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# Fourth Amendment and Statutory Limitations on Entry and Inspection of Commercial Property in Environmental Enforcement

*Steven G. Davison\**

In the twelve years since Earth Day in 1970, public attention has been focused upon the effects of pollution on the health and well-being of people and on the protection of the world's ecosystems. In response to this public concern, the United States Congress has enacted environmental protection statutes that attempt to strike a reasonable balance between economic growth and protection of the public health and the environment.

Federal legislation has been enacted to protect the public and the environment from nuclear radiation,<sup>1</sup> air pollutants,<sup>2</sup> water pollutants,<sup>3</sup> toxic chemicals,<sup>4</sup> hazardous and solid wastes,<sup>5</sup> noise,<sup>6</sup> and natural resources development.<sup>7</sup> Congress also has enacted statutes to protect endangered species of fish and wildlife.<sup>8</sup> Many

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1. The Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1976 & Supp. V 1981); Uranium Mill Tailings Control Act of 1978, 42 U.S.C. § 7901 (Supp. V 1981).

2. Clean Air Act, 42 U.S.C. §§ 7401-7626 (Supp. V 1981).

3. *E.g.*, Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981); Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-10, 7401-7626 (1976 & Supp. V 1981); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §§ 1401-1444 (1976 & Supp. V 1981).

4. Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976 & Supp. V 1981); Federal Environmental Pesticide Control Act, 7 U.S.C. § 136-136y (Supp. 1982).

5. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6986 (1976 & Supp. V 1981); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (Supp. V 1981) ("Superfund Act").

6. Noise Control Act, 42 U.S.C. §§ 4901-4918 (1976 & Supp. V 1981).

7. *E.g.*, Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (Supp. V 1981); Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1976 & Supp. V 1981); Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (Supp. 1982).

8. *E.g.*, Endangered Species Act, 16 U.S.C. §§ 1531-1543 (Supp. 1982), Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (Supp. 1982).

of these federal statutes establish or authorize pollution control and environmental protection standards that regulate the operation of industrial and commercial facilities.<sup>9</sup>

Effective enforcement of pollution control and environmental protection standards established by these federal statutes and the regulations promulgated thereunder requires periodic, unannounced inspections of regulated premises by federal, state, or local government officials. On-site inspection of pollution control equipment and operating procedures often is necessary in order to determine whether a regulated business is complying with pollutant discharge and emission limitations and standards, and other statutory and regulatory environmental protection standards. During such inspections, violations of regulatory standards may be discovered, resulting in imposition of civil or criminal penalties of fines, imprisonment, or injunctive relief. If such inspections are unannounced, frequent, and rigorous in scope, violations of statutory and regulatory environmental protection standards are likely to be detected by government inspectors. If such violations usually are detected, and if the cost of compliance with these standards is less than the amount of monetary penalties imposed by courts or administrative agencies for such violations,<sup>10</sup> businesses will comply to the extent that it is technologically feasible to do so.<sup>11</sup> Consequently, effective inspection schemes are crucial to the successful implementation and enforcement of federal environmental protection statutes.

This article will examine the limitations that the fourth amendment of the United States Constitution places upon entries and inspections of commercial property by government agents for purposes of enforcing federal environmental protection statutes. The inspection provisions of most federal environmental protection statutes will be analyzed to determine if they comply with the requirements of the fourth amendment.

#### FOURTH AMENDMENT: GENERAL PRINCIPLES

The fourth amendment of the United States Constitution pro-

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9. Although private residential dwelling units may in some instances be subject to regulation under federal environmental protection statutes, these statutes primarily regulate businesses operating on commercial property. Consequently, this article will focus only upon businesses operating on commercial property that are regulated under these federal environmental protection statutes.

10. See 42 U.S.C. § 7420 (Supp. V 1981).

11. See *Bethlehem Steel Corp. v. EPA*, 669 F.2d 903 (3d Cir. 1982).

hibits any search or seizure that is unreasonable.<sup>12</sup> "[T]he Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property."<sup>13</sup> Consequently, the fourth amendment protects owners of commercial property against unreasonable searches and seizures by government agents seeking to enforce federal environmental protection statutes.

Although the fourth amendment does not explicitly state that a search or seizure must be authorized by a warrant, the Supreme Court of the United States requires a warrant unless the search or seizure in question fits within a recognized exception to the general rule.<sup>14</sup> A search or seizure is permitted without a warrant when there is a valid consent,<sup>15</sup> when there are exigent circum-

12. *Go-Bart Importing v. United States*, 282 U.S. 344, 357 (1931). The fourth amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

13. *Donovan v. Dewey*, 452 U.S. 594, 598 (1981). Fourth amendment protections are not limited to one's dwelling place. See *v. City of Seattle*, 387 U.S. 541 (1967).

14. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.' . . . Once a lawful search has begun, it is also far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization 'particularly describing the place to be searched and the persons or things to be seized.' Further, a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search . . . .

*United States v. Chadwick*, 433 U.S. 1, 9 (1977) (citations omitted). See *v. City of Seattle*, 387 U.S. 541 (1967) (warrant required in order to make unconsented routine, periodic inspection of private commercial property to obtain compliance with municipal fire code); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (warrant required in order to make unconsented administrative inspection of private commercial property under Occupational Safety and Health Act, 29 U.S.C. § 657(a) (1976), to inspect for safety hazards and violations of regulations promulgated under the Act); *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977).

15. See *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (consent must be freely and voluntarily given in order for search pursuant to consent to be excepted from fourth amendment's warrant and probable cause requirements); *Bumper v. North Carolina*, 391 U.S. 543 (1968) (consent is not valid when it is given in acquiescence to a claim of lawful authority); *United States v. Matlock*, 415 U.S. 164 (1974) (a person who does not own property may give consent to search property that is valid against another person if the person giving the consent mutually uses, possesses common authority over, or has other sufficient relationship to the premises or effects sought to be inspected, so that it is reasonable to recognize that he has the right to permit the

stances present,<sup>16</sup> or when the governmental interests that are furthered by permitting government officials to make warrantless searches or seizures in the situations in question outweigh the invasions of privacy resulting from such warrantless conduct.<sup>17</sup> Furthermore, probable cause is not always required in order for a search or seizure to be reasonable.<sup>18</sup>

#### ADMINISTRATIVE INSPECTIONS AS SEARCHES OR SEIZURES

In order for an inspection or surveillance by a government agent pursuant to an environmental protection statute to be a "search" or "seizure" triggering fourth amendment protection, the governmental conduct must be found to have violated a person's actual expectation of privacy, and this expectation must be one that society recognizes as justifiable, reasonable, or legitimate.<sup>19</sup>

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inspection in his own right and that the other person has assumed the risk that he might permit the property to be searched).

16. See *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (citing *McDonald v. United States*, 335 U.S. 451, 456 (1948)). Exigent circumstances may be present when evidence of a crime may disappear, or the environment harmed, if police or governmental officials are required to delay a search or seizure until a warrant is obtained. See *infra* text accompanying notes 182-99.

17. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (warrant not required for fixed immigration checkpoint); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (warrant not required for inventory of car impounded by police for parking violations); *Donovan v. Dewey*, 452 U.S. 594 (1981) (warrant not required for mine inspection).

18. See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968); *South Dakota v. Opperman*, 428 U.S. 364 (1976). Cf. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

A defendant in a criminal trial has standing to challenge the admissibility of information or evidence, on the grounds that it was obtained as a result of an illegal search or seizure, if the illegal search or seizure violated his own personal fourth amendment rights; however, a person cannot have suppressed as evidence at a criminal trial items or information that were obtained in violation a third person's constitutional rights. *Rakas v. Illinois*, 439 U.S. 128 (1978) (a passenger in an automobile that he does not own generally does not have standing under the fourth amendment to challenge a search of that automobile and the seizure of items that he does not own); *United States v. Payner*, 447 U.S. 727 (1980) (defendant in a criminal trial does not have standing under the fourth amendment to challenge the admissibility of evidence taken from a third person through an intentional violation of that third person's fourth amendment rights).

Evidence obtained either directly or indirectly in violation of a person's fourth amendment rights will not be admissible as evidence at that person's criminal trial under the "exclusionary rule," see, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Brown v. Illinois*, 422 U.S. 590 (1975); however, such evidence may be admissible as evidence against that person in a civil proceeding seeking to impose a civil penalty upon that person or to obtain injunctive relief against that person. See *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Calandra*, 414 U.S. 338 (1974); *Stone v. Powell*, 428 U.S. 465 (1976).

19. *Smith v. Maryland*, 442 U.S. 735 (1979) (use of pen register device—which

Certain types of governmental inspection or surveillance of commercial property pursuant to the enforcement of federal environmental protection statutes clearly constitute a "search" or "seizure" within the meaning of the fourth amendment. Entry of plants and offices on commercial premises by government officials and inspection of equipment and business records on the premises are government actions that constitute a fourth amendment search or seizure if the areas and items inspected were not open to entry or view by the public.<sup>20</sup> Pursuant to this principle, EPA's aerial photography of various parts of a 2000-acre industrial facility was held to violate actual and reasonable expectations of privacy protected under the fourth amendment, where some of the photographs could be enlarged to make observable items located in interior regions of the facility which were impossible to observe from anywhere but directly above.<sup>21</sup>

Some types of surveillance and inspection activities by government agents do not constitute fourth amendment searches or seizures. Pollutants that have been discharged into a public waterway have been held to have been "abandoned to public exposure" and therefore not protected under the fourth amendment, so that when government agents take a sample containing these pollutants from the public waterway, no fourth amendment search or seizure occurs.<sup>22</sup> The same result would probably be reached with respect to governmental seizure of pollutant emissions from a sample of ambient air. Even if the polluter has an actual expectation of privacy against governmental seizure of pollutants he has

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records numbers dialed by a telephone, but does not intercept the contents of a telephone conversation—held not to be a fourth amendment "search"). *See Katz v. United States*, 389 U.S. 347 (1967) (interception of contents of one person's conversation on a telephone, by attaching an electronic listening device to the outside of a public telephone booth, held to be a fourth amendment "search").

