazardous substance or pollutant or contaminant at or from a vessel or facility.
 - (C) Information relating to the ability of a person to pay for or to perform a cleanup.

In addition, upon reasonable notice, such person either (i) shall grant any such officer, employee, or representative access at all reasonable times to any vessel, facility, establishment, place, property, or location to inspect and copy all documents or records relating to such matters or (ii) shall copy and furnish to the officer, employee, or representative all such documents or records, at the option and expense of such person.

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

- (b) The EPA's right of entry has been obstructed by the defendant; and
 - (c) The EPA has a reasonable basis to believe that there may be a release or threat of a release of a hazardous substance, pollutant, or contaminant; and
 - (d) The EPA has sought the defendant's consent to its entry; and
-

- (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 title.
- (4) Inspection and samples.
- (A) Authority. Any officer, employee or representative described in paragraph (1) is authorized to inspect and obtain samples from any vessel, facility, establishment, or other place or property referred to in paragraph (3) or from any location of any suspected hazardous substance or pollutant or contaminant. Any such officer, employee, or representative is authorized to inspect and obtain samples of any containers or labeling for suspected hazardous substances or pollutants or contaminants. Each such inspection shall be completed with reasonable promptness.
 - (B) Samples. If the officer, employee, or representative obtains any samples, before leaving the premises he shall give to the owner, operator, tenant, or other person in charge of the place from which the samples were obtained a receipt describing the sample obtained and, if requested, a portion of each such sample. A copy of the results of any analysis made of such samples shall be furnished promptly to the owner, operator, tenant, or other person in charge, if such person can be located.

- (e) The EPA's demand for entry is not arbitrary and capricious, an abuse of discretion, or otherwise illegal.
- (6) The statute, 42 U.S.C. Section 9604(e)(5)(B), makes no distinction between properties containing hazardous substances and those that are merely adjacent to such properties.

The recent decision by Judge Posner from the Seventh Circuit in the *Tarkowski*¹⁶ case may have changed some of these rules. In that instance, the EPA sought access to a site both to determine the extent of contamination, and to conduct an unspecified remedial activity. In terms of the precedent arising from this case, it probably is very significant that the EPA here chose to combine in one order a request for site access and an order for remediation. The EPA (perhaps for reasons that would appear obvious to anyone reading the Seventh Circuit opinion) did not seek review by the Supreme Court.

In response to the EPA request, the Court concluded that such a request was subject to judicial review and, despite the provisions of CERCLA Section 113(h), which prevent a court from reviewing a challenge to a removal or a remedial action, CERCLA did not prevent a challenge to an access order when the EPA claimed a right to undertake remedial efforts before determining if the site presented a hazard.

The Seventh Circuit concluded that barring pre-enforcement review in these circumstances would allow the EPA to nullify judicial control of access orders, by potentially stating in every application that while the purpose was merely to test, the government reserved the right to take unidentified and unspecified remedial actions in the future, based on test results. The Court concluded that the EPA's reading of the statute was not appropriate, since it would allow the EPA unlimited power of warrantless search and seizure, exceeding both the statutory and constitutional authority of the EPA.

Mr. Tarkowski is an elderly man who lives on a 16-acre tract in Wauconda, Illinois, which was described in the decision and in the briefs as a formerly rural community that has now become an affluent suburb of Chicago. His dwelling is built out of surplus materials, which he has accumulated over the time he has been on the property, and his yard "is

¹⁶ *Tarkowski*, 248 F.3d at 596.

full of what his upscale neighbors regard as junk.”¹⁷ The Court gave as examples of “junk,” barrels, batteries and construction materials. Before the case reached the Federal District Court and the Seventh Circuit, the neighbors had previously complained to both the State of Illinois Environmental Agency, and to the EPA.

The EPA claimed that Mr. Tarkowski denied access to the property in September 1999. In response, the EPA sought an order under Section 104(e) of CERCLA, asking the Court to preclude Mr. Tarkowski from preventing the EPA from entering his land to fence it, conduct additional tests, install groundwater monitoring wells, dig for buried drums, and to remove various (unidentified) objects. The District Court conducted an evidentiary hearing on the government motion for an order in aid of immediate access, a motion that EPA requested contemporaneously with its filing of the complaint. The hearing began in December 1999, and concluded in late March 2000, after the Court had appointed counsel for Tarkowski.¹⁸

The District Court denied the EPA’s motion and dismissed the EPA suit, concluding that the EPA’s request was unreasonable because the contamination was *de minimis*. The District Court concluded that the access for which the EPA sought authorization would be arbitrary and capricious in the circumstances presented to the Court. The EPA appealed to the Seventh Circuit.

In a very strong opinion, on behalf of the three members of the panel, Judge Posner affirmed the trial court decision:

The EPA makes no pretense that the position it advocates serves a public purpose, strikes a reasonable balance between property rights and community rights, rationally advances the agency’s mission, or even comports with *the limitations that the Constitution has been interpreted to place on federal regulation of purely local activities, not to mention the limitation that the Fourth Amendment places on searches and seizures. Access orders are orders to seize as well as search, because of the control that the agency exerts over the property even when it is just doing test borings and other investigative work. That such orders must comply with the Fourth Amendment is apparent from*

¹⁷ *Id.* at 598.

¹⁸ See *United States v. Tarkowski*, 2000 WL 696740, 30 Env’tl. L. Rep. 20,622, Memorandum Opinion (N.D. Ill. May 30, 2000).

Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). Rather, the EPA defends its position as ineluctably compelled by statutory language that we have now to examine in order to determine whether the case can be decided without our having to reach any constitutional issues.¹⁹

This was not the only strong admonition given by the Seventh Circuit to the EPA. Another read as follows:

In effect the agency is claiming the authority to undertake warrantless searches and seizures, of a peculiarly destructive sort, on residential property despite the absence of any exigent circumstances. It is unlikely, even apart from constitutional considerations, that Congress intended to confer such authority on the EPA.²⁰

The Court acknowledged that the EPA has authority under CERCLA Sections 104(e)(1)(3) and (4) to access property to inspect or to obtain samples for testing, or "to effectuate a response action" under Section 104(e)(3)(D).²¹ However, the Court added that this latter authority "to effectuate a response action" was applicable only "if there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant."²²

The Seventh Circuit also interpreted CERCLA Section 104(e)(5)(B)(i), which provides that the EPA could obtain an access order, to preclude the issuance of such an order if "under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."²³

The EPA cited, as its primary argument in favor of Section 113(h), which prevents judicial review of challenges to removal of remedial actions until the remedy is complete. The Court found the provision to be inapplicable. The Seventh Circuit determined that the EPA was

¹⁹ *Tarkowski*, 248 F.3d at 599 (emphasis added).

²⁰ *Id.* at 600-01 (emphasis added).

²¹ *Id.* at 599

²² *Id.*

²³ *Id.*

requesting access to conduct a remedial action, as well as an investigation. The Seventh Circuit acknowledged that under the provisions of Section 113(h), the Court had no authority to limit the remedial measures the EPA could take once it gained access.²⁴ The Seventh Circuit determined that the EPA would have authority to obtain access solely to investigate contamination, but would first have to make a sufficient showing.

The opinion does not specify what would constitute a "sufficient showing," since that narrow issue was not present in the litigation. Likewise, the Court observed that once the EPA issued a remedial order based on test results, the bar on pre-enforcement review under § 113(h) of CERCLA probably would prevent Mr. Tarkowski or others from challenging it. However, in this case, the EPA was seeking an access order, without which it could not conduct remedial actions on the property, rather than seeking only a remediation order.

Summing it all up, and giving a strong indication to the EPA that the agency's interpretation of CERCLA access authority may now have to be reconsidered, the Seventh Circuit observed:

[W]hen an access order is sought, judicial jurisdiction clicks in; the arbitrary and capricious standard clicks in. The right of judicial review of agency action that is expressly conferred by Section 104(e)(5) can thus be preserved without impairment of the objectives of Section 113(h)

*If the agency's very ground for going on the property is to undertake remedial measures, the court cannot perform its duty of determining whether the agency's proposed action is arbitrary or capricious without considering whether the measures proposed are a reasonable basis for authorizing what would otherwise be a trespass.*²⁵

In a separate, concurring opinion, Judge Ripple raised a question about the scope of the Seventh Circuit analysis. He believed that it left "a conceptual and practical difficulty that is bound to emerge in future and more difficult cases."²⁶ Judge Ripple alluded to the fact that the panel had

²⁴ *Id.* at 601.

²⁵ *United States v. Tarkowski*, 248 F.3d 596, 601-02 (7th Cir. 2001) (emphasis added).

²⁶ *Id.* at 603.

observed that the *Tarkowski* fact pattern was a “very unusual case,” noting that “[w]hat makes this case unusual is the very limited evidence of an environmental hazard that the E.P.A. has put forward to justify its request for an access order that includes the authority to ‘effectuate a response action.’”²⁷

Because he considers the *Tarkowski* litigation to be a “narrow and unusual situation,” Judge Ripple went on to contemplate future cases where the EPA could proffer more significant evidence of a release or threat of release of hazardous substances, and sought access to that land to investigate the nature and extent of the problem, and to implement a remedy.²⁸ Judge Ripple concluded by observing “what remains unclear are the circumstances that will justify a court’s denial of entry to effectuate a remedial order.”²⁹ He adds:

Yet, when the E.P.A.’s evidence of contamination allows access for some type of response action, but makes the contemplated remedy seem significantly disproportionate to the perceived violation, the limitations on the court’s authority are not well-defined. Today’s opinion, by suggesting that the E.P.A.’s remediation request must be reasonable, implies that there must be a proportionality between the investigative results and the proposed plan. Such a balancing approach may result in courts assuming a great deal more latitude than Congress intended.³⁰

Not surprisingly, Judge Ripple recommended more explicit Congressional guidance to “permit the E.P.A. to fulfill its responsibilities and the courts to respond more precisely to the legislative mandate.”³¹

In his brief, Mr. Tarkowski had argued extensively that application of CERCLA in the fashion urged by the EPA would exceed the scope of Congress’ power under the Commerce Clause, relying on arguments grounded in the Supreme Court decision in *United States v. Lopez*.³²

²⁷ *Id.* (citing 42 U.S.C. § 9604(e)(3)(D) (1994)).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *United States v. Tarkowski*, 248 F.3d 596, 603-04 (7th Cir. 2001).

³¹ *Id.* at 604.

³² 514 U.S. 549, 558-59 (1995).

However, Judge Posner and the rest of the panel considered this to be nothing more significant than a "procedural detail," which could not be granted because Tarkowski was not seeking a different judgment, which the Seventh Circuit felt was the only basis on which a cross-appeal is either necessary or permitted.³³ Instead, the Court suggests that the primary reason for the cross-appeal, where this constitutional argument had first been raised, was an effort to limit the EPA's ability to seek an access order limited to inspection and testing. In the last sentence of the opinion, such arguments were left for "future consideration," primarily because the Court had "*no reason to believe that the EPA will continue to be obsessed as it has been for far too long with the minuscule threat to the environment*"³⁴ that Mr. Tarkowski poses.

As noted previously, early in the trial court proceedings the District Judge appointed counsel to defend Mr. Tarkowski.³⁵ After the Seventh Circuit decision became final, Mr. Tarkowski's court-appointed counsel petitioned the District Court for an award of attorney's fees and expenses pursuant to the Equal Access to Justice Act ("EAJA").³⁶ The government did not contest counsel's ability to seek an award for fees and expenses despite the fact that counsel had been appointed by the court and had agreed to handle the matter *pro bono*.³⁷ However, the government argued that its efforts to seek access had been substantially justified.

District Judge Matthew Kennelly agreed with the government that the mere fact that the EPA had lost at both the trial and appellate level did not necessarily mean that the government position was unjustified. Instead, he determined that the government position could be substantially justified "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact," citing and quoting *Young v. Sullivan*.³⁸ In addition, Judge Kennelly was even willing to deny an EAJA award of fees and costs if the agency conduct had been found to be arbitrary and capricious, citing and quoting *Andrew v. Bowen*.³⁹

³³ *Tarkowski*, 248 F.3d at 602-03.

³⁴ *Id.* at 603 (emphasis added).

³⁵ John Tarkowski was represented, *pro bono*, by Mark R. Ter Molen, Richard F. Bulger, and Susan Elizabeth Brice, all with the firm of Mayer, Brown & Platt, Chicago, IL.

³⁶ 28 U.S.C. § 2412 (2002).

³⁷ See *Ed A. Wilson, Inc. v. General Services Administration*, 126 F.3d 1406, 1409 (Fed. Cir. 1997).

³⁸ 972 F.2d 830, 835 (7th Cir. 1992) (and noting that Young had relied on and quoted *Pierce v. Underwood*, 487 U.S. 552, 566 (1988)).

³⁹ 837 F.2d 875 (9th Cir. 1987).

Looking at the facts surrounding the agency actions “as an inclusive whole,” and looking at both the pre-litigation and litigation stages of the case, the District Court did take what Judge Kennelly referred to as “guidance” from the Seventh Circuit decision and adopted the appellate court opinion’s factual findings.⁴⁰ Quoting from the factual conclusions of the Court of Appeals, the District Court granted an award of attorneys fees because the Court concluded that the government’s “position was unjustified in any of the three relevant respects: its factual contentions lacked a reasonable basis in truth; its legal theory lacked a reasonable basis in law; and there was no reasonable connection between the facts it alleged and the theory it alleged.”⁴¹

Judge Kennelly’s concluding comments suggest that he had as little patience with what he noted the Court of Appeals had “charitably characterized” as an extreme legal position, as had Circuit Judge Posner a few months earlier:

The government says that “before this case, no court had ever denied a request by EPA for access to conduct response actions under CERCLA based on a determination that EPA’s proposed actions were unjustified.” . . . *The government’s contention seems to be that unless some court has specifically ruled a particular course of action baseless, it is entitled to take the bit in its teeth and run roughshod over any citizen who happens to lie in its chosen path and should have no reason to expect that the courts will have anything to say about it. Claims of this type do not well suit a government of constitutionally limited powers, charged with respecting and protecting the fundamental rights of its citizens.*

. . . .

The government’s position, had it been accepted . . . in effect writing judicial review out of the statute—can in no way be characterized as reasonable. *The fact that it had not been rejected in any case is an indication not of its*

⁴⁰ United States v. Tarkowski, 2001 U.S. Dist. LEXIS 19438 (N.D. Ill. 2001).

⁴¹ *Id.* at 4-5 (emphasis added).