Some courts have held that the "essence" of this actual (subjective) expectation of privacy requirement is "that the party 'must have acted in such a way that it would have been reasonable for him to expect that he would not be observed.'" *Dow Chemical Co. v. United States*, 536 F. Supp. 1355, 1364 (E.D. Mich. 1982) (quoting *United States v. Tabora*, 635 F.2d 131, 137 (2d Cir. 1980)), thus interpreting "this aspect of the test as an 'objective' rather than a 'subjective' requirement." *Dow Chemical*, 536 F. Supp. at 1364.

20. *See v. City of Seattle*, 387 U.S. 541, 545 (1967); *Air Pollution Varnance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974).

21. *Dow Chemical Co. v. United States*, 536 F. Supp. 1355 (E.D. Mich. 1982)

22. *United States v. Syncon Resins, Inc.*, 16 Env't Rep. Cas. (BNA) 1305 (D.N.J. May 29, 1981). This holding is consistent with the holdings of a majority of courts that trash or garbage that has been placed on the curb of a public street is not protected by the fourth amendment. *See United States v. Shelby*, 573 F.2d 971 (7th Cir. 1978).

discharged or emitted, this expectation of privacy would not be recognized as justifiable, reasonable, or legitimate. But a different result may occur if government agents are trespassing on private commercial property when they take pollutant samples or conduct observations or inspections.

In *Air Pollution Variance Board v. Western Alfalfa Corp.*,<sup>23</sup> the Supreme Court held that a fourth amendment search did not occur when, without the property owner's knowledge or consent, a state air pollution inspector entered the outdoor yard of private commercial property and made a Ringelmann opacity test<sup>24</sup> of plumes of smoke being emitted from stacks on the premises. The Supreme Court based this holding on the "open field" doctrine of *Hester v. United States*,<sup>25</sup> in which the Court held that no fourth amendment search occurred when federal agents trespassed onto open fields on private property and observed criminal conduct. The Court in *Western Alfalfa Corp.* found that the state air pollution inspector in question had made his observations from an area equivalent to an open field, since he was not on premises from which the public was excluded.<sup>26</sup> In addition, the Court observed that the inspector had not entered the plant or offices on the property, and had not inspected stacks or any other equipment,<sup>27</sup> files or papers, thereby suggesting that without the owner's consent, such conduct in private plants or offices would be a fourth amendment search or seizure.<sup>28</sup> However, the Supreme Court has not

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23. 416 U.S. 861 (1974).

24. A Ringelmann opacity test involves having a trained inspector stand in a position where he has an unobstructed view of a smoke plume, observe the smoke, and rate the smoke to the opacity scale of the Ringelmann chart. The inspector matches the color and density of the smoke plume with the numbered example on the chart. See *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861, 864 n.1 (1974).

25. 265 U.S. 57 (1924).

26. 416 U.S. at 865. The Court also noted that the inspector "had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke." *Id.*

27. 416 U.S. at 864-65.

28. Subsequent cases have interpreted *Western Alfalfa Corp.* as permitting government agents, without a warrant, to trespass onto private property to obtain information so long as there is no search or inspection of buildings or the curtilage of buildings (the area immediately surrounding a building that is equivalent to a courtyard). See *United States v. Williams*, 581 F.2d 451 (5th Cir. 1978); *United States v. Basille*, 569 F.2d 1053 (9th Cir. 1978).

In dictum in *Western Alfalfa*, the Supreme Court indicated that a fourth amendment search would not occur if an inspector, acting under the Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918 (1976 & Supp. V 1981), enters a "railroad right-of-way to determine whether noise standards are being violated." 416 U.S. at 865.

decided whether a fourth amendment search or seizure occurs when government agents trespass onto open areas of private commercial property and take samples of waste water or ambient air for purposes of testing for pollutant concentrations.<sup>29</sup> In light of the decision in *Western Alfalfa Corp.*, whether such conduct constitutes a fourth amendment search or seizure probably will depend upon whether the area from which the sample was obtained was open to the public (i.e., an open field or yard, as opposed to an area totally fenced in or closely guarded) and was observable from adjacent public or private property.<sup>30</sup>

#### ADMINISTRATIVE ENFORCEMENT INSPECTIONS PURSUANT TO WARRANTS

Search warrants authorizing administrative inspections pursuant to enforcement investigations must be based upon probable cause.<sup>31</sup> However, probable cause in this context differs from the probable cause required in the context of criminal investigations.<sup>32</sup>

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29. *Western Alfalfa Corp.*, as noted earlier in text accompanying note 27 *supra*, appears to hold that a fourth amendment "search" or "seizure" would occur if government agents trespassed into a building on private commercial property and took a wastewater sample or stack gas sample in the building.

30. See *supra* note 26 and text accompanying note 26. Applying *Western Alfalfa Corp.*, in *United States v. Syncon Resins, Inc.*, 16 Env't Rep. Cas. (BNA) 1305 (D.N.J. May 29, 1981), the court held that Coast Guard officers did not conduct a fourth amendment "search" or "seizure" when they trespassed onto private commercial property (to investigate quantities of oil running into a river) and took three wastewater samples from a riverbank above the mean high water mark, from under a product storage tank inside a containment dike, and from a leaching pond in an open area. The court noted that although the private commercial property is surrounded on three of its four sides by a fence and access to the property is gained through an entrance gate adjacent to which is a guardhouse, the Coast Guard officers entered upon the property when the gate was open and no guard was in attendance. The court also noted that the officers did not enter any building; that the officers had entered the property after the oil discharge had been observed by other Coast Guard officers from an adjacent piece of private property; and that the oil discharge could have been seen by anyone traveling along the river. The court also observed that the defendants had a very limited expectation of privacy, because they were subject to regulation under 33 U.S.C. § 1321 to prevent spills of oil; the court asserted that "closely regulated businesses have little or no reasonable expectation or [sic] privacy when officials conduct a search which relates to the reason the corporation is regulated." 16 Env't Rep. Cas., at 1308-09 n.6. See *infra* text accompanying notes 31-181. See also *United States v. Oliver*, 657 F.2d 85 (6th Cir. 1981), *Dow Chemical Co. v. United States*, 536 F. Supp. 1355 (E.D. Mich. 1982).

31. *Camara v. Municipal Court*, 387 U.S. 523, 534-39 (1967)

32. In the criminal context, probable cause means that there are reasonable grounds to believe that the items to be seized have a nexus to criminal activity (i.e., are instrumentalities, fruits or evidence of crime, or contraband). *Warden v. Hayden*,



Probable cause in the criminal law sense is not required. For purposes of an administrative search . . . , probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'<sup>33</sup>

For example, probable cause for issuance of a search warrant for fire, health, or building code inspections by local officials can be established by "the passage of time, the nature of the building (e.g., a multi-unit family apartment house), or the condition of the entire area, but . . . will not necessarily depend upon specific knowledge of the condition of the particular dwelling."<sup>34</sup> When this administrative inspection probable cause standard is satisfied, a court may issue a search warrant authorizing administrative inspections for code enforcement purposes of all of the buildings in a particular neighborhood or area, rather than issue an individual search warrant for each building.<sup>35</sup> By analogy, probable cause

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387 U.S. 294 (1967), and will be found on the premises to be searched. *Camara v. Municipal Court*, 387 U.S. 523, 535 (1967).

33. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978) (footnote omitted) (quoting from *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967)).

This definition of probable cause for the issuance of warrants for administrative inspections is based upon the concept that there is not a single definition of probable cause that governs all searches and seizures; instead, " 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." *Camara*, 387 U.S. at 534. Application of this standard involves weighing the governmental interest being furthered by a particular inspection program against the invasion of privacy caused by that program and against the effect that application of the criminal law probable cause standard would have upon the enforcement of regulatory health and safety codes and statutes. *Camara*, 387 U.S. at 534-38.

In *Barlow's* and *Camara*, the Supreme Court did not differentiate between administrative inspections resulting in civil penalties or sanctions as opposed to administrative inspections resulting in criminal penalties of fines or imprisonment. The Supreme Court in *Barlow's*, however, did differentiate between administrative enforcement inspections, to which its decision applied, and criminal law searches. 436 U.S. at 320-21. The Court indicated that the traditional criminal law probable cause standard, *see supra* note 32, would apply when criminal charges and sanctions are contemplated for a person being subjected to an administrative search. *See Donovan v. Dewey*, 452 U.S. at 598 n.6 (warrant required to enter commercial property to search for contraband or evidence of crime); Note, *Marshall v. Barlow's, Inc.: Administrative Inspections and the Fourth Amendment*, 9 ENVTL. L. 149, 165-66 (1978). The Supreme Court, however, has not indicated whether the criminal law probable cause standard would apply to determine the validity of a warrant authorizing an administrative enforcement inspection that results in a subsequent criminal prosecution when criminal law violations were not suspected prior to the inspection.

34. *Camara*, 387 U.S. at 538.