*reasonableness but rather that government officials in this country, thankfully, tend to be disinclined to take unsupportable positions that impair the rights of its citizens. When they do so, however, they cannot justifiably expect that the courts are powerless to rein them in.*⁴²

A. *Summary of Case Law Before Tarkowski*

Several decisions in the years before the Seventh Circuit's recent evaluation of the reasonable and lawful scope of the EPA's site access authority in *Tarkowski* offer instruction and guidance on both the agency interpretation of its statutory authority, and the extent to which the courts were willing to accede to the EPA assertions of a need to demand a strict right to site access. In *United States v. David B. Fisher*,⁴³ the same Circuit and the same Judge came to quite different conclusions than those reached in *Tarkowski*. In this instance, a farmer and the EPA disagreed about the EPA's right for access to a 230 acre tract, mostly farmland, which had previously been used in part for reclamation of solvents. The EPA was concerned that hazardous waste had leaked into the groundwater from some of 700 to 1,000 drums in which reclamation wastes were stored, and which had been buried under the farm. The farmer's contractor, hired to bury the drums, told the EPA that the farmer told him to puncture as many drums that he could when burying them, and that he had done so.

Perhaps the most significant aspect of this decision is that it was also by the Seventh Circuit, and was also written by Judge Posner, who was also the author of the Court's opinion in *Tarkowski*. However, in the context of the facts presented by the farmer, the contractor and the EPA in the *Fisher* circumstances, Judge Posner was much more willing to allow the agency a far broader right to insist on site access.

In *Fisher*, the farmer argued that he had been denied "due process" because the District Judge had failed to read all of the farmer's "voluminous filings" before deciding to issue an access order.⁴⁴ The District Judge had admitted that he had not read those filings. However, Judge Posner concluded that this constitutional argument was "shallow" because CERCLA, as amended by SARA, required the District Court to

⁴² *Id.* at 4 (emphasis added).

⁴³ 864 F.2d 434 (7th Cir. 1988)

⁴⁴ *Id.* at 438.

grant the EPA site access.⁴⁵ The only requirement, according to Judge Posner in 1988, was that the Agency demand for access be grounded in a “reasonable basis to believe there may be a release or threat of release of a hazardous substance” and that the agency demand for access to a site also not be “arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law.”⁴⁶ The Court determined, on the basis of the statutory authority given to the EPA by the statutory SARA changes, and after observing that these statutory access provisions were more “draconian” than the corresponding provisions authorizing agency access in the Resource Conservation and Recovery Act (“RCRA”), that when access is denied and the EPA turns to the district court for an access order, “the district court to which the EPA applies shall mete out whatever equitable relief is necessary to prevent interference with the agency’s entering.”⁴⁷

Judge Posner concluded that the SARA access requirements established an “undemanding standard” that under the facts presented to the Court, was “amply satisfied” not only by what the EPA Project Manager saw and smelled (discarded waste drums, stained soil and distressed vegetation), but also by the proximity of the main site to the farm, the fact that the farm had been used to store wastes from the main site, and the listing of the main site property high on the EPA National Priorities List.⁴⁸ All of these facts, the Court felt, “gave ample reason to believe that further investigation of the farm might be necessary for the protection of human health.”⁴⁹ As Judge Posner put it, referring to the assertion that the District Judge should have read Fisher’s pleadings and filings more deeply, “Judge Zagel was wise to save his time and energy for cases in which a study of the factual record might make a difference.”⁵⁰

Likewise, Judge Posner rejected the farmer’s argument that the access order violated the takings clause because it placed no limit on what the EPA could do to the farm. Judge Posner concluded that the takings

⁴⁵ *Id.*

⁴⁶ *Id.* at 437. In identifying this standard, Judge Posner directly referred to and cited the statutory access requirements set out at 42 U.S.C. § 9604 (e)(5)(B)(i) (1994).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *United States v. David B. Fisher*, 864 F.2d 434, 438 (7th Cir. 1988)

⁵⁰ *Id.*

argument was both "premature" and "frivolous."⁵¹ He based this conclusion on the fact that there was "no indication that the EPA is engaging in or has plans to engage in activities on the farm that would be so disruptive as to constitute a taking of the property."⁵² Judge Posner further noted that should that happen, the farmer would then have a monetary remedy in the United States Claims Court under the Tucker Act.⁵³ Again, he referred to *Hendler* and added that this remedy would be exclusive, citing *Ruckelshaus v. Monsanto Co.*⁵⁴

In another case, which was proceeding through the courts at the same time as *Tarkowski*, District Judge Molloy authorized the EPA access to a site, but also observed that if the related the EPA response action would effect a permanent physical occupation of the property, depriving the landowner of other uses, just compensation would be due.⁵⁵ In this instance, the EPA sought access to an abandoned asbestos mine and the landowner objected because the EPA planned to dispose of asbestos-contaminated soils on the property. The landowner claimed that the EPA was obligated to acquire the property before being allowed to make such a deposit.

The landowner in *Grace* argued that the EPA had no "need" to enter the property because alternative landfill sites were available for disposal.⁵⁶ The Court emphasized that the EPA is "entrusted by Congress and the President with responsibility for taking actions that usually feature a considerable degree of discretion," and responded to the landowner's claim that the EPA had not demonstrated a "need" to enter the property by announcing that it would not permit the landowner to "quibble about whether the agency needs access," because the EPA has a considerable degree of discretion and "the EPA's discretion should remain as unfettered as possible."⁵⁷

Looking at the five element test that the EPA must establish to entitle the agency to an order mandating access,⁵⁸ the Court next

⁵¹ *Id.*

⁵² *Id.* at 438-39 (citing *Hendler v. United States*, 11 Cl. Ct. 91 (1986)).

⁵³ *Id.* at 439.

⁵⁴ *Id.* (citing *Hendler v. United States*, 11 Cl. Ct. 91 (1986) and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984)).

⁵⁵ *United States v. W.R. Grace & Co.*, 134 F. Supp. 2d 1182 (D. Mont. 2001).

⁵⁶ *Id.* at 1187.

⁵⁷ *Id.*

⁵⁸ These five elements were noted and discussed earlier in this Article at pages 753-55.

considered whether the defendants had obstructed the EPA's right of entry. Here the focus was an argument that has come up in other access disputes as well.⁵⁹ The defendant argued that they might not have a right to assert a takings claim under the Tucker Act if it "voluntarily" granted the EPA access.⁶⁰ They similarly asserted that because they "have to obstruct access to preserve their rights," they should not be subject to the imposition of the \$27,500 a day penalty available to the EPA under the statute.⁶¹

⁵⁹ In the administrative proceedings that arose prior to the United States bringing a CERCLA-based suit for cost recovery against a Florida landlord, *Continental Equities, United States v. Continental Equities, Inc.*, Case #99-619-CIV-SEITZ/GARBER (S.D. Fla.) (Closed by Administrative Order dated Feb. 20, 2002, based on a Consent Decree entered Feb. 6, 2002), the EPA, using the standard agency Access Authorization form, requested site access to property owned by Continental Equities, some of which was at the time leased to third parties. In the request for Access Authorization, EPA referred to its access guidance Directive, and used the form in that guidance. Continental Equities objected to a "voluntary" grant of access to EPA and to EPA contractors for well installation and testing, out of concern that in doing so Continental Equities might be waiving its later right, under the Tucker Act, to claim compensation for the taking of its property, or might be assuming liability to third parties or to EPA contractors if under Florida law the contractors were treated as invitees or licensees. Continental Equities also requested EPA or EPA-contractor indemnification for any injuries to Continental Equities or to its tenants caused by the contractors, as well as evidence that the contractors had insurance that could provide such protection.

In response to Continental Equities' refusal to execute the Access Authorization form, and its insistence on indemnification and insurance, EPA told Continental Equities that "conditioning" access in this fashion amounted to a denial of access. As threatened at the time of the previous Access Authorization request, Region IV of EPA then issued an administrative order pursuant to Section 104(e)(5) of CERCLA, determining as a matter of law that Continental Equities had refused to grant access, and ordering access to be available for at least a six year period. In the Matter of Continental Equities, Inc., EPA Docket No. :00-04-C (Region 4) (Nov. 19, 1999). The Unilateral Administrative Order obligated Continental Equities to advise EPA whether Continental Equities intended to "comply" with the Order. In response to this requirement, Continental Equities wrote EPA that the company would "unconditionally abide by the terms" of the Order, and would not impede or bar EPA or EPA contractors from having site access. In the same letter, however, Continental Equities reiterated its position that its response should not be construed as a "consent" to access, citing the same reasons that had previously been raised by EPA. The issue was finally resolved by the Consent Decree associated with settlement of the cost recovery litigation, in which Continental Equities reserved some rights to pursue claims where there was a statutory waiver of sovereign immunity.

⁶⁰ *W.R. Grace & Co.*, 134 F. Supp. 2d at 1187.

⁶¹ *Id.*

Judge Molloy had little patience with this interpretation. In terms of the claim that this need should protect the defendants from the statutory penalty, he determined that such a construction would leave the penalty provision “meaningless.”⁶² Instead, he concluded that CERCLA places the burden on the EPA to show its authority for any access request, but likewise also compels those “who disagree with the EPA’s authority to carefully analyze the agency’s position.”⁶³ In its summary of the statutorily created dichotomy, the opinion also acknowledged that in some circumstances “just compensation” would be due:

CERCLA also compels those who disagree with the EPA’s authority to carefully analyze the agency’s position. If the agency does not meet the statutory requirements, it may safely be opposed. If it follows the statute, Defendants face the consequences of an errant analysis. If the agency’s proposed action effects a permanent physical occupation that deprives the landowner of other uses for the property, just compensation will be due but that does not mean that the EPA loses its statutory right of entry.⁶⁴

The comments by Judge Molloy did not directly reject the Defendant’s assertion that a “voluntary” acquiescence to the EPA access would effect a denial of Tucker Act rights—nor could the Court do so since there was no Tucker Act claim pending before the Court and since Tucker Act claims would be tried through an action to be filed in the Court of Federal Claims, not in a Federal District Court.⁶⁵ However, certainly the comments in the opinion demonstrate that the Court recognized that even though it could properly grant an access order, the actions taken by EPA could create the basis for a separate claim under the Tucker Act⁶⁶:

The second [Fifth Amendment] irony is that the Mine Site’s use as a disposal facility for Grace is precisely what indicates the EPA’s action might amount to a taking . . .

⁶² *Id.*

⁶³ *Id.* at 1188.

⁶⁴ *Id.*

⁶⁵ See *V.J. Scogin v. United States EPA*, 1992 WL 10376 at *2 (E.D. La. 1992); *United States v. Mountaineer Refining Co.*, 886 F. Supp. 824, 829 (D. Wyo. 1995).

⁶⁶ 28 U.S.C. § 1491 (1982 ed.).

The brash bargaining in this letter [a letter, cited earlier in the footnote, where the Defendant asked for what it referred to as "reasonable terms for activities related to EPA's removal action"—listing items such as "just compensation to the extent that EPA intends to dispose of remediation wastes and hazardous substances" on the defendant's property, as well as "appropriate assurances" from EPA such as indemnification against any future liability arising out of EPA's activities on the property] does not *undermine the fundamental principle that the EPA cannot appropriate private property to public uses without paying the piper. Granting the EPA's motion for an order directing access also does not undermine that principle.*⁶⁷

In response to the landowner's constitutional claim, the Court concluded that the EPA could be required to compensate the landowner if there were a taking, citing the Fifth Amendment to the Constitution.⁶⁸ In doing so, the Court noted the standard, drawn from the United States Supreme Court's opinion in *Lucas v. South Carolina Coastal Council*⁶⁹ that to prevail in such a claim there would need to be a showing that the deposit of contaminated soil would deprive the defendants of "all economically feasible use."⁷⁰

In a decision many years before *Tarkowski*, a federal District Court in Connecticut acknowledged that although access rights arising under Section 104(e) of CERCLA might in some instances be limited if access were sought for private parties, as contrasted to access for the EPA or the EPA contractors, under other CERCLA provisions a court order allowing access would be available.⁷¹

In this case, the EPA came to the court seeking an order to allow waste generators, which had entered into settlements with the EPA, access to a landfill site owned by the Defendant (Murtha). The EPA wanted access so that those private parties could comply with their settlement consent order obligations, and could implement the remedy selected by the

⁶⁷ *W.R. Grace & Co.*, 134 F. Supp. 2d at 1190 n.15 (emphasis added).

⁶⁸ U.S.C.A. Const. Amend. 5.

⁶⁹ 505 U.S. 1003, 1016 n.7 (1992).

⁷⁰ *W.R. Grace & Co.*, 134 F. Supp. 2d at 1190.

⁷¹ *B.F. Goodrich Co. v. Murtha*, 697 F. Supp. 89 (D. Conn. 1988).

EPA. The opinion notes that the EPA, in its pleadings and argument, had acknowledged that Section 104(e) of CERCLA did not expressly authorize an order requiring a landowner to permit private parties to enter a hazardous waste disposal site. Instead, the EPA argued that such an order was available based on Section 106(a) of CERCLA, as well as the court's equitable powers. Judge Dorsey agreed with the EPA.

Under the provisions and broad wording of Section 106(a), the Court observed that, "[T] here is no express restriction on the nature of the relief authorized except as equity and the public interest may require."⁷² Furthermore, although a request for an access order predicated on this Section would need to allege "imminent and substantial endangerment," the Court determined that the requirement and language of Section 9606(a) is not limited to emergency situations. There need not be "actual harm" demonstrated, but instead a "threatened or potential harm."⁷³ Drawing from the what the Court saw as its traditional equitable powers, citing one of the earliest CERCLA decisions, *U.S. v. Price*,⁷⁴ the opinion held that "while the risk of harm must be 'imminent,' the harm itself need not be."⁷⁵ In fact, it could be many years before that was realized. Furthermore, Judge Dorsey was willing to grant the EPA a wide range of latitude in public health issues, seeming to recognize the contrast between the complexity of the CERCLA cleanup process and the importance of any threat to public health.⁷⁶

Similarly, in an opinion two years later, a federal court in New Jersey made clear that when a state environmental agency was seeking access to a site, predicated on CERCLA's Section 104 authority, the Congressional history related to the enactment of CERCLA, and to the

⁷² *Id.* at 94.

⁷³ *Id.* at 96 (citing *United States v. Conservation Chem. Corp.*, 619 F. Supp. 162, 192 (W.D. Mo. 1985)).

⁷⁴ 688 F.2d 204, 211 (3d Cir. 1982).

⁷⁵ *Id.*

⁷⁶ The opinion observed as follows on this contrast:

Given the importance of any threat to the public health and the reality that implementation of a remedial plan might take years, "imminence" in the pollution abatement context must be considered in light of the time it may take to prepare administrative orders or moving papers to commence and complete litigation and to permit issuance, notification, implementation, and enforcement of administrative or court orders to protect the public health.

B.F. Goodrich Co., 697 F. Supp. at 96 (citing *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1109 (D. Minn. 1982)).

1986 changes to Section 104, emphasized a clear emphasis on prompt and immediate clean up. Accordingly, even where there might later be compensation claims, to facilitate immediate response to contamination, access to allow remediation "should be granted first, and compensation should be determined later to avoid any delays."⁷⁷

The Court held that under CERCLA, the New Jersey EPA was not required to show irreparable harm in order to obtain a preliminary injunction order granting it access to land adjacent to a landfill, finding that "the plain language of CERCLA suggests that Congress did intend to displace the equitable standards that a court would apply in most instances,"⁷⁸ basing this finding on the specific language of Section 104(e). The Court interpreted Section 104(e), 42 U.S.C. Section 9604(e)(5)(B), to require that a court *must issue* an injunction when the EPA or State agency has "a reasonable basis to believe" there may be a threat of release of a hazardous substance.⁷⁹ In the opinion of District Judge Brotman, the court has no discretion whether to issue an order under these circumstances.

The opinion also determined that for access authority, Section 104(e) draws no distinction between properties containing hazardous substances and those that are merely adjacent to such properties. In reaching this conclusion, the New Jersey court in *Briar Lake Development* relied on an earlier interpretation of the scope of Section 104(e) in *United States v. Charles George Trucking Co.*⁸⁰

In *Charles George Trucking*, the EPA sought access to both a hazardous waste dump and to adjacent land. After a detailed review of legislative history, Judge Woodlock concluded that no distinction is drawn in the statute between adjacent and source properties, adding that "if entry upon an 'adjacent property' is needed to effectuate an otherwise authorized response activity on a source property, such entry is authorized under § 9604(e). To adopt the distinction . . . would be to run the risk of rendering the statutory right of entry ineffectual. *The § 9604(e) right of entry is a right to implement effective remedies.*"⁸¹

⁷⁷ New Jersey Dep't of Env'tl. Prot. v. Briar Lake Dev. Corp., 736 F. Supp. 62, 67 (D.N.J. 1990).

⁷⁸ *Id.* at 66.

⁷⁹ *Id.*

⁸⁰ 682 F. Supp. 1260 (D. Mass. 1988)).

⁸¹ *Id.* at 1273 (emphasis added).

In this instance, there was no prior administrative order before the EPA came to the federal district judge, requesting an order to prohibit interference with entry. Judge Woodlock noted that although "numerous courts [before] have apparently issued precisely the type of order" the EPA was seeking, the case was one of first impression.⁸² Although the United States was able to point to those cases as earlier decisions where there had been no prior administrative order of entry, because the defendants challenged the "unarticulated assumption" [in the cases cited by the government] that authority under § 104(e)(5) extended to any situation where access had been denied, and was not limited to those where there was first an administrative determination, Judge Woodlock concluded that he needed to determine "whether the assumption is in error."⁸³

The opinion outlined the steps that the EPA could take if consent to entry were not voluntarily provided.⁸⁴ When consent is not granted to entry authorized by Section 9604(e)(3), the government can either obtain an administrative order of entry and then go to the federal court for a court order requiring compliance with the administrative order, or (based on what the Court saw as the face of the statute) could proceed directly to federal court to obtain an original court order enjoining interference with an authorized request entry.⁸⁵ Emphasizing the need for prompt response, the opinion concludes that the government does not have to do both, but that these were "optional routes to obtain compliance with legitimate requests for entry." In detail, the opinion traces the legislative history of CERCLA and the Section 104(e) changes to it, and concludes that Congress was "giving the government the 'tools necessary for a prompt and effective response' to the enormous problems of hazardous waste disposal."⁸⁶

Other cases where Section 104(e) was used as the basis for a request for access demonstrate that at least until recently, courts have generally been willing to grant access if there was a demonstration of how it related to the needed site assessment or remediation. The decisions also point out that refusals to allow access, after being ordered to do so, sometimes can result in the imposition of significant penalties. In *United*

⁸² *Id.* at 1266.

⁸³ *Id.*

⁸⁴ *Id.* at 1267.

⁸⁵ *Id.*

⁸⁶ *Charles George Trucking, Co.*, 682 F. Supp. at 1268.

*States v. Genzale Plating, Inc.*⁸⁷ the federal court confronted the task of determining what a reasonable penalty would be where a landowner had denied access. The Court identified at least five factors that should bear upon the amount of the penalty:

1. The good or bad faith of the defendant;
2. The extent of injury to the public;
3. The defendant's ability to pay;
4. The desire to eliminate any benefits derived through a violation; and
5. The necessity of vindicating the authority of the enforcing party.⁸⁸

The court found that the defendants acted in bad faith by denying the EPA access to a contaminated site. The court ordered the corporate landholders to pay a \$40,000 civil penalty for failure to comply with an order granting the EPA access.

By contrast, in *United States v. Taylor*,⁸⁹ the District Court initially, in response to a request from the Michigan Department of Natural Resources ("DNR") for a fine after the landowner denied access for 115 days, imposed a fine of \$57,500 based on \$500 per day of noncompliance with the access order (compared to the DNR request for \$25,000 per day). The Sixth Circuit vacated the order and remanded the case back to the District Court.⁹⁰ After remand, District Judge Enslin considered the five penalty factors noted in *Genzale Plating*, and also evaluated five other factors set out by the Sixth Circuit in its order, which were:

1. The extent and gravity of the landowner's unreasonable conduct;
2. Any prior history of such conduct;
3. The degree of culpability involved;
4. The urgency of the state's need for access to the site; and

⁸⁷ 807 F. Supp. 937 (E.D.N.Y. 1992).

⁸⁸ *Id.* at 939.

⁸⁹ 1994 WL 695918 (W.D. Mich. May 18, 1994).

⁹⁰ 8 F.3d 1074 (6th Cir. 1993).

5. The cost to the state of prosecuting the application for an order in aid of execution.

However, it does not seem that all of these factors had the same weight in the eyes of the District Judge. Notwithstanding the clear emphasis of the Sixth Circuit's remand order, the Michigan DNR returned to its plea for a fine based on a fine of \$25,000 for the first day of violation, and \$1,000 for each of the remaining 114 days, or a total of \$139,000.⁹¹ Although this was less than the original \$25,000 per day suggested by DNR, the District Court looked at most of the ten factors on the list, concluded that all of the factors identified by the Sixth Circuit "obviously have some bearing on the amount of the fine to be assessed," but then concluded that since there was no environmental emergency, and since fine decision remained "very subjective," the denial of access should not result in the "major" fine requested by Michigan.⁹² Instead, giving great emphasis to the defendant's ability to pay a fine, the District Court set it at \$4,420, which was computed on the basis of \$1,000 for the first day and another \$30 fine for each of the remaining 114 days during which access was denied.⁹³

In *United States v. Northside Sanitary Landfill, Inc.*,⁹⁴ the court first considered an argument very similar to that put forth in *Tarkowski* many years later. The EPA argued that the court was without jurisdiction to review challenges to removal or remedial activities, because of Section 113(h).⁹⁵ While generally agreeing with that interpretation of the limitation imposed through Section 113(h), and acknowledging that it was unable to examine any technical merits of an EPA CERCLA response action, the court did conclude that notwithstanding this limitation, when the EPA comes to a federal court and seeks court-imposed compliance with an entry request, the court must consider the five statutory elements previously noted in this Article.⁹⁶

The court in *Northside Sanitary Landfill* also considered what would constitute the "interference" required as one of these five elements. Noting that the term "interference" is not defined in CERCLA,

⁹¹ *Taylor*, 1994 WL 695918 at *3.

⁹² *Id.* at *5.

⁹³ *Id.*

⁹⁴ 18 Env'tl. L. Rep. 20,850 (S.D. Ind. 1988).

⁹⁵ *Id.* at 20,851.

⁹⁶ *Id.*

nevertheless based on what it saw as “overarching purpose” of CERCLA—to achieve quick remedial action in the cleanup of hazardous waste sites—the court concluded that the term should be “interpreted to mean conduct which could delay the cleanup schedule.”⁹⁷ The court noted several other cases, including *Charles George Trucking* and *United States v. Long* (discussed *infra*), where the opinions had not even discussed the issue of “interference” because the defendants in those cases had all “physically excluded.”⁹⁸

In one of the earliest access cases after the SARA changes to CERCLA, *United States v. Long*,⁹⁹ the court considered how much deference must be given to the EPA’s determination that there was a “release or threatened release” from a site. The EPA argued that except in instances where a court could enter a finding that the EPA conclusion concerning the threat of a release was “arbitrary and capricious,” the court has to simply “defer to EPA.”¹⁰⁰ In the EPA’s view, once a court made a determination that the EPA had a reasonable basis to believe that there may be a release or a threatened release, the court may not, in the view of the United States, condition the EPA’s right of entry in any way whatsoever. As in *Charles George Trucking* a year later and in *Tarkowski* over a decade later, the EPA centered these arguments on the limited role a court could exercise on the restrictions created by Section 113(h).

In *Long*, the government moved for immediate access to property that was listed on the on the National Priorities List. SARA authorizes the EPA to have access to property for the purposes of undertaking investigative, engineering, design, and remedial activities where the EPA has a reasonable basis to believe that there may be a release or threat of a release of hazardous substance or pollutant or contaminant from the property.¹⁰¹ The Court found that the EPA’s reasonable basis determination was not arbitrary or capricious.¹⁰² The Court also enjoined the defendants from interfering with “[a]ny activities which EPA deems necessary.”¹⁰³

⁹⁷ *Id.*

⁹⁸ *Id.* at 20,852.

⁹⁹ 687 F. Supp. 343 (S.D. Ohio 1987).

¹⁰⁰ *Id.* at 344.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 344-45.

As is apparent (and in stark contrast to *Tarkowski*, probably because in *Tarkowski* the courts were never convinced that the EPA had any rational basis for its actions), District Judge Spiegel was willing to give the EPA almost all of the deference the agency sought. The only limits the opinion shows to be available to the defendants came from Judge Spiegel's requirement that the EPA had to give oral or written notice to defendants at least twenty-four hours before the time of the initiation of the EPA activities on the defendant's property.¹⁰⁴

In another recent case, considered by a different District Court at about the same time as, but with significantly different facts than those in, *Tarkowski*, the Federal District Court for the Eastern District of Louisiana appears to have had little trouble being able to conclude that the EPA demonstrated a reasonable basis for the agency's belief that there could have been a release. The City of New Orleans had delayed cleanup and therefore had "interfered" with entry on the site by the EPA, and therefore the EPA should receive an order enjoining the City from any further interference with the EPA site access.¹⁰⁵

In this case, the EPA requested access to former municipal waste landfill based on its reasonable belief that there could have been release or threat of release of hazardous substances. During prior investigations the EPA had discovered that soil at site contained numerous hazardous substances. Analyzing the five-part test, and especially the requirements in Section 104(e)(1) that for this authority to be exercised, there must be a reasonable basis to believe that there may be a release or threat of release of a hazardous substance or pollutant or contaminant, the Court examined the factual basis for the EPA belief.¹⁰⁶ The existence of hazardous substances located at the site and the site's inclusion in the National Priorities List was enough evidence for the court to conclude that the EPA had this reasonable basis.¹⁰⁷

The opinion also noted other cases, which held that reasonableness requirements would be satisfied when: (1) the EPA site manager smelled something and the site had been included in the National Priorities List;¹⁰⁸ or (2) the EPA demonstrated that a reasonable basis to believe that there

¹⁰⁴ *Id.* at 345.

¹⁰⁵ *United States v. City of New Orleans*, 86 F. Supp. 2d 580 (E.D. La. 1999).

¹⁰⁶ *Id.* at 582.

¹⁰⁷ *Id.* at 584.

¹⁰⁸ *United States v. Mountaineer Refining Co.*, 886 F. Supp. 824, 828 (D.Wyo. 1995).

could be a hazardous release in the future;¹⁰⁹ or (3) samples analysis showed existence of hazardous substances.¹¹⁰

III. CASE LAW REGARDING STATE ENVIRONMENTAL ACCESS STATUTES

In the absence of a uniform act defining procedures for access to sites for the purpose of environmental assessment and remediation, as expected there are wide variations from state to state as to what is allowed, and where limits are imposed. However, despite this diversity, it might be helpful to look at some of the state variations, and the way they have been construed by their state courts.

A. *California*

In *Jacobsen v. Superior Court of Sonoma County*,¹¹¹ the California Supreme Court examined the extent of entry onto private lands permitted by a state statute. Whatever entry into or examination of private lands is permitted by California Code Civ. Proc. § 1242, the Court concluded that this entry or examination cannot amount to anything more than innocuous entry and superficial examination that would suffice for the purposes of the entry and which would not seriously impinge upon or impair the rights of the owner to use and enjoy his property. Although this case does not involve an environmental agency, the court's interpretation of the California statute may be helpful in predicting how a court would interpret a similar situation with a state environmental agency.

In this case, the agency regulating municipal water districts requested permission of local landowners to enter their properties for the purpose of determining whether or not there was rock under the property suitable for building dams. The testing would involve drilling holes in the property about five inches in diameter and 150 feet deep as well as excavating pits measuring up to six feet wide and fifteen feet deep. The agency estimated that it would take four men approximately sixty days to complete this testing. The court found that compelling the landowners to

¹⁰⁹ *United States v. Northside Sanitary Landfill*, 18 Env'tl. L. Rep. 20,850, 20,851 (S.D. Ind. 1988).

¹¹⁰ *In the Matter of Venus Labs., Inc.*, 1990 WL 172583 *1 (N.D. Ill. 1990).

¹¹¹ 219 P. 986 (Ca. 1923).

submit to this type of entry without compensation would amount to a taking and be unconstitutional.¹¹²

B. *Ohio*

After obtaining an administrative search warrant from the trial court, the Ohio EPA entered onto the property of the Ross Incineration Service. The owner then requested a temporary restraining order, which was denied. The owner filed a motion to quash the warrant, which was denied, by the trial court. The Court of Appeals of Ohio, Ninth District, held that a property owner is entitled to an evidentiary hearing to quash the warrant. The court also held that under the applicable state statute, R.C. § 3734.07, there is a statutory procedure granting the Ohio Environmental Protection Agency discretion in seeking an access warrant and in the imposition of, as well as judicial discretion in issuing a warrant and in the imposition of costs. The same statute further provides that if the landowner is successful in its challenge to a warrant, any costs of the entry and warrant imposed on the landowner *must* be reviewed.¹¹³

C. *New York*

In general, entries onto private property made by the state and its agencies for the purpose of making surveys and examinations are not takings of property in the constitutional sense.¹¹⁴ A New York Supreme Court decision found that allowing such entry was constitutional because New York law also requires that any damage to private property done in the process of surveys or examinations must be compensated by the state.¹¹⁵ In *King*, employees of the Power Authority entered upon the Plaintiff's land and dug holes, blasted, cut trees and other vegetation. The Plaintiff claimed that this entry constituted a taking without compensation. The court dismissed the plaintiff's claim, relying upon New York Public Authorities Law Section 1007 subd. 8, allowing entry onto private property for purposes of survey and examination.