35. *Id.* at 537-38. The reasons given in support of permitting issuance of area-wide search warrants authorizing inspections of all structures for purposes of enforce-

for issuance of a search warrant authorizing an administrative enforcement inspection under an environmental protection statute, such as the Clean Air Act,<sup>36</sup> might be established by an administrative plan that scheduled periodic inspections of regulated industries on the basis of the frequency with which the type of pollution control equipment to be inspected breaks down or malfunctions, or on the basis of the toxicity of the pollutants or wastes emitted, discharged, or handled in the industry.<sup>37</sup> The issuance of warrants based on such factors, rather than on the particular conditions of each individual site, would foster routine periodic inspections of all businesses in a particular industrial category or subcategory that is regulated by the statute, rather than infrequent spotchecks of just some of these businesses. The goals of federal environmental protection statutes would be better served by a thorough plan of industry-wide inspection; enforcement should not be limited to situations in which there is prior knowledge of violations of applicable environmental protection and pollution control standards.<sup>38</sup>

#### WARRANTLESS ADMINISTRATIVE INSPECTIONS OF COMMERCIAL PROPERTY UNDER THE "PERVASIVELY REGULATED INDUSTRY" EXCEPTION

One exception to the general rule requiring a search warrant for unconsented administrative enforcement inspections of non-public areas of private commercial property<sup>39</sup> is the "pervasively regulated industry" exception, as recently interpreted by the United

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ment of municipal fire, safety, and health codes are that routine periodic inspection of all structures is "the only effective way to seek universal compliance with the minimum standards required by municipal codes. . . ." *Id.* at 535, and that the "decision to conduct an area inspection is unavoidably based on . . . appraisal of conditions in the area as a whole, not on . . . knowledge of conditions in each particular building." *Id.* at 536.

A search warrant authorizing an administrative inspection, however, must be drafted to apprise the owner of premises being inspected of the reason for the inspection and the place or objects that the officers are entitled to take or inspect. This circumscribes the discretion of the officers executing the search warrant and informs the owner of the lawful limits of the inspectors' power to search. *Commonwealth v. Lipomi*, 385 Mass. 370, 432 N.E.2d 86, 89-90 (1982).

36. 42 U.S.C. § 7414 (Supp. V 1981).

37. *Cf. Public Service Co. v. EPA*, 509 F. Supp. 720 (S.D. Ind. 1981) (warrant for inspection of commercial premises under Clean Air Act issued on the basis of suspected violations of state implementation plan emission standards and overall purposes of Clean Air Act).

38. *See supra* note 35.

39. *See supra* text accompanying notes 23-30.

States Supreme Court in *Donovan v. Dewey*.<sup>40</sup> In *Donovan*, the Supreme Court held that provisions of Section 103(a) of the Federal Mine Safety and Health Act<sup>41</sup> authorizing warrantless inspections of underground and surface mines<sup>42</sup> and providing for injunctive relief against a mine operator who refused entry to an inspector seeking to make such a warrantless inspection, do not violate the fourth amendment of the United States Constitution.<sup>43</sup> Noting that Congress has the power under the Commerce Clause of the United States Constitution<sup>44</sup> to regulate commercial enterprises by means of inspection programs,<sup>45</sup> the *Donovan* Court found that privacy interests in commercial property "may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections."<sup>46</sup> In approving the Federal Mine Safety and Health Act provisions, the Court established that the statute authorized warrantless conduct, and then, building on that foundation, assessed the pervasiveness of regulation of the industry, reasonableness of the search, and protection of special privacy concerns of the industry. In the next section of this article,

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40. 452 U.S. 594 (1981).

41. 30 U.S.C. § 813(a) (Supp. V 1981).

42. The Act defines "coal or other mine" to include "an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground." 30 U.S.C. § 802(h) (Supp. V 1981). It was undisputed in *Donovan v. Dewey* that appellee's stone quarry was within this definition and subject to regulation under the Act. 452 U.S. at 596 n.2.

43. Section 103(a) of that Act directs federal mine inspectors to inspect underground mines at least four times a year and surface mines at least twice a year to determine whether mines are in compliance with health and safety standards promulgated by the Secretary of Interior under the Act to protect mine workers. Section 103(a) also requires that federal mine inspectors make follow-up inspections to determine whether previously discovered violations have been corrected. In addition, § 103(a) grants federal mine inspectors "a right of entry to, upon, or through any coal or other mine without a search warrant" and without providing advance notice of an inspection to any person. A mine operator who refuses to allow a warrantless inspection conducted pursuant to § 103(a) may be subject to injunctive or other appropriate relief in a civil action instituted by the Secretary of Labor. 30 U.S.C. § 818(a)(1)(C) (Supp. V 1981).

*Donovan v. Dewey* was a civil action brought by the Secretary of Labor against operators of a stone quarry seeking to enjoin them from refusing to permit warrantless inspections of the quarry pursuant to § 103(a) of the Act. The District Court granted summary judgment in favor of the appellees (stone quarry operators) on the grounds that § 103(a) of the Act violated the fourth amendment. The Secretary of Labor appealed directly to the United States Supreme Court pursuant to 28 U.S.C. § 1252; the Supreme Court noted probable jurisdiction, 449 U.S. 1122 (1981), and then reversed the District Court's judgment and remanded to the District Court.

44. U.S. CONST. art. I, § 8, cl. 3.

45. 452 U.S. at 599.

46. *Id.*

these and other considerations relevant to the pervasively regulated industry exception will be explored more fully and applied to environmental protection statutes.

To an extent, *Donovan v. Dewey* provides standards by which to evaluate warrantless administrative inspections in light of fourth amendment requirements. However, it is important to note that if a provision of a federal environmental protection statute authorizing warrantless administrative inspections of commercial premises is held to violate the standards established in *Donovan v. Dewey*, the provision is not automatically declared void. It may be cured by amendment or by the adoption of administrative regulations.<sup>47</sup> In some cases, however, warrantless administrative inspections of commercial premises may not be permissible in the enforcement of a particular federal environmental protection statute, regardless of how the statute or regulations are drafted.<sup>48</sup>

### 1. Statutory Authorization of Warrantless Inspections

The Court in *Donovan v. Dewey* recognized that administrative inspections not authorized by statute do not *necessarily* violate the fourth amendment.<sup>49</sup> Warrantless entries and inspections of commercial property may be lawful under exceptions to the general rule requiring a warrant, such as the emergency exception<sup>50</sup> and the pervasively regulated industry exception. But in order for warrantless administrative inspections to be constitutional under the pervasively regulated industry exception, they must be permissible under the statute in question.<sup>51</sup> In *Donovan v. Dewey*, the

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47. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 n.23 (1978)

48. See *infra* text accompanying notes 99-108.

49. This conclusion follows from the Court's statement that warrantless inspections of commercial property *may* be unreasonable under the Fourth Amendment if not authorized by law. 452 U.S. at 599.

50. See *infra* text accompanying notes 182-99

51. *Commonwealth v. Lipomi*, 385 Mass. 370, 432 N.E.2d 86, 95 (1982). See *Balelo v. Klutznick*, 519 F. Supp. 573 (S.D. Cal. 1981) (reaching same result in decision issued after *Donovan v. Dewey* was issued, but which did not cite *Donovan v. Dewey*); *United States v. Pugh*, 417 F. Supp. 1019, 1023 (W.D. Mich. 1976) (reaching same result in decision issued before *Donovan v. Dewey* was decided).

The court in *United States v. Rucinski*, 658 F.2d 741 (10th Cir. 1981), on the other hand, interpreted *Donovan v. Dewey* more broadly, allowing inspection of commercial property without a search warrant when the search is "reasonable", even in the absence of a regulatory scheme established by statute providing for warrantless inspections. The court in *Rucinski* held that the furtherance of federal interest (determining whether fraud against the United States was being committed by persons harvesting timber from national forests) justified warrantless telescopic observations of employees on defendant's lumber company's private property. (The court in *Rucinski* alter-

Supreme Court assumed, without supporting analysis of the Act or its legislative history, that the Federal Mine Safety and Health Act authorizes warrantless administrative inspections,<sup>52</sup> apparently because the Act does not explicitly require a warrant in order to make required inspections under the Act.<sup>53</sup> Consequently, it is reasonable to assume that the Supreme Court would find that where federal environmental protection statutes grant federal agencies a right of entry and inspection of commercial premises but are silent on the issue of warrant, such statutes implicitly authorize warrantless inspections. Legislative history strongly indicating that such inspections should be made pursuant to a warrant might cause the Supreme Court to interpret such provisions as requiring entries and inspections to be made pursuant to a warrant.

Many of the federal environmental protection statutes satisfy *Donovan v. Dewey*'s requirement that there must be implicit statutory authorization of warrantless entries and inspections of commercial premises. Statutes with this type of provision include the Clean Air Act,<sup>54</sup> the Federal Water Pollution Control Act,<sup>55</sup> the

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natively appears to have held that telescopic observations did not constitute a "search" within the meaning of the fourth amendment. 658 F.2d at 746. See *supra* text accompanying notes 19-30.) See also *United States v. Gordon*, 655 F.2d 487 (2d Cir. 1981), discussed *infra* at note 135.

52. *Donovan v. Dewey*, 452 U.S. at 596, 597-98 nn.4-5.

53. See *United States v. Blue Diamond Coal Co.*, 667 F.2d 510, 516 n.6 (6th Cir. 1981), in which the court noted that "the right of entry set forth in 30 U.S.C. § 813(b)(1) [under the Coal Mine Safety and Health Act of 1969] . . . has consistently been interpreted as creating an exception to the Fourth Amendment warrant requirement. The legislative history to the 1977 Act specifically states there is no need for a warrant . . ." The decision in *Donovan v. Dewey* interpreted the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-961 (1976 & Supp. V 1981), but the warrantless inspection procedure of the 1977 Act only differs from the 1969 Act in that it specifically allows a representative of the mine operator to accompany the federal inspector during an inspection. *Blue Diamond Coal Co.*, 667 F.2d at 517 n.8.