¹¹² See generally *id.*

¹¹³ Ohio Env'tl. Prot. Agency v. Ross Incineration Servs., Inc., 579 N.E.2d 758 (Ohio Ct. App. 1989).

¹¹⁴ New York Public Authorities Law § 1007, subd. 8.

¹¹⁵ King v. Power Auth., 353 N.Y.S.2d 547 (N.Y. App. Div. 1974).

Another state environmental agency case from New York is *Juliano v. Montgomery-Otsego-Schoharie Solid Waste Management*.¹¹⁶ This case involved plaintiffs who sought “just compensation” for monitoring wells and piezometers remaining on their land after testing was completed.¹¹⁷ In terms of some of the language used in the EPA “consent for access” document appended to this Article, and because of its analysis of the primary federal decision in the area of site analysis, access and takings law, the *Hendler* decision, discussed below, the *Juliano* case warrants closer attention than perhaps do many state court opinions on these subjects.

In this case, the plaintiffs owned 166 acres of land that they purchased in 1987 to operate a shooting and hunting club. The defendant in the case was a New York Public Authority created to establish a solid waste facility in the county where the land was. The Authority’s powers included the power to condemn. The plaintiffs signed a “Testing Agreement,” paying them \$1000 for granting the Authority the right to enter and to test their property. Well installation and testing went on for almost three years, and by that point there were 24 monitoring wells and 8 piezometers left in the property.¹¹⁸ The Authority at that point told the plaintiffs that no decision about the location of the landfill could be made for a few more years, and told them that if the property were acquired, the plaintiffs would be compensated. The Authority also admitted that if the project were abandoned, they would be obligated to compensate the plaintiffs for any damage to their property, as required by the Testing Agreement.¹¹⁹

Chief Judge McAvoy identified two takings issues. The first was whether the wells and piezometers left in the property constituted a “permanent physical occupation” requiring just compensation. The second was the designation of the property as a potential site for a regional landfill constituted a regulatory taking requiring just compensation.¹²⁰ In a footnote, the opinion acknowledges that all takings law is based on the Fifth Amendment to the United States Constitution, and that analysis (starting with the *Pennsylvania Coal* case, discussed below) needs now to

¹¹⁶ 983 F. Supp. 319 (N.D.N.Y. 1997).

¹¹⁷ *Id.* at 322.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 328.

¹²⁰ *Id.* at 323.

consider both of the two distinct theories of liability, physical occupation and regulatory takings.¹²¹

As far as a regulatory takings-based claim was concerned, since there had been no decision on whether to use the plaintiff's property, or even to build a landfill, the Court determined that the claim was not ripe for judicial review, and therefore was dismissed.

Next, the Court considered the issue of permanent physical occupation and the takings consequences of that. Alluding to the U.S. Supreme Court's 1992 decision in *Yee v. City of Escondido*,¹²² the Court recognized that if the government had committed or authorized a permanent physical occupation of property, "the Takings Clause generally requires compensation."¹²³ Based on the U.S. Supreme Court's earlier 1982 decision in *Loretto v. Teleprompter Manhattan CATV Corp.*,¹²⁴ Judge McAvoy further acknowledged that where there is such a permanent, physical occupation, there is a *per se* taking, "*without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.*"¹²⁵

But the opinion goes on to lament the inconsistencies of takings theories, and the absence of clear guidance where a court confronts what has come to be termed "temporary physical takings:"

In summary, where the governmental action consists of a permanent physical occupation, a *per se* taking exists. Conversely, where the governmental action is not physical and permanent, a multi-factor balancing test is required. See, e.g. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) [citations omitted]. Takings jurisprudence has thus evolved into two distinct branches that purport to protect the same right but use tests that share virtually no common elements.¹²⁶ *However, by*

¹²¹ *Id.* at 323 n.3.

¹²² 503 U.S. 519 (1992).

¹²³ *Id.* at 522.

¹²⁴ 458 U.S. 419 (1982).

¹²⁵ *Id.* at 434-35 (emphasis added).

¹²⁶ In footnote five, the opinion observes that the apparent inconsistencies and contradictions between the two branches of takings law have not escaped comment by academics, citing specifically Dennis H. Long, *The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and an Opportunity for New Directions in Takings Law*, 72 IND. L. J. 1185 (1997).

*abandoning the multi-factor balancing test in favor of a per se rule, the physical occupation branch of takings jurisprudence has overlooked an important subspecies of physical takings: the temporary physical taking. Unfortunately, this appears to be precisely the issue presented here.*¹²⁷

The opinion notes the dilemma created by the *Loretto* opinion's conclusion that permanent physical occupations are takings "even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land"¹²⁸ (as appears to be the situation with the Authority's intrusion). It also recognizes the problem, raised and strongly criticized in Justice Blackmun's dissent in *Loretto*, that there is no precise definition developed for what is meant by the term "permanent."¹²⁹

The *Juliano* decision then proceeded to examine what it felt to be, since *Loretto*, the only reported case to try to clarify what was "permanent," and the impact of that evaluation on whether there was a taking, *Hendler v. United States*,¹³⁰ Since the facts and analysis in *Hendler* are discussed below, they are not repeated here. However, it is significant, as recognized by the opinion, that both the *Juliano* and the *Hendler* cases involved very similar facts related to wells that had been installed and maintained by a governmental agency that had entered a private landowner's property.

Chief Judge McAvoy was critical of both the *Hendler* analysis and with its reliance on precedent that the New York District Court felt not only did not support the *Hendler* reasoning, but which actually undercut it. He also concluded that some of the statements in *Hendler* about whether a permanent physical occupation in all cases had to be exclusive or continuous (*Hendler* said it did not¹³¹), were in "clear conflict" with Supreme Court precedent, particularly *Loretto*.¹³² Based on all of this, the District Court in *Juliano* rejects what it believes to be "*Hendler's*

¹²⁷ *Juliano v. Montgomery-Otsego-Schoharie Solid Waste Management*, 983 F. Supp. 319, 325 (N.D.N.Y. 1997) (emphasis added).

¹²⁸ *Loretto*, 458 U.S. at 430.

¹²⁹ *Id.* at 448.

¹³⁰ *Hendler v. United States*, 952 F.2d 1364 (1991).

¹³¹ *Id.* at 1377.

¹³² *Juliano*, 983 F. Supp. at 327.

contorted definition" of the term "permanent."¹³³ Instead, the New York District Court uses the dictionary definition of permanent—"intended to exist or function for a long, indefinite period without regard to unforeseeable conditions."¹³⁴ The District Court examines the details of what will be required to decommission the wells and piezometers.¹³⁵ Then, applying the dictionary definition of "permanent," the Court concludes that such procedures as the pressure injection of cement grout would be permanent, and that therefore, as a matter of law, the Authority's actions constituted a permanent physical taking entitling the Plaintiffs to an award of just compensation.¹³⁶ The exact amount of compensation was a question of fact, and therefore was left for a jury to determine.¹³⁷

D. *Massachusetts*

A Massachusetts statute allows the state to remove hazardous waste and prevent further contamination.¹³⁸ However, public interest has been held to take precedence over private property rights. In *Nassr v. Commonwealth*,¹³⁹ the Supreme Court of Massachusetts found that the fact that the state temporarily occupied private property near a contamination site did not transform the state's actions through the exercise of police power pursuant to Massachusetts's statute into the exercise of eminent domain power under which the landowner would be entitled to compensation.¹⁴⁰ In this case, the Plaintiff was completely barred from the use of his property for eighteen months. However, the court found that this action was not a taking because the court did not consider it an eminent domain action under Massachusetts's statute.¹⁴¹

E. *New Jersey*

¹³³ *Id.* at 328.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ M.G.L.A c. 21 § 27(14).

¹³⁹ 477 N.E.2d 987 (Mass. 1985).

¹⁴⁰ *Id.* at 990.

¹⁴¹ *Id.* at 991.

A New Jersey statute appears to be more inclusive with what it defines as a taking.¹⁴² Case law relying upon this statute has interpreted certain monitoring actions by the Department of Environmental Protection (“DEP”) as physical takings. Because of this interpretation, the taking is considered a taking *per se*, and does not depend upon the size or extent of the taking.¹⁴³ In *Rohaly*, the DEP installed three groundwater monitoring devices onto the Plaintiff’s property to monitor contamination of the surrounding areas. The court in this case found the size of the wells were irrelevant as to the determination of whether this is a taking because physical takings are takings *per se* under a New Jersey statute N.J.S.A. 20:3-1 to 20:3-50.¹⁴⁴

IV. TAKINGS LAW—ITS INTERACTION WITH SITE ACCESS

A. *History of Takings Law Prior to 1987*

Prior to 1987, the United States Supreme Court was extremely deferential to governmental agencies, and consequently often seemed reluctant to label an agency’s actions as a taking. In 1978, the Court endorsed a series of factual inquires for determining a taking.¹⁴⁵ Specifically, the Supreme Court’s three-prong test included analyses of (1) the character of the government action, (2) the economic impact of the particular action on the property owner, and (3) the extent to which the government action has interfered with distinct, investment-backed expectations.¹⁴⁶ This test applied to the traditional understanding of a taking—the physical entrance and use of an individual’s land by the state without compensation. Even with these clearly stated factors, the Supreme Court, operating with the assumption that our properly functioning democracy would not unjustifiably impose burdensome regulation or enter onto another’s land, was hesitant to find takings.

1. The Takings Triumvirate—1987

¹⁴² N.J.S.A. 20:3-1 to 20:3-50.

¹⁴³ *Rohaly v. Dep’t of Env’tl. Prot. & Energy*, 732 A.2d 524 (N.J. Super. Ct. App. Div. 1999).

¹⁴⁴ *Id.* at 526.

¹⁴⁵ *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

¹⁴⁶ *Id.* at 124.

However, three decisions in 1987 revealed a more critical stance by the Supreme Court. First, in a case by heirs of members of the Sioux Tribe, the Court found that the Indian Land Consolidation Act of 1983, Section 207, effected a taking that required just compensation.¹⁴⁷ In this case, the Court systematically attacked the Section of the Act by adhering to the three-prong test articulated in *Penn Central*. Ultimately, the Court rested its recognition of a taking on the character of the government action and the economic impact on the plaintiffs.¹⁴⁸ In its analysis the Court also rests its decision on the Act's restraint of a fundamental right of property—alienation.¹⁴⁹

Less than a month later, the Court found another taking.¹⁵⁰ The Court invalidated a condition of public access to property in exchange for a rebuilding permit. The Court found that the character of such a restriction did not “substantively advance” a legitimate state interest.¹⁵¹ While the state of California may have a legitimate interest in beach access, conditioning rebuilding permits on such access without just compensation oversteps the regulative capacity of the State.¹⁵²

The Court also found a regulatory action by the government to be a taking in another 1987 case.¹⁵³ This case reasserted the doctrine that in

¹⁴⁷ *Hodel v. Irving*, 481 U.S. 704 (1987).

¹⁴⁸ *Id.* at 714-17.

¹⁴⁹ *Id.* at 717.

¹⁵⁰ *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

¹⁵¹ *Id.* at 834.

¹⁵² *Id.* at 841-42.

¹⁵³ *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 322 (1987) (holding that regulatory ordinance that prohibited building on property already owned by plaintiff constituted a taking). In its decision a few months ago in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465 (2002), the United States Supreme Court may have narrowed the impact of *First English*. By a 6-3 majority the Court determined that a 32 month moratorium on development in the Lake Tahoe Basin, while a comprehensive land-use plan was formulated, did not constitute a regulatory taking under the approach taken in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

With respect to *First English*, Justice Stevens, after noting that “*First English* was certainly a significant decision,” and further claiming that “nothing we say here today qualifies its holding,” concluded that *First English* had decided a “compensation question” or a “remedial question,” (referring to 482 U.S. at 311, 313 and 318) and did not address the “quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking.” *Tahoe-Sierra Preservation Council*, 122 S. Ct. 1482 (emphasis added). The three dissenting Justices (Rehnquist, Thomas and Scalia) apparently viewed the holding of *First English* differently, since they felt that in

addition to the typical notion of a governmental taking by eminent domain, the regulation of property can potentially constitute a taking.¹⁵⁴ Specifically the Court, analyzing the status of temporary interference with the use of property—"temporary takings," concluded that temporary takings are not different from permanent takings in their effect and requisite compensation.¹⁵⁵

2. The Branching Structure of Takings Law

Historically, takings law has been roughly divided into two types of cases: the traditional notion of a taking as a permanent, physical occupation of land ("physical taking") and the regulation of property until it is of worthless value ("regulatory taking").¹⁵⁶ As noted earlier (in connection with the discussion of the New York Federal District Court decision in *Juliano*) recent case law, however, has suggested a third branch—the "temporary physical taking."

Although it probably does not rise to the dignity of a fourth branch, the circumstances usually present when an environment regulatory agency enters a site for contamination assessment or remediation present an interesting overlap of both physical and regulatory taking. Clearly the agency or its contractors are physically on the property to drill wells, sample or even to remove contaminated material. How long they will need to be there depends entirely on the nature and extent of the of the contamination, and on the techniques used to analyze and respond to it. Yet, at the same time, the agencies in their justification of why they need to enter and to remain rely on their regulatory and police power authority. As can be seen from the comments below, whether a reviewing court evaluates the entry as a physical taking or as a regulatory taking can have a major impact on the recoverability of any damages from that entry.

B. *Physical Taking: Physical Deprivation as a Per Se Taking*

First English the Court had rejected any requirement that there be a "taking of 'the parcel as whole'"—another point where the majority in *Tahoe* felt otherwise (*see, e.g. id.*)—and instead had held that "temporary and permanent takings 'are not different in kind,' when a landowner is deprived of all beneficial use of his land." *Id.* at 1492 (Thomas, J., dissenting).

¹⁵⁴ *Id.* at 316; *see also* Penn. Cent. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

¹⁵⁵ *First English*, 482 U.S. at 318-19.

¹⁵⁶ Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-16 (1992).

In 1871, *Pumpelly v. Green Bay Co.* expanded the notion of a physical taking beyond that of the traditional formal action of eminent domain.¹⁵⁷ Here, the Supreme Court held that the Takings Clause of the Wisconsin Constitution demanded compensation for the physical deprivation of plaintiff's property resulting from the construction of a dam that continuously flooded plaintiff's property. Specifically, the Court reasoned that, regardless of the public benefit, such permanent deprivation was a *per se* taking demanding compensation.¹⁵⁸

In its more recent and oft-cited decision in *Lucas v. South Carolina Coastal Council*,¹⁵⁹ the Court stated that "[i]n general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."¹⁶⁰

Where the government must act to remedy a nuisance, courts have been willing to create an exception to this *per se* rule.¹⁶¹ The United States Supreme Court's recent decision in *Tahoe-Sierra Preservation Council* does not appear to recognize that "when the government physically takes possession of an interest in property for some public purpose, it has a *categorical duty* to compensate the former owner regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof."¹⁶² If a court is willing to regard a regulatory or governmental action as a physical taking of a possessory interest, then even after *Tahoe-Sierra Preservation Council* it appears that a *per se* taking will exist.

C. *Regulatory Taking: Regulation Subject to a Factual Analysis to Determine Whether a Taking*

In *Pennsylvania Coal Co. v. Mahon*, the Court explained, "the general rule at least is, that while property may be regulated to a certain

¹⁵⁷ *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871).

¹⁵⁸ *Id.* at 181.

¹⁵⁹ 505 U.S. 1003 (1992).

¹⁶⁰ *Id.* at 1015.

¹⁶¹ See *Aztec v. Romer*, 940 P.2d 1025 (Colo. Ct. App. 1996).

¹⁶² *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1478 (2002).

extent, if regulation goes too far it will be recognized as a taking."¹⁶³ Over fifty years later, the Court adopted the three-prong test for determining whether a regulation had gone "too far."¹⁶⁴ However, as articulated in *Lucas*, if a regulation destroys the total economic value of the property, then the deprivation may be treated as a taking per se.¹⁶⁵

D. *Temporary Physical Taking: The Uncertain Standard*

In *Loretto*, the Court distinguished a physical invasion from the more traditional physical occupation or permanent taking.¹⁶⁶ Later in the opinion, the Court states, "such temporary limitations are subject to a more complex balancing process to determine whether they are a taking."¹⁶⁷ But, this language was part of the dicta of the Court. The Court still has not specifically addressed this issue.

However in one of the appellate decisions in *Hendler v. United States*,¹⁶⁸ the court suggested that the *per se* rule may be applicable.¹⁶⁹ Specifically, the *Hendler* court said that all takings are temporary in the sense that the government agencies can change their minds at a later time.¹⁷⁰ Further, the court observed both of the following characteristics when evaluating what might make a taking "temporary" or "permanent:"

Permanent does not mean forever, or anything like it. A taking can be for a limited term—what is "taken" is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute

If the term temporary has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly

¹⁶³ *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

¹⁶⁴ *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

¹⁶⁵ *Lucas*, 505 U.S. at 1027.

¹⁶⁶ *Loretto*, 458 U.S. at 433 (arguing that physical invasion cases are "special").

¹⁶⁷ *Id.* at 435 n.12.

¹⁶⁸ *Hendler v. United States*, 952 F.2d 1364 (1991).

¹⁶⁹ *See id.*

¹⁷⁰ *Id.* at 1376.

can be viewed as no more than a common law trespass
quare clausum fregit.¹⁷¹

Additionally, the court declared that the three-prong test of *Penn Central* applied to regulatory takings and had no relevance to a cause of action premised on an actual physical occupancy.¹⁷²

Notably, in *Scogin v. United States* (discussed below), the Federal Claims Court cited both *Hendler* and *Loretto* when saying that the broader *Penn Central* analysis applies when a physical intrusion does not amount to a permanent physical occupation, but merely a "transient and relatively inconsequential" physical presence.¹⁷³

V. THE CURRENT STATUS OF ENVIRONMENTAL SITE ACCESS LAW— ALMOST TO THE POINT WHERE THERE CAN BE A COMPENSABLE TAKING

*The intruder who enters clothed in the robes of authority in broad daylight commits no less an invasion of these rights than if he sneaks in in the night wearing a burglar's mask. In some ways, entry by the authorities is more to be feared, since the citizen's right to defend against the intrusion may seem less clear. Courts should leave no doubt as to whose side the law stands upon.*¹⁷⁴

As is probably evident from the frequent references to it thus far, at the present time the *Hendler* case probably is the most relevant, at least at the federal level, in any effort to claim that regulatory site access can amount to a taking. As seen from cases like *Juliano*, the claim of a taking does not come, usually from mere access, but instead most often surfaces

¹⁷¹ *Hendler*, 952 F.2d at 1376. The United States District Court for the Northern District of New York, in a 1997 opinion written by Chief Judge McAvoy, in *Juliano v. Montgomery-Otsego-Schohaire Solid Waste*, 983 F. Supp. 319, 327 n.7 (1997), characterized the *Hendler* terminology and criticized its lack of a rational definition of terms, as "creative use of language" that "calls to mind Lewis Carroll's famous passage: "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less," *id.* (citing and quoting from LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 163).

¹⁷² *Id.* at 1381.

¹⁷³ *Scogin v. United States*, 33 Fed. Cl. 285, 291-92 (1995).

¹⁷⁴ *Hendler*, 952 F.2d at 1375 (emphasis added).

when the access is, accompanied by longer term well placement, vehicle storage, demobilization activities, or similar activities affecting a landowner's right to use its property.

*Hendler v. United States*¹⁷⁵ actually is a case that has generated numerous decisions. The property involved is approximately 100 acres in size, and is located in Southern California. The land was acquired for investment purposes in 1960, at a time when the area was largely agricultural. The property is near a former rock quarry, which in the past had been converted to use as a toxic waste disposal site. That site became one of the more famous—probably infamous—sites involved in the CERCLA program, as is still known as the Stringfellow Acid Pits site.

In 1983, the EPA, acting pursuant to CERCLA, approached the owners of the Hendler property with a proposal that the EPA locate wells and associated equipment on the Hendler location, to monitor the movement of contaminated groundwater from Stringfellow. When Hendler did not agree, the EPA issued an access order to allow both federal and state officials to have access to the property for the purpose of installing wells and testing the groundwater.¹⁷⁶ Over the next three years, twenty wells were installed and maintained. Litigation based on the original access order began in 1984 in the Claims Court, and the the EPA terminated the order itself in 1994.¹⁷⁷

In their suit, the Hendler property owners claimed that entry onto their land, and the installation of wells, constituted a "taking" under the Fifth Amendment. The EPA moved to dismiss based on the plaintiffs' failure to comply with discovery requests, and the Claims Court granted the EPA's motion. In 1991, the Federal Circuit Court of Appeals, in an opinion written by Circuit Judge Plager, reversed the dismissal and concluded that the trial court should have entered summary judgment for the Plaintiffs on their physical taking claim, observing in the opinion that "the Government behaved as if it had acquired an easement"¹⁷⁸

As noted already the Federal Circuit Court of Appeals left open for future fact-specific findings the issue of whether the character of the governments actions and the plaintiff's investment-backed expectations, might have created sufficient economic impact on the plaintiffs to amount

¹⁷⁵ *Id.* at 1364.

¹⁷⁶ *See Hendler v. United States*, 36 Fed. Cl. 574, 576-579 (1996).

¹⁷⁷ *Id.* at 580.

¹⁷⁸ *Hendler v. United States*, 952 F.2d 1364, 1378 (1991).

to a regulatory taking. However, the Court did proceed, applying the traditional physical occupation theory, to determine that physical occupation of property that is "adjudged to be of a permanent nature" is a taking regardless of whether achieves a public benefit or has only minimal economic impact on the owner.¹⁷⁹

The Court then proceeded to consider what was a "permanent" taking. Although, as already discussed, subsequent opinions and commentators have criticized the character of the definition used, even those comments rarely have questioned the Court's determination that "there is nothing 'temporary' about the wells that the Government installed on the plaintiff's property"—these wells were seen to be at least as "permanent" as was the CATV equipment in *Loretto*.¹⁸⁰

The Court said it was not necessary to define what duration makes a physical presence a taking, because it felt the case before it is "comfortably within the degree necessary to make out a taking."¹⁸¹

In 1999, the Federal Circuit Court of Appeals once again considered Hendler's claims.¹⁸² Circuit Judge Plager also wrote this opinion. The Court observed that a pivotal criterion for when there would be a taking is the impact the regulatory imposition has had on the economic use of the property.¹⁸³ The Court acknowledged that the value of the property does not require a total wipeout of all regulatory use before there would be a taking, but unless the facts and evidence establish some negative economic impact, then there will be no regulatory taking.¹⁸⁴

Although the Court had previously found a physical taking, it denied and rejected the claim for compensation because the government's taking of what the Court acknowledged was a well site and access corridor easement resulted in a "special benefit" to the property owners which outweighed the value of the easements.¹⁸⁵ The Court also rejected the claim that there had been a regulatory taking because "if the regulatory action is not shown to have had negative economic impact on the property,

¹⁷⁹ *Id.* at 1375.

¹⁸⁰ *Id.* at 1376.

¹⁸¹ *Id.* at 1377.

¹⁸² *Hendler v. United States*, 175 F.3d 1374 (1999).

¹⁸³ *Id.* at 1385 (citing *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1564-65 (1994) and *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171, 1179-80 (1994)).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

there is no regulatory taking.”¹⁸⁶ Here, the trial court had rejected the claims of economic impact, and found that for purposes of measuring any economic impacts, their land was already stigmatized by Stringfellow, rather than by government action under the access order.¹⁸⁷ The Court of Appeals did not consider the trial court factual findings to be clearly erroneous, and therefore could not disturb those.¹⁸⁸

There are two other federal cases of note, following and applying the early *Hendler* analysis. In *Scogin v. United States*,¹⁸⁹ the Claims Court determined that when there was a physical intrusion, but not a permanent physical occupation, then the Court was obligated to apply the broader balancing *Penn Central* inquiry.¹⁹⁰ As is often the situation, in the instant case, the EPA went on the plaintiff's property to clean up a neighboring CERCLA site.

Consistent with conclusions in some of the *Hendler* decisions, the Court concluded that the EPA site access order, by itself, did not constitute a taking. For there to be a taking, the EPA would first have to act on that order.¹⁹¹ Based on the facts presented, the Court felt that the property owner had consented to the entry, use, and occupation, thereby relinquishing any claim for taking *unless* the agency oversteps the boundaries of the original agreement. In the instant case, the plaintiff failed to prove that the EPA did more than what was allowed in what the Court considered, under the CERCLA standard, to be a valid access agreement.

In *McKay v. United States*,¹⁹² the Federal Claims Court of Appeals considered a situation where multiple groundwater monitoring wells had been drilled and maintained on federal land, but wells and their impact extended into the plaintiff's separate underground mineral estate. Therefore, the Court determined that there was a physical taking by the government installing groundwater monitoring wells, even though the wells were on federal land. The decision cites *Lucas*' observation that a small intrusion and weighty public purpose still does not excuse the

¹⁸⁶ *Id.* at 1385 (citing *Florida Rock Indus.*, 18 F.3d at 1569-71 and *Loveladies Harbor*, 28 F.3d at 1180).

¹⁸⁷ 36 Fed.Cl. 574 at 588.

¹⁸⁸ *Hendler*, 175 F.3d at 1378

¹⁸⁹ 33 Fed.Cl. 285 (April 1995) and 33 Fed.Cl. 568 (June 1995).

¹⁹⁰ 33 Fed.Cl. at 291-92.

¹⁹¹ 33 Fed.Cl. at 576.

¹⁹² 199 F.3d 1376 (1999).

government from its duty to compensate.¹⁹³ Although this case had facts similar to those in *Hendler*, on the basis of the evidence presented at trial the appellate court felt that this invasion into the mineral estate was neither isolated nor transitory, since multiple wells had been drilled and maintained for several years.¹⁹⁴

A. The EPA's Use of Consent Decree Language to Address These Issues

Perhaps in response to cases like these, or perhaps just as a result of an increasing awareness by the EPA of the complexity of law with respect to site access and to when site access demands might result in a taking, in several recent consent decrees and draft decrees now in negotiation, the EPA appears to have developed provisions to address, or attempt to address at least, the takings and access issues already discussed. It does not appear that the EPA has yet announced these provisions as a part of a formal change in the Department of Justice "form" decree,

"Standard" provisions in almost any CERCLA consent decree dealing with remediation include language to assure the EPA that it can have the needed access, both at the site under remediation and in adjacent properties where wells or soil sampling might be needed. A recent decree, however, went further and provides as follows:

25. If the Site, or any other property where access and/or land/water use restrictions are needed to implement this RD/RA Consent Decree, is owned or controlled by persons other than the Settling Defendant, Settling Defendant shall use best efforts to secure from such persons:
 - a. an agreement to provide access thereto for Settling Defendant, as well as for the United States on behalf of EPA, and the State, as well as their representatives (including contractors), for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 24.a of this Consent Decree [Paragraph 24.a identifies the

¹⁹³ *Id.* at 1381.

¹⁹⁴ *Id.* at 1381-82.

- activities expected to occur as a part of the RD/RA remediation, including tasks such as well monitoring, obtaining samples, and inspecting the progress of the remediation];
- b. an agreement, enforceable by the Settling Defendant and the United States, to abide by the obligations and restrictions established by Paragraph 24.b of this Consent Decree, or that are otherwise necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree [Paragraph 24.b deals with any interference with groundwater monitoring, and includes a prohibition on any installation or use of any drinking water wells that would draw from the surficial aquifer]; and
- c. the execution and recordation in the Registry of Deeds or other appropriate land records office of _____ County, State of _____, of an easement, running with the land, that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 24.a of this Consent Decree, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph 24.b of this Consent Decree, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree. The access rights and/or rights to enforce land/water use restrictions shall be granted to one or more of the following persons: (i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, (iii) the

other Settling Defendants and their representatives, and/or (iv) other appropriate grantees. Within 45 days of entry of this Consent Decree, Settling Defendant shall submit to EPA for review and approval with respect to such property:

- (1) A draft easement, in substantially the form attached hereto as Appendix D, that is enforceable under the laws of the State of Florida, free and clear of all prior liens and encumbrances (except as approved by EPA), and acceptable under the Attorney General's Title Regulations promulgated pursuant to 40 U.S.C. § 255; and
- (2) a current title commitment or report prepared in accordance with the U.S. Department of Justice Standards for the Preparation of Title Evidence in Land Acquisitions by the United States (1970) (the "Standards").

Within 15 days of EPA's approval and acceptance of the easement, Settling Defendant shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment or report to affect the title adversely, the easement shall be recorded with the Registry of Deeds or other appropriate office of Orange County. Within 30 days of the recording of the easement, Settling Defendant shall provide EPA with final title evidence acceptable under the Standards, and a certified copy of the original recorded easement showing the clerk's recording stamps.