54. 42 U.S.C. §§ 7401-7626 (Supp. V 1981). The Clean Air Act contains a provision that grants the Administrator of the United States Environmental Protection Agency (EPA) or his authorized representative a "right of entry to, upon, or through any premises"; and a right, at reasonable times, to have access to and copy any records required to be kept by EPA regulations, to inspect any monitoring equipment or method required by EPA regulations, and to sample any emissions which are required to be sampled under the Act, of a pollutant emission source, or any other person subject to any requirement of the Act, other than manufacturers of new motor vehicles and new motor vehicle engines subject to regulation under 42 U.S.C. §§ 7525(c) or 7542. 42 U.S.C. § 7414(a)(2) (Supp. V 1981). See *Public Service Co. of Indiana v. EPA*, 509 F. Supp. 720 (S.D. Ind. 1981). The Clean Air Act appears to authorize such entries and inspections to be made without a warrant, because the provision authorizing such entries and inspections does not explicitly require a warrant in order to make such entries and inspections, and the Act's legislative history is silent with respect to whether administrative inspections under the Act can be made

without a warrant. This conclusion is further supported by the fact that the only procedural requirement that the Act requires EPA to follow prior to making an entry and inspection is to provide the state air pollution control agency reasonable prior notice of an entry, inspection, or monitoring with respect to any emission standard, limitation, or other requirement adopted by the state as part of an applicable implementation plan or as part of an order issued under 42 U.S.C. § 7413(d). 42 U.S.C. § 7414(d)(1) (Supp. V 1981).

In *Bunker Hill Co. Lead & Zinc Smelter v. EPA*, 658 F.2d 1280 (9th Cir. 1981), EPA, however, declined to claim a right to make warrantless inspections under 42 U.S.C. § 7414(a)(2); the court in that case held that the power of entry granted under 42 U.S.C. § 7414(a)(2) was sufficient authority to justify issuance by a court of ex parte inspection warrants. See *supra* *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 n.23 (1978), and text accompanying notes 47-48.

But the court in *Dow Chemical Co. v. United States*, 536 F. Supp. 1355, 1362 (E.D. Mich. 1982), held that the Clean Air Act requires a warrant in order to enter commercial premises to make an inspection under 42 U.S.C. § 7414, and also indicated in dictum that the Act requires a warrant in order to make a forced entry for purposes of making an inspection under 42 U.S.C. § 7414. The *Dow* court based this conclusion upon dictum in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), which stated that the Clean Air Act envisions "resort to federal-court enforcement when entry is refused," *id.* at 321, because the Act "grants federal district courts jurisdiction 'to require compliance' with the Administrator of the Environmental Protection Agency's attempt to inspect under 42 U.S.C. § 7414 (1976 ed., Supp. 1), when the Administrator has commenced 'a civil action' for injunctive relief or to recover a penalty. 42 U.S.C. § 7413(b)(4) (1976 ed., Supp. 1)." *Id.* at 322 n.18. This dictum, however, should be interpreted only as indicating that § 114 of the Clean Air Act does not permit forcible entry by EPA without a warrant when entry to inspect is refused, because this dictum only referred to what EPA must do when entry is refused when attempted without a warrant. *Marshall v. Barlow's, Inc.* did not address in this dictum whether EPA may make a warrantless non-forcible entry and inspection of commercial premises under § 114 of the Clean Air Act under the pervasively regulated industry exception, or whether refusal to permit a warrantless entry and inspection by EPA pursuant to § 114 could be punished by civil or criminal penalties. *Public Service Co. of Indiana v. EPA*, 509 F. Supp. 720 (S.D. Ind. 1981), a case decided before *Donovan v. Dewey*, stated in dictum that *Marshall v. Barlow's, Inc.* requires EPA to obtain a warrant in order to make an entry and inspection authorized by the Clean Air Act under 42 U.S.C. § 7414(a).

Several courts have held that private independent contractors hired by EPA, as well as full-time employees of EPA, are "authorized representatives" of EPA within the meaning of 42 U.S.C. § 7414, *Bunker Hill Co. Lead & Zinc Smelter v. EPA*, 658 F.2d 1280 (9th Cir. 1981); *In re Aluminum Co. of America*, 15 Env't Rep. Cas. (BNA) 1116 (M.D.N.C. 1980), *rev'd on other grounds sub nom. Aluminum Co. of America v. EPA*, 663 F.2d 499 (4th Cir. 1981), but other courts have held that only full-time employees of EPA, but not independent private contractors hired by EPA, are "authorized representatives" of EPA within the meaning of this section. *Stauffer Chemical Co. v. EPA*, 647 F.2d 1075 (10th Cir. 1980); *United States v. Stauffer Chemical Co.*, 17 Env't Rep. Cas. (BNA) 1753 (6th Cir. July 7, 1982). See Comment, *EPA's Use of Contractors on Stationary Source Inspections Provokes Circuit Split Over § 114 of Clean Air Act*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 10018 (Feb. 1982); Note, *EPA Enjoined From Using Contractors to Inspect Emission Sources* 22 NAT. RESOURCES J. 247 (1982).

The Clean Air Act states that entries and inspections under 42 U.S.C. § 7414 are for purposes of developing or assisting in the development of state implementation plans under 42 U.S.C. § 7410, new source standards of performance under 42 U.S.C. § 7411, or any hazardous pollutant emission standard under 42 U.S.C. § 7412; deter-

Safe Drinking Water Act,<sup>56</sup> the Federal Environmental Pesticide

mining whether any person is in violation of any such standard or any requirement of a state implementation plan; or carrying out any provision of the Clean Air Act, other than a provision of subchapter II of the Act governing a manufacturer of new motor vehicles or new motor vehicle engines. 42 U.S.C. § 7414(a) (Supp. V 1981).

The Clean Air Act also has provisions that appear to provide for warrantless entries and inspections of the commercial premises of manufacturers of automobiles and automobile engines. 42 U.S.C. § 7525(c) provides that for purposes of enforcement of certain testing and certification requirements under the Clean Air Act,

officers or employees duly designated by the [EPA] Administrator, upon presenting appropriate credentials to the manufacturer or person in charge, are authorized (1) to enter, at reasonable times, any plant or other establishment of such manufacturer, for the purpose of conducting tests of vehicles or engines in the hands of the manufacturer, or (2) to inspect at reasonable times, records, files, papers, processes, controls, and facilities used by such manufacturer in conducting tests under regulations of the Administrator. Each such inspection shall be commenced and completed with reasonable promptness.

This section would probably be interpreted as authorizing warrantless entries and inspections, because this section does not explicitly require that such entries and inspections be made pursuant to a warrant and the Act's legislative history is silent with respect to whether entries and inspections under 42 U.S.C. § 7525(c) must be made pursuant to a warrant.

55. 33 U.S.C. § 1256 (Supp. V 1981). The Federal Water Pollution Control Act contains a provision, 33 U.S.C. § 1318(a)(B) (1976), which appears to authorize warrantless entries and inspections by EPA of the premises of dischargers' pollutants into waterways, that is almost identical to the provision of the Clean Air Act authorizing entries and inspections of regulated businesses. This provision gives the EPA Administrator or his authorized representative, upon presentation of his credentials, a "right of entry to, upon, or through any premises in which an effluent source is located" or in which any records required to be maintained by EPA regulations under the Act are located, 33 U.S.C. § 1318(a)(B)(i) (1976), and a right, at reasonable times, to have access to records required to be kept by EPA regulations under the Act, to inspect any monitoring equipment or method required to be installed, used and maintained by EPA regulations under the Act, and to sample any effluents which the owner or operator of such source is required to sample by EPA regulations under the Act. 33 U.S.C. § 1318(a)(B)(ii) (1976). Such entries, inspections, and sampling are not explicitly required to be made pursuant to a warrant, and presentation of credentials prior to entry is the only procedure that the Act requires prior to entry, which might cause a court to hold that entries, inspections and sampling under the Act are not required to be made pursuant to a warrant. *Dow Chemical Co. v. United States*, 536 F. Supp. 1355, 1362 (E.D. Mich. 1982), relying upon legislative history of the Federal Water Pollution Control Act of 1972, S. REP. NO. 92-414, 92d Cong., 2d Sess. 62, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3729, stated in dictum that the Federal Water Pollution Control Act does not permit warrantless inspections under 33 U.S.C. § 1318 or forced entry without a warrant.

*Stauffer Chemical Co. v. EPA*, 647 F.2d 1075, 1078-79 (10th Cir. 1981), and *United States v. Stauffer Chemical Co.*, 17 Env't Rep. Cas. (BNA) 1753 (6th Cir. July 7, 1982), state in dictum that "authorized representatives" within the meaning of 33 U.S.C. § 1318 are limited to full-time employees of EPA and do not include independent private contractors hired by EPA.

56. The EPA Administrator, and his duly designated representatives, upon presenting appropriate credentials and a written notice, are authorized by the Safe Drinking Water Act to enter any establishment, facility, or other property of any

Control Act,<sup>57</sup> the Toxic Substances Control Act,<sup>58</sup> the Resource

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supplier of water or other person subject to national primary drinking water regulations under the Act, to an applicable underground injection control program under the Act, or to any requirement under the Act to monitor an unregulated contaminant in drinking water, in order to determine whether the Act is being complied with. 42 U.S.C. § 300j-4(b)(1) (Supp. V 1981). The Act also authorizes inspection, at reasonable times, of records, files, papers, processes, controls, and facilities, and testing of any feature of a public water system, including its raw water source, *id.*, which implicitly would seem to authorize the taking of water samples to test for pollutants and contaminants. The Act appears to authorize these entries and inspections to be made without a warrant, because the only procedure that the Act requires to be followed prior to such entries and inspections is presenting appropriate credentials and a written notice to the operator of the premises and giving prior notice of an inspection to the state agency charged with responsibility for safe drinking water if the state has primary responsibility under the Act. 42 U.S.C. § 300j-4(b)(2) (1976).