26. For purposes of Paragraph 25 of this Consent Decree, "best efforts" includes the payment of reasonable sums of money in consideration of access, access easements, land/water use restrictions, and/or restrictive easements. If any access or land/water use restriction agreements required by Paragraphs 25.a or 25.b of this Consent

Decree are not obtained within 45 days of the date of entry of this Consent Decree, or any access easements or restrictive easements required by Paragraph 25.c of this Consent Decree are not submitted to EPA in draft form within 45 days of the date of entry of this Consent Decree, Settling Defendant shall promptly notify the United States in writing, and shall include in that notification a summary of the steps that Settling Defendant has taken to attempt to comply with Paragraph 25 of this Consent Decree. The United States may, as it deems appropriate, assist Settling Defendant in obtaining access or land/water use restrictions, either in the form of contractual agreements or in the form of easements running with the land. Settling Defendant shall reimburse the United States in accordance with the procedures in Section XVI (Reimbursement of Response Costs), for all costs incurred, direct or indirect, by the United States in obtaining such access and/or land/water use restrictions including, but not limited to, the cost of attorney time and the amount of monetary consideration paid or just compensation.¹⁹⁵

The following provision did *not* get included in the final decree—but had been suggested in the negotiation process. The only two reasons given for its deletion in the final draft were (1) the Department of Justice was tired of negotiating, and the decree was presented (without this provision) in a “take it or leave it” option and (2) some people at the Department, involved in the review of the proposed decree, had questions about the advisability of adding this kind of a “standard”.¹⁹⁶

In making a determination as to whether to assist Settling Defendant in obtaining access and/or land use restrictions, the United States will consider the ability of

¹⁹⁵ United States v. Drum Serv. Co. of Florida et al., Civ. No. 98-687-Civ-Orl.-28JGG (excerpt from paragraphs 25 and 26 of the RD/RA Consent Decree for Settling Defendant Drum Serv. Co. of Florida, entered by Judge Antoon on September 17, 2001).

¹⁹⁶ Undated correspondence between author and the EPA (on file with author).

the Settling Defendant to pay for such access and/or restrictions at the time any request for assistance is made.

At the time the final decree provisions were being negotiated, the Settling Defendant and its counsel requested some standards for what might constitute the "reasonable sum" required to prove "best efforts" under Paragraph 26. They were told that no more specific standards could be offered, nor could the term of this part of the decree be limited, nor could any type of "comfort letter" be given, because the determination of whether the Settling Defendant had offered a "reasonable sum" for an easement would depend on market conditions at the time of the offer.¹⁹⁷

Furthermore, even though the EPA and the Department of Justice were unwilling or unable to include such language in the final decree, the Settling Defendant was told that this language (had it been included) ought to give that party some "comfort" that, if the market value of the easement exceeded what the EPA/DOJ determined to be the ability to pay of the Settling Defendant, the EPA would assist the Settling Defendant.¹⁹⁸ Instead, the final decree language apparently leaves the determination of what is a "reasonable sum" to the EPA, and further obligates the Settling Defendant (as a Reimbursement Cost) to reimburse the United States for whatever is needed to obtain the necessary access or land use/water use restrictions.¹⁹⁹

Other "standard" provisions in any CERCLA consent decree are covenants by various parties. There usually are mutual covenants not to sue, but recently there have been some additions to those expected to be given by a Settling Defendant. Two of these additions (highlighted below) relate directly to a requirement that the Settling Defendant forego any right to make the very claim which the cases discussed here have concluded was the only remedy where there had been a taking—to bring an action under the Tucker Act, or to make any claim under the United States Constitution, or even to claim the benefits of any state statutory or constitutional provision for compensation where there has been a taking.

The text of a Covenant Not to Sue (by the Settling Defendant) in a recently entered consent decree reads as follows:

XXII. COVENANTS BY THE SETTLING DEFENDANT

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

88. Covenant Not to Sue. Subject to the reservations in Paragraph 89, the Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States with respect to the Site or this RD/RA Consent Decree, including, but not limited to:
- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;
 - b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or
 - c. any claims arising out of response activities at the Site, including claims based on EPA's selection of response actions, oversight of response activities or approval of plans for such activities.
 - d. any claims arising under the United States Constitution, the Florida Constitution, State law, the Tucker Act, 28 U.S.C. § 1491, or common law, arising out of or relating to past or future access to, imposition of deed restrictions or easements, or other restrictions on the use and enjoyment of property owned or controlled by the Settling Defendant; and
 - e. any claims for costs, fees or expenses incurred in this action (including claims arising under the Equal Access to Justice

Act, as amended, 28 U.S.C. § 2412) or
under any provision of State law.²⁰⁰

VI. CONCLUSION: WHERE TO GO FROM HERE?

Based on the foregoing analysis, it should be apparent that both state and federal regulatory agencies have a need and right to obtain access to contaminated sites. Equally apparent is the fact that federal and state law can impose some limitations on those agencies, although in many instances the limitations can be quite limited. Furthermore, the circumstances related to an agency's request for site access to contaminated property are usually not driven by the agency looking for some way to "harass" or interfere with a private property owner's rights, but instead by a real agency belief that there is a contamination problem which needs assessment, remediation or both.

Even so, in light of some of the issues which arose in the *Tarkowski* litigation, as well as some of the other observations noted earlier in this article, when a regulatory agency believes it has a need for access, and when a property owner is confronted with an agency request for access, where possible the interaction between the agency and the landowner should include an early and clear explanation of the site and environmental circumstances dictating the request, and the opportunity to document this need for the landowner.

In the process of requesting access, regulatory agencies should try to take into account some of the factors that the author identified earlier as a more "rational and reasonable" approach to the issues confronting site access requests. Some of these are included in the private party Site Access and License Agreement form that is appended to this article. However, counsel for private parties must recognize that many of the mechanisms included in that form, such as indemnification or covenants to pay the landowner's consultant and legal fees, are neither applicable to, nor usually legally a part of, agreements with public regulatory agencies.

But, likewise, agencies should accept that landowners' requests for having these issues addressed in the site access documentation are not efforts to interfere with the agency performance of its job, or to delay the access, but are instead recognition by the landowner that there are some risks related to the access and to the agency or agency agents' and

²⁰⁰ United States v. Drum Serv. Co. of Florida et al., Civ. No. 98-687-Civ-Orl.-28JGG (excerpt from paragraph 88 of the RD/RA Consent Decrees for Settling Defendant Drum Serv. Co. of Florida entered by Judge Antoon on September 17, 2001).

contractors' use of the property, that should not be imposed on the landowner merely because it has "consented" to access.

Some, but not all, of these potential issues and requests would include the following:

(a) Is there any insurance in place to cover the risks of injury to the site and to those on and around it? Often the agency contractors have been required to obtain such protection as a condition to receiving their contract with the agency. If there is such insurance in place, often the contractors can very easily be able to include the landowner in the policy's protection, perhaps even including the landowner as an additional named insured.

(b) Can the access documents reflect agreement by the agency that the landowner's "consent" to access should not be construed, for state law lien or tort law purposes, as an "invitation" to the agency or its contractors onto the property, nor as work being done for or at the request of the property owner? If the applicable state law has provisions whereby a landowner can disavow lien liability for work done at the direction of others, although done on the landowner's property and with its "consent," can the access documents include language to provide the landowner the benefit of those?

(c) To the extent possible, can the scope of the work to be performed on the property, and the area where there is a right of access, be defined or limited in some way? Perhaps there could an easement defined and actually granted to get to where wells are to be placed or monitored? Perhaps wells could be placed at locations that would minimize their impact on the landowner's normal use of its property, or of the property use by tenants. Although admittedly it is far easier on the agency to define the area for which they need access as the entire site, that broad-brush treatment can create real issues and problems for the landowner. If the property is encumbered with a mortgage, deed of trust or existing restrictive covenants, the agency should be willing to work with the landowner to assure, to extent feasible, that

agency and agency contractor activities on the land do not result in a violation of restrictions in those instruments.

(d) To the extent possible, can the document include some realistic process to provide the landowner with notice of when the agency or its agents and contractors expect to be present, and how long they would expect they would need to be at the site?

(e) Can the access documentation assure the landowner that when there is no longer any need for access, wells will be properly closed, equipment removed, and the property returned to the same condition, except for "normal wear and tear" as it was in when access began? If there cannot be such an assurance granted by the agency itself, can the agreement include a provision whereby the agency will agree to use its best efforts to have its contractors provide such assurances, in writing, to the landowners?

(f) Can the document include some limit on its duration, perhaps coupled with a practical process to extend the term if needed?

(g) Can the document include some process whereby the agency will provide the landowner with copies of the data resulting from the sampling on its property? It should not be necessary—as has been the case at some CERCLA locations—for the landowner to have to file a Freedom of Information Act request to be able to obtain these results.

The author recognizes that where the EPA, or state agencies acting in conjunction with the EPA, are involved, those agencies must consider the EPA and DOJ guidance on this issue (a copy of which is attached to this article). Under that guidance, those agencies are expected to use the "Consent for Access to Property" form that is a part of the guidance memo, and which is also appended to this article. Unfortunately, that form offers absolutely none of the assurances suggested by the list above. Furthermore, to the extent that the EPA or state agency insists on use of that form, negotiations can become unnecessarily antagonistic.

The author has had personal experiences with some EPA Regions, where there have been varying degrees of insistence that there has to be

“strict” adherence to the Guidance and to the use of the “Consent” form. In other instances, state and EPA personnel have been more flexible and have dealt with many of the issues listed above. Perhaps in connection with the process of revising EPA guidance in connection with requirements of the Small Business Liability Relief and Brownfields Revitalization Act, an effort could be made to allow agency personnel greater flexibility.

To the extent that agencies are able to work together with landowners in this fashion, there would certainly be a decreased risk of the situation getting to the point where the landowner demanded compensation for a “taking.” Furthermore, to the extent that these procedures can be followed, circumstances such as those in *Tarkowski* can certainly be avoided. The success of these efforts will assure the further and future twists to this old tale.

APPENDIX A*

Entry and Continued Access Under CERCLA

***** DISCLAIMER *****

The following electronic file contains the text of a policy issued by the U.S. Environmental Protection Agency (EPA). This file has been reformatted to make it available to you in electronic form. Formatting (margins, page numbering, etc.) may be different than the original hard copy to make the document more easily readable on your computer screen. Where graphics have been removed, the editor has noted it in the text. This electronic file is a courtesy copy of the official policy. If any discrepancies are found, the file copy (hard copy original) which resides at the U.S. EPA provides the official policy.

JUN 5 1987

OSWER Directive #9829.2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Entry and Continued Access Under CERCLA
FROM: Assistant Administrator
TO: Regional Administrators I-X
Regional Counsels I-X

* Appendix A consists of 4 documents: The Access Memorandum; the Disclaimer; Exhibit A; and Exhibit B. All documents begin on their own separate pages within the Appendix.

INTRODUCTION

This memorandum sets forth EPA's policy on entry and continued access to facilities by EPA officers, employees, and representatives for the purposes of response and civil enforcement activities under CERCLA.¹ In short, the policy recommends that EPA should, in the first instance, seek to obtain access through consent. Entry on consent is preferable across the full range of onsite activities. If consent is denied, EPA should use judicial process or an administrative order to gain access. The appropriate type of judicial process varies depending on the nature of the onsite activity. When entry is needed for short-term and non-intrusive activities, an *ex parte*, judicial warrant should be sought. In situations involving long-term or intrusive access, EPA should generally file suit to obtain a court order.

The memorandum's first section addresses the recently amended access provision in CERCLA. The memorandum then sets forth EPA policy on obtaining entry and the procedures which should be used to implement this policy, including separate discussions on consent, warrants, court orders, and administrative orders.

STATUTORY AUTHORITY

EPA needs access to private property to conduct investigations, studies, and cleanups. The Superfund Amendments and Reauthorization Act of 1986 (SARA) explicitly grants EPA² the authority to enter property for each of these purposes. Section 104(e)(1) provides that entry is permitted for "determining the need for response, or choosing or taking any response action under this title, or otherwise enforcing the provisions of this title."

SARA also establishes a standard for when access may be sought and defines what property may be entered. EPA may exercise its entry authority "if there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant." Section 104(e)(1). SARA, however, does not require that there be a

¹ This policy does not address information requests under Section 104(e)(2).

² Although CERCLA and SARA confer authority upon the President that authority has been delegated to the EPA Administrator. Exec. Order No. 12580, Section 2(g) and (i), 52 Fed. Reg. 1923 (1987).

release or threatened release on the property to be entered.³ Places and properties subject to entry under Section 104(e) include any place any hazardous substance may be or has been generated, stored, treated, disposed of, or transported from; any place a hazardous substance has or may have been released; any place which is or may be threatened by the release of a hazardous substance; or any place where entry is needed to determine the need for response or the appropriate response, or to effectuate a response action under CERCLA. Section 104(e)(3). EPA is also authorized to enter any place or property adjacent to the places and properties described in the previous sentence. Section 104(e)(1).

EPA is granted explicit power to enforce its entry authority in Section 104(e)(5). Under that provision EPA may either issue an administrative order directing compliance with an entry request or proceed immediately to federal district court for injunctive relief. Orders may be issued where consent to entry is denied. Prior to the effective date of the order, EPA must provide such notice and opportunity for consultation as is reasonably appropriate under the circumstances. If EPA issues an order, the order can be enforced in court. Where there is a "reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant," courts are instructed to enforce an EPA request or order unless the EPA "demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." Section 104(e)(5). The legislative history makes clear that courts should enforce an EPA demand or order for entry if EPA's finding that there is a reasonable basis to believe there may be a release or threat of release is not arbitrary and capricious. 132 Cong. Rec. S14929 (October 3, 1986) (Statement of Sen. Thurmond); 132 Cong. Rec. H9582 (October 8, 1986) (Statement of Rep. Glickman). See *United States v. Standard Equipment, Inc.*, No. C83-252M (W.D. Wash. November 3, 1986). In addition, a penalty not to exceed \$25,000/day may be assessed by the court for failure to comply with an EPA order or the provisions of subsection (e).

Finally, Section 104(e)(6) contains a savings provision, which preserves EPA's power to secure access in "any lawful manner." This broad savings provision is significant coming in the wake of the Supreme Court's holding that:

³ The House Energy and Commerce bill at one point contained this limitation. H.R. Rep. No. 99-253 Part 1, 99th Cong., 1st Sess., 158 (1985). This limitation, however, was dropped prior to introduction of the bill for floor debate. See H.R. 2817, 99th Cong., 1st Sess., 131 Cong. Rec. H10857 (December 4, 1985).

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.

. . . Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted.

Dow Chemical Co. v. United States, 90 L.Ed. 2d 226, 234 (1986).⁴ One lawful means of gaining access covered by this paragraph is use of judicially issued warrants. See S. Rep. No. 99-11, 99th Cong. 1st Sess. 26 (1985).

In numerous instances prior to the passage of SARA, EPA obtained court ruling affirming its authority to enter property to conduct CERCLA activities.⁵ Following enactment of SARA, several courts have ordered site owners to permit EPA access. *United States v. Long*, No. C-1-87-167 (S.D. Ohio May 13, 1987); *United States v. Dickerson*, No. 84-76-VAL (M.D. Ga. May 4, 1987); *United States v. Standard Equipment, Inc.*, No. C83-252M (W.D. Wash. Nov. 3, 1986). Further, the one adverse ruling on EPA's right of access has been vacated by the Supreme Court. *Outboard Marine Corp. v. Thomas*, 773 F.2d 883 (7th Cir. 1985), vacated, 93 L. Ed.2d 695 (1986).

EPA ACCESS POLICY

EPA needs access to sites for several types of activities, including:

- preliminary site investigations;

⁴ See also, *Mobil Oil Corp. v. EPA*, 716 F.2d 1187, 1189 (7th Cir. 1983), cert. denied, 466 U.S. 980 (1984) (EPA authority to sample effluent under Section 308 of the Clean Water Act broadly construed); *CEDs, Inc. v. EPA*, 745 F.2d 1092 (7th Cir. 1984), cert. denied, 471 U.S. 1015 (1985).

⁵ *United States v. Pepper Steel and Alloy, Inc.*, No. 83-1717-CIV-EPS (S.D. Fla. October 10, 1986); *Bunker Limited Partnership v. United States*, No. 85-3133 (D. Idaho October 21, 1985); *United States v. Coleman Evans Wood Preserving Co.*, No. 85-211-CIV-J-16 (M.D. Fla. June 10, 1985); *United States v. Baird & McGuire Co.* No. 83-3002-Y (D. Mass. May 2, 1985); *United States v. United Nuclear Corp.*, 22 ERC 1791, 15 ELR 20443 (D.N.M. April 18, 1985).

- removal actions;
- RI/FSs; and
- remedial actions.

Within each of these categories, the scope of the work and the time needed to complete that work may vary substantially. This memorandum sets Agency policy on what means should be used to gain access over the range of these various activities.

EPA may seek access through consent, warrant, administrative order, or court order. Consent is the preferred means of gaining access for all activities because it is consistent with EPA policy of seeking voluntary cooperation from responsible parties and the public. In certain circumstances, however, the Region should consider obtaining judicial authorization or issuing an administrative order in addition to obtaining consent. For example, where uncertainty exists whether a site owner will continue to permit access over an extended period, reliance on consent alone may result in a substantial delay if that consent is withdrawn.

When consent is denied, EPA should seek judicial authorization or should issue an administrative order. If the judicial route is chosen, EPA may seek an ex parte warrant or a court order. Warrants are traditionally granted for short-term entries. Generally, warrants should not be used when the EPA access will involve long-term occupation or highly intrusive activities. Clearly, warrants are appropriate for preliminary site investigations. On the other hand, because of the long, involved nature of remedial actions, access for such projects should be sought through a request for a court order. Neither removals nor RI/FSs, however, can be rigidly matched with a given judicial access procedure. Depending on the activities to be undertaken and the circumstances at the site, either a warrant or a court order may be appropriate.

In deciding whether to use a warrant or a court order when access is needed for a removal or to conduct a RI/FS, the following general principles should be considered. First, if the activity will take longer than 60 days a court order normally is appropriate. Second, even if the activity will take less than 60 days, when the entry involves removal of large quantities of soil or destruction of permanent fixtures, a court order may again be appropriate. Finally, warrants should not be used if EPA action will substantially interfere with the operation of onsite business activities. These issues must be resolved on a case-by-case basis.

If EPA needs to gain access for a responsible party who has agreed to undertake cleanup activities under an administrative order or judicial decree, EPA may, in appropriate circumstances, designate the responsible

party as EPA's authorized representative solely for the purpose of access, and exercise the authorities contained in Section 104(e) on behalf of the responsible party. Such a procedure may only be used where the responsible party demonstrates to EPA's satisfaction that it has made best efforts to obtain access. A further condition on the use of this procedure is that the responsible party agree to indemnify and hold harmless EPA and the United States for all claims related to injuries and damages caused by acts or omissions of the responsible party. The responsible party should also be advised that the expenses incurred by the government in gaining access for the responsible party are response costs for which the responsible party is liable. Before designating any responsible party as an authorized representative, the Region should consult with the Office of Enforcement and Compliance Monitoring.

ACCESS PROCEDURES

A. Entry on Consent

1. General Procedures

The following procedures should be observed in seeking consent:

Initial Contact. Prior to visiting a site, EPA personnel⁶ should consider contacting the site owner to determine if consent will be forthcoming. EPA personnel should use this opportunity to explain EPA's access authority, the purpose for which entry is needed, and the activities which will be conducted.

Arrival. EPA personnel should arrive at the site at a reasonable time of day under the circumstances. In most instances this will mean during normal working hours. When there is a demonstrable need to enter a site at other times, however, arrival need not be limited to this timeframe. Entry must be reasonable given the exigencies of the situation.

⁶ As used in this guidance, the term "EPA personnel" includes contractors acting as EPA's authorized representatives.

Identification. EPA personnel should show proper identification upon arrival.

Request for Entry. In asking for consent, EPA personnel should state the purpose for which entry is sought and describe the activities to be conducted. EPA personnel should also present a date-stamped written request to the owner or person-in-charge. A copy of this request should be retained by EPA. Consent to entry must be sought from the owner⁷ or the person-in-charge at that time.

If practicable under the circumstances, consent to entry should be memorialized in writing. A sample consent form is attached. Although oral consents are routinely approved by the courts, a signed consent form protects the Agency by serving as a permanent record of a transaction which may be raised as a defense or in a claim for damages many years later. If a site-owner is unwilling to sign a consent form but nonetheless orally agrees to allow access, EPA should document this oral consent by a follow-up letter confirming the consent. Since EPA contractors often are involved in gaining access in the first instance, the Regions should ensure that their contractors are acquainted with these procedures.

2. Denial of Entry

⁷ If EPA's planned site activities will not have a physical effect on the property, EPA generally need not seek consent from the owner of leased property where the lessee is in possession. The proper person in those circumstances is the lessee. But where EPA entry will have a substantial physical effect on the property, both the lessee and the property-owner should be contacted since in this instance interests of both will be involved.

If consent is denied, EPA personnel or contractors, before leaving, should attempt to determine the grounds for the denial. EPA personnel, however, should not threaten the site owner with penalties or other monetary liability or make any other remarks which could be construed as threatening. EPA personnel may explain EPA's statutory access authority, the grounds upon which this authority may be exercised, and that the authority may be enforced in court.

3. Conditions Upon Entry

Persons on whose property EPA wishes to enter often attempt to place conditions upon entry. EPA personnel should not agree to conditions which restrict or impede the manner or extent of an inspection or response action, impose indemnity or compensatory obligations on EPA, or operate as a release of liability. The imposition of conditions of this nature on entry should be treated as denial of consent and a warrant or order should be obtained. see U.S. EPA, General Counsel Opinions, "Visitors' Release and Hold Harmless Agreements as a Condition to Entry of EPA Employees on Industrial Facilities," Gen'l and Admin. at 125 (11/8/72). If persons are concerned about confidentiality, they should be made aware that business secrets are protected by the statute and Agency regulations. 42 U.S.C. Section 9604(e); 40 C.F.R. Section 2.203(b). EPA personnel should enter into no further agreements regarding confidentiality.

B. Warrants

1. General Procedures

To secure a warrant, the following procedures should be observed:

Contact Regional Counsel. EPA personnel should discuss with Regional Counsel the facts regarding

the denial of consent or other factors justifying a warrant and the circumstances which give rise to the need for entry.

Contact Department of Justice. If after consultation with Regional counsel a decision is made to seek a warrant, the Regional Counsel must contact directly the Environmental Enforcement Section in the Land and Natural Resources Division at the Department of Justice.⁸ The person to call at the Department is the Assistant Chief in the Environmental Enforcement Section assigned to the Region. The Assistant Chief will then arrange, in a timely manner, for the matter to be handled by either an Environmental Enforcement Section attorney or a U.S. Attorney. The Region must send to the Environment Section, by Magnafax or other expedited means, a draft warrant application and a short memorandum concisely stating why the warrant is needed.

Prepare Warrant Application. The warrant application must contain the following:

- 1) a statement of EPA's Authority to inspect; (see Section II, *supra*)
- 2) a clear identification of the name and location of the site and, if known, the name(s) of the owner and operator of the site;

⁸ This procedure is necessary to comply with internal Department of Justice delegations of authority. Referral to a local U.S. Attorney's office is not sufficient for CERCLA warrants. The Environmental Enforcement Section of the Department of Justice must approve all warrant applications. (See Memorandum from David T. Buente, Jr. to All Environmental Enforcement Attorneys, "Procedures for Authorizing Applications for Civil Search Warrants Under CERCLA" (4/3/87) attached).

- 3) a statement explaining the grounds for a finding of a reasonable basis for entry (i.e., a reasonable basis to believe that there may be a release or threatened release of a hazardous substance or pollutant or contaminant) and the purpose for entry (i.e., determining the need for response, or choosing or taking any response action, or otherwise enforcing CERCLA);
- 4) affidavits supporting the asserted reasonable basis for entry and describing any attempts to gain access on consent, if applicable; and
- 5) a specific description of the extent, nature, and timing of the inspection;

Following preparation of the warrant application, the Justice Department attorney will file the application with the local U.S. Magistrate.

EPA may ask the Justice Department attorney to seek the assistance of the United States Marshals Service in executing the warrant where EPA perceives a danger to the personnel executing the warrant or where there is the possibility that evidence will be destroyed.

2. Reasonable Basis for Entry

A warrant for access on a civil matter may be obtained upon a showing of a reasonable basis for entry. This reasonable basis may be established either by presenting specific evidence relating to the facility to be entered or by demonstrating that the entry is part of a neutral administrative inspection plan.

A specific evidence standard is incorporated in SARA as a condition on EPA's exercise of its access authority: EPA must have "a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant." Section 104(e)(1). SARA's express

specific evidence standard is consistent with how courts have formulated the specific evidence test in the absence of statutory guidance. E.g., *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 958 (11th Cir. 1982) (there must be a "showing of specific evidence sufficient to support a reasonable suspicion of a violation").

In drafting a warrant application, conclusory allegations regarding the specific evidence standard under subsection 104(e) will not suffice. Courts generally have refused to approve warrants where the application contains mere boilerplate assertions of statutory violations. Warrant applications have been granted, on the other hand, where the application contained detailed attestations by government officials or third-party complaints which have some indicia of reliability. Ideally, EPA warrant applications should contain an affidavit of a person who has personally observed conditions which indicate that there may be a release or threat of a release of a hazardous substance. If they are available, sampling results, although not required, should also be attached. Warrant applications based on citizen, employee, or competitor complaints should include details that establish the complainant's credibility.⁹

C. Court Orders

The provisions in CERCLA authorizing EPA access may be enforced by court order. To obtain a court order for entry, the Region should follow the normal referral process.

⁹ If information gathered in a civil investigation suggests that a criminal violation may have occurred, EPA personnel should consult the guidance on parallel proceedings. (Memorandum from Courtney Price to Assistant Administrators et al., "Policy and Procedures on Parallel Proceedings at the Environmental Protection Agency" (1/23/84)). Use of CERCLA's information-gathering authority in criminal investigations is addressed in separate guidance. Memorandum from Courtney M. Price to Assistant Administrators et al., "The Use of Administrative Discovery Devices in the Development of Cases Assigned to the Office of Criminal Investigations" (2/16/84)).

If only access is required, the referral package can obviously be much abbreviated. If timing is critical, EPA HQ will move expeditiously and will refer the case orally if necessary. The Regions, however, should attempt to anticipate the sites at which access may prove problematic and should allow sufficient lead time for the referral process and the operation of the courts. The Regions should also not enter lengthy negotiations with landowners over access. EPA and DOJ are prepared to litigate aggressively to establish EPA's right of access.

Prior to seeking a court order, EPA should request access, generally in writing, and assemble the record related to access. The showing necessary to obtain a court order is the same as for obtaining a warrant: EPA must show a reasonable basis to believe that there may be a release of a threat of a release of a hazardous substance or pollutant or contaminant. An EPA finding on whether there is reason to believe a release has occurred or is about to occur must be reviewed on the arbitrary and capricious standard. Section 104(e)(5) (B)(i). If the matter is not already in court, EPA must file a complaint seeking injunctive and declaratory relief. Simultaneous to filing the complaint, EPA may, if necessary, file a motion, supported by affidavits documenting the release or threatened release, requesting an immediate order in aid of access. If the matter is already in litigation, EPA may proceed by motion to seek an order granting access.¹⁰

¹⁰ Parenthetically, it should be noted that the broad equitable power granted to courts in Section 106 can also be relied on to obtain a court order. An additional source of authority for courts in this regard is the All Writs Act, 28 U.S.C. Section 1651. The Act authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions" 28 U.S.C. Section 1651. This authority "extends under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing are in a position to frustrate the implementation of a court order" *United States v. New York Telephone Co.*, 434 U.S. 159, 174 (1977). Thus, the All Writs Act may prove useful as a means of compelling persons not a party to a consent decree to cooperate with EPA and other settling parties in execution of the decree. The use of the All Writs Act, however, may be limited in light of the Supreme Court's interpretation of the Act in *Pennsylvania Bureau of Correction v. United States Marshal Service*, 88 L. Ed. 2d 189 (1985).

In a memorandum supporting EPA's request for relief it should be made clear that by invoking judicial process, EPA is not inviting judicial review of its decision to undertake response action or of any administrative determinations with regard to the response action. Section 113(h) of SARA bars judicial review of removal or remedial action except in five enumerated circumstances. A judicial action to compel access is not one of the exceptions. Statements on the floor of the House and the Senate confirm that EPA enforcement of its access authority does not provide an opportunity for judicial review of response decisions. Senator Thurmond, chairman of the Judiciary Committee, remarked that when EPA requests a court to compel access "there is no jurisdiction at that time to review any response action. [T]he court may only review whether the Agency's conclusion that there is a release or threatened release of hazardous substances is arbitrary or capricious." 132 Cong. Rec. S14929 (October 3, 1986) (Statement of Sen. Thurmond); 132 Cong. Rec. 119582 (October 8, 1986) (Statement of Rep. Glickman); see *United States v. Standard Equipment, Inc.*, No. C83- 252M (W.D. Wash. Nov. 3, 1986).