57. 7 U.S.C. § 136-136y (Supp. 1982). The Federal Environmental Pesticide Control Act grants officers or employees of the EPA Administrator, for the purposes of enforcing the Act, the right to enter, "at reasonable times, any establishment or other place where pesticides or devices are held for distribution or sale for the purpose of inspecting and obtaining samples of any pesticides or devices, packaged, labeled and released for shipment, and samples of any containers or labeling for such pesticides or devices." 7 U.S.C. § 136g(a) (Supp. 1982). See also 7 U.S.C. § 136f(b) (right of EPA to inspect, apparently without a warrant, books and records required to be maintained under the Act). Congress apparently authorized entries, inspections, and sampling under this provision of the Act to be made without a warrant, because inspections under the Act can be made even if no violation is suspected, 7 U.S.C. § 136g(a) (Supp. 1982), and because the only procedural requirement that the Act requires to be followed before an inspection is that an inspector must provide the owner, operator, or agent in charge of the premises to be inspected a written statement as to the reason for the inspection, including a statement as to whether a violation of the law is suspected, prior to undertaking the inspection. *Id.* The Act, however, does provide for issuance of warrants authorizing entry and inspection of establishments "for purposes of enforcing the provisions" of the Act upon a showing that there is reason to believe that the Act has been violated, 7 U.S.C. § 136g(b) (Supp. 1982), but the Act does not state that warrants are required in order to make an authorized entry, inspection, or sampling. This provision arguably might be interpreted as requiring "inspectors upon being denied entry to obtain a search warrant authorizing entry and inspection" see Comment, 8 ENVTL. L. REP. at 10134, on the grounds that a warrant, in such a case of denial of entry, would be enforcing EPA's right of entry and inspection under 7 U.S.C. § 136g(a), and because there would be reasonable grounds to believe that the provisions of 7 U.S.C. § 136j(2)(B) (making it unlawful for any person to refuse to allow inspection of records or an establishment, or the taking of a sample of any pesticide, pursuant to 7 U.S.C. § 136(f), (g)) have been violated when entry, inspection, or sampling previously has been refused. The Act's legislative history is silent with respect to whether administrative inspections and sampling under the Act must be made pursuant to a warrant.

58. The Toxic Substances Control Act authorizes the EPA Administrator and any duly designated representative of the Administrator, for purposes of administering the Act and determining whether the requirements of the Act applicable to chemical substances and mixtures have been complied with, "to inspect any establishment, facility, or other premises in which chemical substances or mixtures are manufactured, processed, stored, or held before or after their distribution in commerce and any conveyance being used to transport chemical substances, mixtures, or such articles in



Conservation and Recovery Act,<sup>59</sup> the Superfund Act,<sup>60</sup> the Surface Mining Control and Reclamation Act of 1977,<sup>61</sup> and the En-

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connection with distribution in commerce." 15 U.S.C. § 2610(a)(1) (1976). Such inspections are required to ". . . be commenced and completed with reasonable promptness and shall be conducted at reasonable times, within reasonable limits, and in a reasonable manner." *Id.* The Act does not explicitly authorize EPA to take samples of chemical substances or mixtures on premises being inspected. *Cf.* 15 U.S.C. § 2610(b)(1) (1976). Congress apparently intended that such entries and inspections under the Act be conducted without a warrant, because the only procedures that the Act requires to be followed prior to entry and inspection is "the presentation of appropriate credentials and of a written notice to the owner, operator, or agent in charge of the premises or conveyance to be inspected," 15 U.S.C. § 2610(a) (1976), and no reference is made to prior authorization by a warrant. The Act's legislative history also is silent with respect to whether a warrant is required to make authorized entries and inspections under the Act when consent to entry is denied.

59. Duly designated officers or employees of EPA, or states having an authorized hazardous waste program, are authorized by the Resource Conservation and Recovery Act, for the purposes of developing or assisting in the development of any regulation or enforcing the hazardous waste provisions of the Act, to enter "at reasonable times any establishment or other place maintained by any person where hazardous wastes are generated, stored, treated, disposed of, or transported from," 42 U.S.C. § 6927(a)(1) (Supp. V 1981), and "to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling of such wastes." 42 U.S.C. § 6927(a)(2) (Supp. V 1981). The Act does not explicitly require a warrant in order to conduct such authorized entries, inspections, and sampling, so the Act would probably be interpreted as authorizing warrantless inspections.

60. The Superfund Act authorizes certain federal and state officials ". . . to enter at reasonable times any establishment or other place where . . . hazardous substances are or have been generated, stored, treated, or disposed of, or transported from; . . ." and ". . . to inspect and obtain samples from any person of any such substance and samples of any containers or labeling for such substances. Each such inspection shall be commenced and completed with reasonable promptness." 42 U.S.C. § 9604(e)(1) (Supp. V 1981). The Act also requires persons subject to regulation under the Act to permit certain federal and state officials "at all reasonable times to have access to . . . all records relating to such substances." *Id.* Such entries and inspections apparently may be conducted without a warrant, because the Act does not explicitly require such entries and inspections to be conducted pursuant to a warrant. The Superfund Act also appears to authorize warrantless entries and inspections of commercial premises in order to undertake removal actions, *id.* at § 9601(23), or remedial actions, *id.* at § 9601(24), whenever there is a release, reason to believe that a release is about to occur, or a substantial threat of a release, into the environment of a hazardous substance or pollutant or contaminant which may present an imminent and substantial danger to public health or welfare. *Id.* at § 9604(a), (b).

61. The Surface Mining Control and Reclamation Act directs the Secretary of Interior to "cause to be made such inspections of any surface coal mining and reclamation operations as are necessary to evaluate the administration of approved State programs, or to develop or enforce any Federal program," and for such purposes grants "authorized representatives of the Secretary . . . a right of entry to, upon, or through any surface coal mining and reclamation operations." 30 U.S.C. § 1267(a) (Supp. V 1981). The Act also grants authorized representatives of the regulatory authority (the Secretary of Interior or a state with an approved enforcement program under the Act), without advance notice and upon presentation of appropriate credentials, "the right of entry to, upon, or through any surface coal mining and reclamation

dangered Species Act.<sup>62</sup>

Several other federal environmental protection statutes appear to authorize warrantless administrative inspections of regulated commercial premises either pursuant to regulations adopted by an administrative agency or pursuant to permit or license conditions. The Atomic Energy Act authorizes the Nuclear Regulatory Commission to adopt regulations with respect to inspection of businesses regulated by the Act (which include nuclear power reactors);<sup>63</sup> Nuclear Regulatory Commission regulations implementing this statutory authorization<sup>64</sup> have been interpreted as authorizing warrantless administrative inspections of commercial premises regulated by the Act.<sup>65</sup> The Marine Protection, Research and Sanctuaries Act requires that permits for the ocean dumping of materials issued by the Environmental Protection Agency or the Army Corps of Engineers "shall include . . . any special provisions deemed necessary . . ." by the agency issuing the permit for monitoring and surveillance of the transportation or dumping

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operations" or any premises in which any records required to be maintained under the Act are located, and "at reasonable times and without delay, the right of access to and to copy any records, and to inspect any monitoring equipment or method of operation required under the Act." 30 U.S.C. § 1267(b)(3) (Supp. V 1981). The Act does not explicitly authorize warrantless seizures of pollutant samples, although persons regulated under the Act are required to take and evaluate pollutant samples and inspectors are authorized under the Act to evaluate records of such sampling. 30 U.S.C. § 1267(b) (Supp. V 1981).

62. 16 U.S.C. §§ 1531-1543 (Supp. 1982). The Endangered Species Act requires that a person engaged in business as an importer or exporter of certain endangered or threatened species of wildlife or fish

. . . at all reasonable times upon notice by a duly authorized representative of the Secretary [of Interior], afford such representative access to his place of business, an opportunity to examine his inventory of imported fish, wildlife, or plants and the records required to be kept under subparagraph (A) of this paragraph . . .

16 U.S.C. § 1538(d)(2)(B) (1976). No warrant is required by the Act in order to make such entries and inspections.

The Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. §§ 2014-2201, 7901-7942 (Supp. V 1981), authorizes states, pursuant to cooperative agreements with the federal government, to enter an inactive uranium mill tailing site "at any time" to make inspections in furtherance of remedial actions to minimize radiation health hazards to the public. 42 U.S.C. § 7913(d) (Supp. V 1981). Such entries, which are not explicitly required to be conducted pursuant to a warrant, appear to be permitted only when such remedial actions have the consent of persons holding record interest in the site, *id.* at § 7913(c), or when the state has acquired the site. *Id.* at § 7914(a). Consequently, the Act does not actually authorize warrantless administrative inspections of privately owned uranium mill tailing sites over the objection of the owners of such sites.

63. 42 U.S.C. §§ 2201(o), 2035(c) (1976).

64. 10 C.F.R. § 30.52(a) (1982).

65. *NRC v. Radiation Technology, Inc.*, 519 F. Supp. 1266 (D.N.J. 1981).

of the material;<sup>66</sup> this provision would appear to authorize permits issued under the Act to require warrantless boarding and inspection of vessels and planes transporting materials pursuant to a permit issued under the Act. The Outer Continental Shelf Act authorizes the Secretary of Interior to "prescribe such rules and regulations as may be necessary to carry out provisions . . ." of the Act,<sup>67</sup> which arguably would authorize regulations subjecting oil and gas drill platforms on lands leased under the Act to warrantless entry and inspection by government officials. Regulations adopted under the Act, however, do not appear to authorize warrantless entry and inspection of drill platforms on lands leased under the Act.<sup>68</sup>

Warrantless entry and inspection of commercial premises are *not* authorized by the solid waste disposal regulatory provisions of the Resource Conservation and Recovery Act,<sup>69</sup> the Coastal Zone Management Act,<sup>70</sup> the Marine Mammal Protection Act,<sup>71</sup> or the Noise Control Act.<sup>72</sup>

## 2. Pervasive Regulation

In addition to requiring implicit statutory authorization of warrantless conduct, the pervasively regulated industry exception also requires, as its name implies, that the industry be pervasively regulated.<sup>73</sup> This requirement follows from *Donovan v. Dewey's*

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66. 33 U.S.C. § 1414(a)(5) (1976). *See also* § 1417(c).

67. 43 U.S.C. § 1334(a) (1976).

68. *See* 30 C.F.R. §§ 250.38-.39 (1981).

69. 42 U.S.C. §§ 6941-6949 (1976 & Supp. V 1981).

70. 16 U.S.C. §§ 1451-1464 (Supp. 1982).

71. 16 U.S.C. §§ 1361-1407 (Supp. 1982). *Balelo v. Klutznick*, 519 F. Supp. 573 (S.D. Cal. 1981), a case decided after *Donovan v. Dewey*, 452 U.S. 594 (1981), but which did not cite it, held that a regulation adopted by the Secretary of Commerce, 50 C.F.R. § 216.24(f) (authorizing federal observers to board tuna fishing vessels for research purposes and to determine if civil or criminal violations of the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407, take place), violated both the fourth amendment and the Act because the Act does not authorize such warrantless boarding and inspections of vessels by federal observers. *Balelo*, however, did not address the constitutionality of 16 U.S.C. § 1377(d) (Supp. V 1981), which authorizes government officials to make warrantless searches of vessels when there is probable cause to believe that violations of the Act are occurring, and to make warrantless seizures of cargo on such vessels.

72. 42 U.S.C. §§ 4901-4918 (1976 & Supp. V 1981).

73. *Dow Chemical Co. v. United States*, 536 F. Supp. 1355 (E.D. Mich. 1982); *Dunlop v. Hertzler Enterprises, Inc.*, 418 F. Supp. 627 (D.N.M. 1976); *Commonwealth v. Lipomi*, 385 Mass. 370, 432 N.E. 2d 86 (1982); *State ex rel. Environmental Improvement Agency v. Albuquerque Publishing Co.*, 91 N.M. 125, 571 P.2d 117 (1977), *cert. denied*, 435 U.S. 956 (1978). "The enterprise sought to be inspected must

statement that "some statutes 'apply only to a single industry, where regulations might already be so pervasive that [the pervasively regulated industry] exception to the warrant requirement could apply.'"<sup>74</sup>

The Supreme Court has not explicitly defined the extent to which an industry must be subject to statutory regulation in order to be a pervasively regulated industry that can be subject to warrantless administrative inspections under the pervasively regulated industry exception. *Donovan v. Dewey* held that application of the exception is not limited to industries with a long tradition of close government supervision and regulation, but

the duration of a particular regulatory scheme will often be an important factor in determining whether it is sufficiently pervasive to make the imposition of a warrant requirement unnecessary. But if the length of regulation were the only criterion, absurd results would occur . . . . [N]ew or emerging industries, including ones such as the nuclear power industry that pose enormous potential safety and health problems, could never be subject to warrantless searches even under the most carefully structured inspection program simply because of the recent vintage of regulation.<sup>75</sup>

*Colonnade Catering Corp. v. United States*<sup>76</sup> approved a federal statute that subjected businesses distributing alcoholic beverages to warrantless administrative inspections.<sup>77</sup> The Supreme Court

be engaged in a pervasively regulated business. The presence of this factor insures that warrantless inspection will pose only a minimal threat to justifiable expectations of privacy." *Dunlop v. Hertzler Enterprises, Inc.*, 418 F. Supp., at 631-32.

74. *Donovan v. Dewey*, 452 U.S., at 601-02, quoting *Marshall v. Barlow's, Inc.*, 436 U.S. at 321.

75. 452 U.S. at 606. This holding rejected the position taken by Justice Stewart in dissent. Justice Stewart argued that warrantless administrative searches are permitted under the fourth amendment only in the case of businesses that are in an industry that is both pervasively regulated and that has "a long tradition of close government supervision, of which any person choosing to enter such a business must be aware." *Id.* at 610-12. He argued that the reason for this rule is that a businessman in such an industry in effect consents to the restrictions placed upon him. *Id.* at 612. He argued that this was the holding in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), and that the majority had misstated the holding in *Barlow's*. Justice Stewart asserted in dissent that "it can hardly be said that a businessman consents to restrictions on his business when those restrictions are not imposed until *after* he has entered the business," 452 U.S. at 612, but stated that this "is precisely what the Court says today to many stone quarry operators." *Id.* Justice Stewart concluded his dissent by arguing that the majority's opinion allows Congress "to avoid the Fourth Amendment industry by industry" by defining "any industry as dangerous" and regulating it "substantially." *Id.* at 613-14.

76. 397 U.S. 72 (1970).

77. In *Colonnade Catering Corp.*, 397 U.S. 72, federal agents, without a warrant and without the owner's consent, forcibly entered a storeroom at a catering establish-

noted that the statute required liquor distillers to pay an excise tax on distilled spirits and be subject to inspection by federal officers, and required retail sellers of alcoholic beverages to have a federal license and a federal tax stamp and to be subject to federal inspections.<sup>78</sup> In *United States v. Biswell*,<sup>79</sup> which upheld a federal statute—the Gun Control Act of 1968,<sup>80</sup> which made firearm dealers subject to warrantless inspections<sup>81</sup>—the Supreme Court pointed out that the Gun Control Act subjected importers, manufacturers, dealers, and collectors of firearms to a program of licensing, inspection, and special taxes.<sup>82</sup> These two cases might be interpreted as implicitly holding that an industry, in order to be subject to warrantless inspections under the pervasively regulated industry exception, must be required to obtain a permit or license, to pay special taxes, and to be inspected. None of the federal environmental protection statutes explicitly subject the industries that

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ment and seized bottles of liquor which they suspected of being refilled in violation of 26 U.S.C. § 5301(c). The owner of the catering establishment brought suit to obtain the return of the seized liquor and to have the liquor suppressed as evidence. The Supreme Court affirmed the District Court, which had granted the requested relief, on the grounds that Congress had not authorized federal agents to make forcible entries, without a warrant, of establishments such as those of the petitioner (owner of the catering establishment). *See supra* text accompanying note 51. The court stated, in dictum, that the fourth amendment would not prohibit Congress from authorizing warrantless inspections of the liquor industry and forcible, unconsented entries of commercial premises in the liquor industry. 397 U.S. at 76-77. But the Court held that Congress had made imposition of a criminal fine for refusal to permit entry by a federal inspector the exclusive sanction under the relevant statute for denial of entry. 397 U.S. at 77.

78. 397 U.S. at 72-73, 75.

79. 406 U.S. 311 (1972).

80. 18 U.S.C. §§ 921-928 (1976).

81. In *Biswell*, a pawnshop operator, who was federally licensed to deal in sporting weapons under the Gun Control Act of 1968, consented to a warrantless entry to a locked gun storeroom by federal agents, after being told by the agents, when he asked if they had a search warrant, that the Act authorized warrantless inspection of the storeroom. The agents found two sawed-off rifles which the operator was not licensed to possess under the Act; subsequently, the operator was indicted and convicted under the Act for dealing in firearms without having paid a special occupational tax. The Supreme Court affirmed the conviction, reversing the holding of the Court of Appeals that the sawed-off rifles had been illegally seized in violation of the fourth amendment because of the lack of a search warrant. The Supreme Court held that the Act's authorization of warrantless regulatory searches of gun dealers does not violate the fourth amendment, on the grounds that warrantless inspections are necessary under the Act in order to give federal agents the flexibility in time, scope, and frequency of inspection that is required to further the Act's "urgent interest" of preventing violent crime, and that gun dealers accepting a federal license under the Act do so with the knowledge that they will be subject to inspection to determine compliance with specified standards. 406 U.S. at 316, 317.