D. Administrative Orders

If a site owner denies an EPA request for access, EPA may issue an administrative order directing compliance with the request. Section 104(e)(5)(A). Each administrative order must include a finding by the Regional Administrator that there exists a reasonable belief that there may be a release or threat of release of a hazardous substance and a description of the purpose for the entry and of the activities to be conducted and their probable duration. The order should indicate the nature of the prior request for access. Further, the order should advise the respondent that the administrative record upon which the order was issued is available for review and that an EPA officer or employee

will be available to confer with respondent prior to the effective date of the order. The length of the time period during which such a conferences may be requested should be reasonable under the circumstances. In deciding what is a reasonable time period, side ration should be given to the interference access will cause with onsite operations, the threat to human health and the environment posed by the site, and the extent of prior contacts with the respondent. The order should advise the respondent that penalties of up to \$25,000 per day may be assessed by a court against any party who unreasonably fails to comply with an order, Section 104(e)(5). Following the time period for the conference and any conference, the issuing official should send a document to the respondent summarizing any conference, EPA's resolution of any objections, and stating the effective date of the order.

If, following issuance of an administrative order, the site owner continues to refuse access to EPA, the order may be enforced in federal court. EPA should not use self-help to execute orders. Courts are required to enforce administrative orders where there is a reasonable basis to believe that there may be a release or threat of a release of a hazardous substance. EPA's determination in this regard must be upheld unless it is arbitrary and capricious, Section 104(e)(5)(B)(i). EPA will seek penalties from those parties who unreasonably fail to comply with orders.

All administrative orders for access must be concurred on by the Office of Enforcement and Compliance Monitoring prior to issuance.

DISCLAIMER

The policies and procedures established in this document are intended solely for the guidance of government personnel. They are not intended, and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

EXHIBIT A**CONSENT FOR ACCESS TO PROPERTY**

Name:

Address of Property:

I consent to officers, employees, and authorized representatives of the United States Environmental Protection Agency (EPA) entering and having continued access to my property for the following purposes:

[the taking of such soil, water, and air samples as may be determined necessary;]

[the sampling of any solids or liquids stored or disposed of on site;]

[the drilling of holes and installation of monitoring wells for subsurface investigation;]

[other actions related to the investigation of surface or subsurface contamination;]

the taking of a response action including]

I realize that these actions by EPA are undertaken pursuant to its response and enforcement responsibilities under the Comprehensive Environmental Response, Compensation and Liability Act (Superfund), 42 U.S.C. Section 9601 et seq.

This written permission is given by me voluntarily with knowledge of my right to refuse and without threats or promises of any kind.

Date

Signature

EXHIBIT B**SITE ACCESS AND LICENSE AGREEMENT**

This Agreement is made and entered into this ____ day of July, 2000, by and between **I. M. OWNER** (hereinafter "Owner") having as its address c/o _____ Florida 33870-7204, **BIG HIGH-TECH COMPANY**, having an address of _____ (hereinafter referred to as "BIG HTC" or "Adjacent Owner"), and **WONDERFUL ENVIRONMENTAL SERVICES, INC.**, having an address of _____, and any other subcontractor of WES, pre-approved in writing by Adjacent Owner (collectively referred to as "WES" or "Adjacent Owner's Contractor")

WITNESSETH:

WHEREAS, Owner owns a comprehensive general professional practice and building operating and located on certain real property in Sunny, Florida (the "Property"), legally described in Exhibit "A" attached hereto and made a part hereof.

WHEREAS, Adjacent Owner is the owner and operator of a convenience store and petroleum retail facility, referred to by Adjacent Owner as Deep Hole #222, which facility is located on Sunnyside Drive in Sunny, Florida, and is adjacent to the Property.

WHEREAS, in October 13, 1999, Adjacent Owner learned that free petroleum product was observed in sumps above underground storage tanks at the site of the convenience store and petroleum retail facility. In response to this, Adjacent Owner submitted a Discharge Reporting Form to the Florida Department of Environmental Protection ("DEP"), and commenced initial free product recovery activities at that time.

WHEREAS, in response to this free product discovery and to the submission of the Discharge Reporting Form to DEP, Adjacent Owner retained WES to perform a contamination assessment in accordance with the requirements of DEP. The results of that assessment were contained in a report entitled "Limited Contamination Assessment Report" prepared by

WES dated March 15, 2000. WES provided a copy of that report at the request of Adjacent Owner, to DEP.

WHEREAS, DEP reviewed the Report and by letter dated May 13, 2000 (such letter being attached hereto as Exhibit "B") recommended additional sampling and the construction of additional wells.

WHEREAS, in response to the DEP request, Adjacent Owner intends to drill one and possibly a second well on the Property of Owner, such wells being located at the locations indicated on the sketch attached hereto as Exhibit "C".

WHEREAS, Owner is willing to allow Adjacent Owner and WES to drill such well or wells conditioned upon Adjacent Owner and WES's compliance with the provisions of this Agreement.

NOW, THEREFORE, in consideration of the recitals set forth above and good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Owner, Adjacent Owner and WES hereby agree as follows:

1. Owner hereby grants Adjacent Owner's Contractor reasonable access to the Property for the sole purpose of installing and sampling up to two monitoring wells (the "Monitoring Wells") (the "Work") in accordance generally with the two locations described in the sketch which is attached hereto as Exhibit "C"; provided, however, the exact location for such wells shall be subject to Owner's prior written approval. With respect to the Work, Adjacent Owner and WES shall comply with all requirements imposed by DEP, including but not limited to requirements as to the depth of such wells and the laboratory parameters for sampling. Adjacent Owner and WES have represented to Owner that if the northerly of the two wells noted is not shown through sampling results to be impacted, the southerly well will not be installed. Owner agrees that such construction, sampling and re-sampling of the Monitoring Wells by Adjacent Owner's Contractor pursuant to this Agreement creates no obligation upon Adjacent Owner subsequently to re-sample any Monitoring Wells on the Property, except to the extent requested or required by DEP, it being agreed by the parties that neither the grant of this Site Access Agreement by Owner nor the performance of the Work by Adjacent Owner shall be deemed to constitute or give rise to any waiver of any

defense, right or remedy either party may have against the other, whether in law or in equity.

2. In connection with conduct of the Work, Owner hereby agrees that Adjacent Owner's Contractor may bring onto the Property such equipment or machinery as may be reasonably necessary in order to complete the Work.
3. The Work shall be performed at Adjacent Owner's sole cost and expense, and neither WES nor Adjacent Owner shall make any charge against Owner for the work it performs on or about the Property in connection with the Work or with this Agreement. Owner's interest in the Property shall not be subject to liens for improvements made by Adjacent Owner or by WES, and neither WES nor Adjacent Owner shall have any power or authority to create any lien or permit any lien to attach to the Property for any cause or reason. Adjacent Owner's Contractor, and all materialmen, contractors, artisans, mechanics and laborers and other persons contracting with Adjacent Owner with respect to the Property or any part thereof, are hereby charged with notice that such liens are expressly prohibited and that they must look solely to Adjacent Owner to secure payment for any work done or material furnished for improvements by or for any other purpose during the term of this agreement. Adjacent Owner's Contractor shall advise all persons furnishing designs, labor, materials or services to the Property in connection with Adjacent Owner's Contractor's work thereof of the provisions of this Section. Prior to commencing the Work on the Property, Adjacent Owner's Contractor (and all authorized subcontractors) shall provide Adjacent Owner with a waiver of lien for the Work in the form attached hereto.
4. Adjacent Owner commits to provide funding to WES or to any replacement Adjacent Owner Contractor, to allow completion of the Work in accordance with all applicable regulatory requirements. Adjacent Owner further commits that it shall expend such funds as are needed to pay for the proper abandonment of the wells (and borings, if applicable) contemplated to be performed as a part of the Work. Adjacent Owner represents to Owner that Adjacent Owner concurs in WES's determination, as Reported in the Limited contamination Assessment Report on page 5, that "active remediation of the contaminated groundwater (related to the site studied by the Report) should be conducted immediately." In that regard, Adjacent Owner further represents to Owner that it is the intention of Adjacent Owner

to allow WES to proceed as expeditiously as is possible with the cleanup and remediation of any petroleum contamination disclosed and reported in the Limited Contamination Assessment Report. Adjacent Owner and Adjacent Owner's Contractor jointly agree to provide Owner (or Owner's counsel if so requested by Owner) with copies of all data results and reports which arise or are prepared in connection with the performance of the sampling and of any remediation related to the Work by Adjacent Owner's Contractor.

5. Adjacent Owner's Contractor shall conduct the activities described above at the Property at a specific times to be approved in advance in writing by Owner or by Owner's designated agent, and without interfering with Owner's conduct of its normal dental operations on the Property. Adjacent Owner's Contractor shall provide Owner with at least five (5) days written notice of the date the Work shall begin. Owner shall have the right to observe the Work and, if desired by Owner, to take split samples of the samples collected by Adjacent Owner's Contractor. WES personnel authorized to have access to the Property under this Agreement shall include DEP employees and authorized representatives of DEP for purposes of monitoring WES's activities hereunder.
6. At its sole cost and expense, Adjacent Owner's Contractor shall maintain its equipment and other materials in an orderly manner while they are located on the Property and shall promptly remove or engage a qualified subcontractor (in accordance with all applicable environmental requirements of all federal, state or local regulatory authorities having jurisdiction over the Property and the Work) promptly to remove and properly to dispose of all contaminated materials excavated or extracted from the Property during the Work. All debris, trash, equipment and other materials used or caused by the Work shall similarly be removed prior to the time the Work is completed. Adjacent Owner's Contractor agrees to complete the work on the Property as quickly as possible, and to minimize any disruption of Owner's business and professional activities on the Property. If Adjacent Owner's Contractor causes damage to the Property during the Work, the Adjacent Owner's Contractor promptly shall cause such damage to be repaired, upon written notice to from Owner to Adjacent Owner or to WES. Upon completion of the Work, WES shall leave the Property in the same condition as before the Work began, to the extent possible, except that monitoring well or wells will be required and allowed to remain in place pursuant to the terms of this

Agreement, until such time as WES abandons such well(s) in accordance with applicable regulatory provisions.

7. WES and Adjacent Owner jointly agree to indemnify and to defend, protect, and hold harmless Owner, and Owner's agents from any and all losses, liabilities, fines, damages, injuries, penalties, response costs, or claims of any and every kind, whatsoever paid, incurred or asserted against or threatened to be asserted against Owner or Owner's agents, resulting from or in any way connected with the access granted to Adjacent Owner and to WES pursuant to the provisions of this Agreement, or connected with or related to the performance of the Work pursuant to the provisions of this Agreement. Adjacent Owner further agrees to reimburse Owner for all reasonable environmental consultant and attorneys fees which environmental consultants and counsel to Owner (which, in the instance of "counsel" is intended to be a term that shall include both Owner's regular counsel and any special environmental counsel retained by Owner in connection with this matter) charge to Owner for professional services related to the Work, to this Agreement, and to the site assessment and remediation related thereto. Owner shall submit copies of such invoices to Adjacent Owner through a submission to Adjacent Owner's Contractor, including an indication of whether those statements have as of that time been paid by Owner, and Adjacent Owner's Contractor agrees promptly to submit such requests for reimbursement to Adjacent Owner. Adjacent Owner agrees to review, process and pay such requests, within a reasonable time period after they are received by it from its Contractor.
8. During the term hereof and at all times during which access is available to Adjacent Owner's Contractor, WES and all subcontractors performing the activities described in this Agreement, and their employees and agents shall maintain insurance with the following coverage:
 - (1) Workmen's Compensation with statutory limits;
 - (2) Automobile Liability with \$1,000,000.00 single limit or equivalent; and
 - (3) Comprehensive General Liability, including contractor liability covering Adjacent Owner's

obligations set forth in paragraph 6, with \$1,000,000.00 single limit or equivalent.

Prior to commencing the Work, Adjacent Owner's Contractor and all subcontractors shall provide Owner with a Certificate of Insurance, naming Owner as an additional insured, showing coverage no less than set forth above.

9. The right of access to the Property pursuant to this Site Access and License Agreement shall terminate June 30, 2003, or upon DEP issuance of a Site Rehabilitation Completion Order, whichever earlier occurs. Notwithstanding the foregoing, Owner may terminate such right of access under this Agreement, upon Owner's submission of written notice to Adjacent Owner and to WES advising those parties of a breach of this Agreement by WES, Adjacent Owner or by their employees, agents, contractors or subcontractors. Termination of the right of access pursuant to this Agreement shall not operate as a, not shall it be construed to, release of any party to this Agreement from contractual, reimbursement or indemnification obligations arising from the provisions of this Agreement, or by operation of law. The term of this Agreement may be extended if such extension is in writing, and is executed by all parties hereto.
10. This Agreement shall be binding upon the Owner, Adjacent Owner, the Adjacent Owner's Contractor and their respective successors and assigns, but this provision shall not be interpreted to permit Adjacent Owner or WES to assign their responsibilities hereunder without the prior written consent of Owner.
11. This Agreement may be executed in any number of counterparts, all of which together shall constitute one and the same instrument, any party or signatory hereto may execute this Agreement by signing any such counterpart. Delivery of a facsimile of an executed copy of this Agreement shall be effective to bind the executing party. Each party so executing this Agreement shall promptly deliver an original executed counterpart to the other signatories.
12. Adjacent Owner agrees to provide to Owner a copy of all data derived from Adjacent Owner's work on the Property or adjacent properties within a reasonable time, but in no event later than four (4) weeks after the completion of such sampling event or events. In the event that Owner splits samples with Adjacent Owner's Contractor, Owner

agrees to provide Adjacent Owner a copy of all data derived from Owner's split samples within a reasonable time, but in no event later than four (4) weeks after the completion of such sampling event or events.

IN WITNESS WHEREOF, the Owner, Adjacent Owner, and Adjacent Owner's Contractor have caused this Agreement to be executed on the date and year indicated below.

Executed by Adjacent Owner on April 1, 2002.

Executed by Adjacent Owner on April 1, 2002.

Executed by Adjacent Owner's Contractor on April 1, 2002.

By: _____

I. M. Owner

"OWNER"

WONDERFUL ENVIRONMENTAL
SERVICES, INC.

By: _____

Fame Yus Geologist, PG, President

"ADJACENT OWNER'S CONTRACTOR"

BIG HIGH-TECH COMPANY

By: _____

Title: _____

ADJACENT OWNER