82. 406 U.S. at 311-12, 313 n.2.

they regulate to license or permit, special taxes, and inspection requirements. A number of federal environmental protection statutes, however, subject industrial and commercial facilities to permit or license and inspection requirements, but not to special taxes.<sup>83</sup>

On the other hand, the Federal Mine Safety and Health Act,<sup>84</sup> whose warrantless inspection provisions were upheld in *Donovan v. Dewey*, makes mine operators subject to regulations to protect the health and safety of mine workers, but does not subject the mine operators to license or permit requirements or to special taxes. *Donovan v. Dewey* consequently might be interpreted as implicitly making an industry "pervasively regulated" if a statute subjects the industry's operations that may adversely affect human life or safety to regulation and to inspection. Under this interpretation, a federal environmental protection statute, which attempts to protect public health and safety by regulating industrial and commercial facilities in part through warrantless entries and inspections, could be held to pervasively regulate an industry.<sup>85</sup>

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83. The Clean Water Act requires point sources to have a permit in order to discharge pollutants into waters of the United States, 33 U.S.C. §§ 1311, 1342 (1976 & Supp. V 1981), and makes such sources subject to government inspection. *Id.* at § 1318 (1976). The Marine Protection, Research and Sanctuaries Act requires that a permit be obtained in order to dump material in the ocean, 33 U.S.C. § 1411(a) (1976); such permits may require that vessels or planes transporting material to be dumped in the ocean be subject to warrantless boarding and inspection. *See supra* text accompanying note 66. The Clean Air Act makes businesses emitting pollutants into the ambient air subject to inspection, 42 U.S.C. § 7414 (Supp. V 1981), and requires in certain circumstances that a permit be obtained in order to construct a new source or to modify or reconstruct an existing source. *Id.* at §§ 7410(a)(2)(D), 7475, 7502(b)(6) (Supp. V 1981). Under the Resource Conservation and Recovery Act, hazardous waste disposal facilities cannot operate unless they have a permit, 42 U.S.C. § 6925 (1976 & Supp. V 1981), and are subject to inspection. *Id.* at § 6927 (Supp. V 1981). Similarly, the distribution and sale of pesticides are prohibited under the Federal Environmental Pesticide Control Act unless the pesticide is registered, 7 U.S.C. § 136a (Supp. 1982), and establishments holding pesticides or pesticide devices for distribution or sale are subject to inspection. *Id.* at § 136g (Supp. 1982). Nuclear power plants are required by the Atomic Energy Act, 42 U.S.C. §§ 2011-2296 (1976 & Supp. V 1981), to obtain construction permits and operating licenses, and are subject to warrantless entry and inspection. *See supra* text accompanying notes 63-65. The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (Supp. V 1981), requires a permit to engage in surface coal mining operations, and subjects surface coal mining operations to warrantless inspections. *See supra* note 61.

84. 30 U.S.C. §§ 801-961 (1976 & Supp. V 1981).

85. A number of the federal environmental protection statutes that authorize warrantless entries and inspections of private commercial property would be considered to pervasively regulate industry under this interpretation. The Clean Air Act regulates the emission of pollutants into the ambient air to protect public health and welfare. 42 U.S.C. § 7401 (1976 & Supp. V 1981). The Federal Water Pollution Control

### 3. Single Industry

*Donovan v. Dewey*'s reference to a pervasively regulated "single industry" indicates that a statute can authorize warrantless administrative inspections only of a "single industry." But the Supreme Court has not defined what constitutes a "single industry." As noted earlier, the Supreme Court has held that the alcoholic beverage industry,<sup>86</sup> gun dealers,<sup>87</sup> and underground and surface mines<sup>88</sup> could be made subject to warrantless administrative inspections. However, these three examples do not provide a clear definition of what is a "single industry." The "alcoholic beverage industry" appears to include distillers, vintners, brewers, and importers as well as retailers, wholesalers, and caterers<sup>89</sup> dealing with many types of liquors.<sup>90</sup> The gun industry includes firearms and ammunition importers, manufacturers, retailers (dealers), and collectors (purchasers),<sup>91</sup> and the mining industry includes under-

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Act regulates the discharge of pollutants into the waters of the United States both to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251 (1976 & Supp. V 1981), and to protect public health. See 33 U.S.C. § 1317(a)(2) (Supp. V 1981); *Hercules, Inc. v. EPA*, 598 F.2d 91 (D.C. Cir. 1978). Similarly, the distribution of public drinking water supplies is regulated by the Safe Drinking Water Act to protect public health. 42 U.S.C. § 300g-1 (1976 & Supp. V 1981). The Safe Drinking Water Act also regulates the underground injection of pollutants that might endanger public drinking water supplies. *Id.* at § 300h(b)(1). In order to protect the health and welfare of the public, the Noise Control Act directs EPA to establish noise control standards for certain products and transportation equipment. 42 U.S.C. § 4901(a)(b) (1976). Finally, the Surface Mining Control and Reclamation Act of 1977 imposes environmental protection and reclamation standards upon surface coal mine operators to protect human life and safety and the environment. 30 U.S.C. § 1201 (Supp. V 1981). If a statute must regulate activities of an industry to protect human health and safety in order to be a statute that pervasively regulates that industry, statutes whose purpose is to protect natural resources or wildlife, see *supra* notes 7 and 8, would not meet this requirement.

The chemical manufacturing industry, however, has been held not to be an industry that is pervasively regulated by the Clean Air Act, so that the chemical manufacturing industry is not subject to warrantless inspections under the Clean Air Act pursuant to *Donovan v. Dewey*. *Dow Chemical Co. v. United States*, 536 F. Supp. 1355 (E.D. Mich. 1982). *Dow Chemical Co.* also indicated in dictum that all of the industries that are regulated by the Clean Air Act and the Clean Water Act are not pervasively regulated by those two statutes and may not be inspected without a warrant under *Donovan v. Dewey*'s pervasively regulated industry exception. *Id.* at 1278. See Martin, *EPA and Administrative Inspections*, 7 FLA. ST. U. L. REV. 123, 131-32 (1979).

86. See *supra* note 77.

87. See *supra* note 81.

88. See *supra* text accompanying notes 40-45.

89. See *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 72-77.

90. See 26 U.S.C. § 5146(b) (1976), quoted in *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 73 (1970).

91. See *United States v. Biswell*, 406 U.S. at 312 n.1.

ground and surface mines involved in recovery of many varied types of minerals and substances.<sup>92</sup> Consequently, a "single industry" within the meaning of the pervasively regulated industry exception may be very broadly defined as including persons involved in the manufacture, sale, and distribution of a particular product, as well as purchasers of the product and persons using the same type of manufacturing or industrial process even though they manufacture or process different types of products or materials. Under this interpretation, the surface coal mines regulated by the Surface Mining Control and Reclamation Act<sup>93</sup> clearly would qualify as a "single industry," since all underground and surface mines were considered to be a "single industry" in *Donovan v. Dewey*. Similarly, under this interpretation, manufacturers, processors, and distributors of chemical substances who are regulated by and subject to warrantless inspections under the Toxic Substances Control Act,<sup>94</sup> and sellers and distributors of pesticides who are regulated by and subject to warrantless inspections under the Federal Environmental Pesticide Control Act,<sup>95</sup> would constitute a pervasively regulated single industry that may be subject to warrantless inspections under the Acts. Although manufacturers, processors, and distributors of chemical substances and mixtures, which are subject to warrantless entries and inspections under the Toxic Substances Control Act, are a single industry subject to the pervasively regulated industry exception, the Act also provides for warrantless entries and inspections of premises where chemical substances and mixtures are stored or held after distribution in commerce.<sup>96</sup> This provision would authorize warrantless entries and inspections of purchasers and conveyancers of chemical substances and mixtures, thus potentially affecting a wide variety of businesses.<sup>97</sup> Although manufacturers, distributors, and purchasers of a particular product may be viewed as a single industry under the pervasively regulated industry exception, the Supreme Court has not addressed the question of whether commercial carriers of a product, such as railroads and trucks, can be considered to be part of the same industry as the manufacturers, distributors, and purchasers of the product.<sup>98</sup>

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92. See 452 U.S. at 596 n.2, 597-98 n.4.

93. 30 U.S.C. §§ 1201-1328 (Supp. V 1981).

94. 15 U.S.C. §§ 2601-2629 (1976 & Supp. V 1981).

95. 7 U.S.C. § 136-136y (Supp. 1982).

96. See *supra* note 58.

97. *Id.*

98. A similar issue arises under the Marine Protection, Research, and Sanctuaries



On the other hand, *Marshall v. Barlow's, Inc.*,<sup>99</sup> arguably indicates that a "single industry" within the pervasively regulated industry exception cannot be defined on the basis of general dangers to a class of people, such as employees, created by businesses, if such a definition would subject businesses in a wide variety of industries to regulation under a specific statute.<sup>100</sup> By analogy, the businesses regulated by the Clean Air Act<sup>101</sup> and the Federal Water Pollution Control Act,<sup>102</sup> which regulate businesses in a wide variety of industrial categories, would not be a "single industry" within the meaning of the pervasively regulated industry exception. Similarly, the warrantless inspection provisions of the hazardous wastes regulatory and liability provisions of the Resource Conservation and Recovery Act<sup>103</sup> and the Superfund Act<sup>104</sup> may not satisfy the requirements of the pervasively regulated industry exception because they do not regulate a "single industry." Both Acts regulate and subject to liability and warrantless inspections<sup>105</sup> persons and businesses that generate, transport, and dispose of hazardous wastes. But although businesses engaged in the transport and disposal of hazardous wastes as a pri-

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Act, 33 U.S.C. §§ 1401-1444 (1976 & Supp. V 1981), which regulates and subjects to warrantless inspections vessels and airplanes transporting materials for the purpose of dumping them in ocean waters. Persons subject to the Act would include businesses engaged in transporting materials into ocean waters for the purpose of dumping them; such businesses might be considered to be a "single industry." But the Act would also apply to generators of waste materials who transport such materials to ocean waters for the purpose of dumping them. Waste generators might be businesses in many separate and distinct industries.

Nuclear power plants generating electricity, which are regulated by the Atomic Energy Act, 42 U.S.C. §§ 2011-2296 (1976 & Supp. V 1981), as well as facilities and sites where uranium mill tailings are stored or disposed of (which are regulated by the Uranium Mill Tailings Control Act of 1978, 42 U.S.C. § 7901 (Supp. V 1981)), would also seem to be single industries that may be subjected to warrantless inspections.

99. 436 U.S. 307 (1978).

100. The *Barlow's* court required a warrant for unconsented entries and inspections under section 8(a) of OSHA, but stated that "some . . . statutes cited apply only to a single industry, where regulations might already be so pervasive that a Colonnade Biswell exception to the warrant requirement could apply." 436 U.S. at 321. Section 8(a) of OSHA, 29 U.S.C. § 657(a)(1976), authorizes representatives of the Secretary of Labor to conduct inspections of businesses engaged in or affecting interstate commerce to determine whether there is compliance with health and safety standards promulgated under the Act. Virtually all commercial establishments in the United States are subject to regulation and inspection under section 8(a) of OSHA. See *supra* Note, 9 ENVTL. L. 149, 199 n.33.

101. 42 U.S.C. §§ 7401-7626 (Supp. V 1981).

102. 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981).

103. 42 U.S.C. §§ 6901-6986 (1976 & Supp. V 1981).

104. 42 U.S.C. §§ 9601-9657 (Supp. V 1981).

105. See *supra* notes 59 and 60.

mary function may be a single industry that can be subject to warrantless inspections, businesses in many different industries may incidentally transport and dispose of hazardous wastes which they generate. The public drinking water systems that are regulated by the Safe Drinking Water Act<sup>106</sup> are a single industry that may be subject to warrantless inspections under the Act. However, businesses in numerous and diverse industries may be engaged in underground injection of pollutants (subsurface emplacement of fluids by well injection).<sup>107</sup> Because such businesses are not a pervasively regulated single industry, they cannot be subject under the Act to warrantless inspections under the pervasively regulated industry exception.<sup>108</sup>

#### 4. Reasonableness of Search

According to *Donovan v. Dewey*, warrantless administrative inspections of commercial property may be reasonable searches (and thus within the pervasively regulated industry exception) when Congress has reasonably determined that warrantless searches are "necessary to further a regulatory scheme. . . ."<sup>109</sup> In order to meet this criterion, "' . . . warrantless inspection must be a crucial part of a regulatory scheme designed to further an urgent [governmental] interest.'"<sup>110</sup> The Supreme Court held in

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106. 42 U.S.C. §§ 300f-300j-10, 7401-7626 (Supp. V 1981).

107. *See id.* at § 300h(d)(1).

108. Similar issues may arise under the provisions of the Atomic Energy Act, 42 U.S.C. §§ 2011-2296 (1976 & Supp. V 1981), that subject users of radioactive material who are licensed and regulated under the Act to warrantless inspections. *See* NRC v. Radiation Technology, Inc., 519 F. Supp. 1266 (D.N.J. 1981). Because such licensees may be in different industries that use radioactive materials for different purposes, all licensees are not within the same industry.

109. 452 U.S. at 600. The Court in *Donovan v. Dewey* alternatively stated that a warrant may not be constitutionally required when there is a "strong federal interest in conducting unannounced warrantless inspections," *id.*, but that warrantless administrative inspection programs may violate the fourth amendment if they "are unnecessary for the furtherance of federal interests." *Id.* at 599.

110. *Commonwealth v. Lipomi*, 385 Mass. 370, 432 N.E.2d 86, 93 (1982) (quoting *Dunlop v. Hertzler Enterprises, Inc.*, 418 F. Supp. 627, 631-32 (D.N.M. 1976)). *See State ex rel. Environmental Improvement Agency v. Albuquerque Publishing Co.*, 91 N.M. 125, 571 P.2d 117 (1977), *cert. denied*, 435 U.S. 956 (1978) (reaching same result in case decided prior to *Donovan v. Dewey*). With regard to the reasonable scope of a regulatory inspection, *see Public Service Co. v. EPA*, 509 F. Supp. 720 (S.D. Ind. 1981), which held that an inspection of all areas of commercial premises having a direct bearing on the emission of pollutants and the taking of photographs of equipment on the premises, pursuant to a warrant issued under the Clean Air Act, 42 U.S.C. § 7414 (Supp. V 1981), did not violate the fourth amendment or the Clean Air Act. The court, citing *Michigan v. Tyler*, 436 U.S. 449 (1978), and *Camara v. Municipal Court*, 387 U.S. 523 (1967), held that the determination of the permissible scope of

*Donovan v. Dewey* that the Federal Mine Safety and Health Act<sup>111</sup> met this requirement because Congress reasonably could determine that a system of warrantless inspections was necessary for the proper enforcement of the statute and for inspections to be effective.<sup>112</sup> The Court referred to legislative history of the Act which indicated that Congress had believed that a warrant requirement would give advance notice or warning of inspections and that advance notice of inspections would result in concealment of safety or health hazards in mines.<sup>113</sup> The Court also quoted with approval<sup>114</sup> the statements in *United States v. Biswell*<sup>115</sup> that "if inspection is to be effective and serve as a credible deterrent, unannounced, ever frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection."<sup>116</sup> The Court in *Biswell* did not refer to the possibil-

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an administrative inspection involves a weighing of the need to search against privacy interests and consideration of the language of an agency's enabling statute and the facts of a particular case. In upholding the inspections at issue, *Public Service Co.* noted that the inspections lasted only several hours, did not result in plant shutdowns or loss of generating capacity, and did not result in the seizure of secret or classified information. 509 F. Supp. at 725. *Accord*, *Dow Chemical Co. v. United States*, 536 F. Supp. 1355 (E.D. Mich. 1982) (holding that 42 U.S.C. § 7414 does not authorize EPA to use aerial surveillance and photography).

On the other hand, *Joe Flynn Rare Coins, Inc. v. Stephan*, 526 F. Supp. 1275 (D. Kan. 1981), held that a statute that authorized law enforcement officers to make warrantless inspections of "any and every part" of the business premises of pawnbrokers and precious metal dealers "to search for and to take into possession any article known or believed to have been stolen" could not be upheld under the pervasively regulated industry exception because, in part, "the scope of the search and seizure is virtually unlimited, or, at the very least, includes articles other than 'precious metals,'" 526 F. Supp. at 1286. The court noted that the statute at issue in *Biswell* was "specifically limited in scope to conducting a search for firearms. Here, the entire business premise [*sic*], and any articles therein, are subject to search and seizure." *Id.*

111. 30 U.S.C. §§ 801-961 (1976 & Supp. V 1981).

112. 452 U.S. at 602-03.

113. *Id.* at 603. Justice Stewart argued in dissent that this expressed fear that the obtaining of a warrant would give advance notice to a mine operator of the forthcoming inspection was groundless, because warrants are issued *ex parte*, because the time of execution of a warrant does not have to be made known to a mine operator if a warrant is obtained after the operator refuses to consent to an inspection, and because a warrant can be issued in accordance with an administrative plan based on specific objective criteria in advance of the planned inspection when it is anticipated that consent will not be given for an inspection. *Id.* at 612 n.5 (Stewart, J., dissenting). See *Bionic Auto Parts and Sales, Inc. v. Fahner*, 518 F. Supp. 582, 586 (N.D. Ill. 1981).

114. 452 U.S. at 603.

115. 406 U.S. 311, 316 (1972).

116. In addition, *Donovan v. Dewey* noted that there is a substantial federal interest in improving the health and safety conditions in underground and surface mines. 452 U.S. at 602. The Court, citing the Act's legislative history, found that "Congress

ity of giving advance notice of inspections, or to the ease with which gun dealers could conceal violations, but instead indicated that warrantless inspections of gun dealers are needed to provide "necessary flexibility as to time, scope, and frequency [of inspections] . . . ." <sup>117</sup> Because *Biswell* was cited approvingly by *Donovan v. Dewey* several times, <sup>118</sup> *Donovan v. Dewey* should be interpreted as permitting a regulatory statute to authorize periodic, unannounced warrantless inspections of commercial property either when the legislature reasonably determines that obtaining a warrant might give advance notice of an inspection

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was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce." *Id.* The Supreme Court also noted that the Federal Mine Safety and Health Act, unlike OSHA, was "narrowly and explicitly directed at inherently dangerous industrial activity," *id.* at 602 n.7, and "applies to industrial activity with a notorious history of serious accidents and unhealthful working conditions." *Id.* at 603. These statements by the Court might be interpreted as implicitly limiting warrantless administrative inspections of commercial property under the pervasively regulated industry exception to statutes that regulate activities of industries that are significantly more hazardous to health and safety than most other industries. Such an interpretation arguably is consistent with *United States v. Biswell*, 406 U.S. 311, 315-16 (1972), where the Supreme Court, while upholding warrantless administrative inspections of gun dealers under the Gun Control Act of 1968, 18 U.S.C. §§ 921-928 (1976), noted that the purposes of the Gun Control Act of 1968 were to prevent violent crime and to assist the states in regulating the firearms traffic within their borders, by assuring that weapons are distributed through regular channels and in a traceable manner and by preventing sales of weapons to undesirable customers. If this interpretation of *Donovan v. Dewey* was followed, warrantless administrative inspections under federal environmental protection statutes, such as the Clean Air Act, 42 U.S.C. §§ 7401-7626 (Supp. V 1981), and the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (Supp. V 1981), each presenting different degrees of harm or threat of harm to the public and the environment, would violate the fourth amendment. Such an interpretation of *Donovan v. Dewey*, however, is inconsistent with *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and earlier statements in *Donovan v. Dewey* that warrantless inspection programs satisfy the pervasively regulated industry exception when Congress has reasonably determined that warrantless inspections are necessary to further federal interests, 452 U.S. at 599, and a regulatory scheme. *Id.* at 600. In *Colonnade Catering Corp.*, the Supreme Court indicated that the reason for warrantless inspections of the liquor industry was to protect "the revenue against various types of fraud," by insuring the collection of duties and excise taxes, 397 U.S. at 75, not the protection of the health and safety of consumers of alcoholic beverages and minors. *Colonnade Catering Corp.*, which was cited approvingly in *Donovan v. Dewey*, 452 U.S. at 598-99, 605-06, would seem to indicate that warrantless administrative inspection programs are not limited to statutes whose purposes are to protect against significant threats or hazards to health and safety, but may be included as part of any valid regulatory scheme where Congress has found that a warrantless inspection program is necessary for proper enforcement.

117. 406 U.S. at 316.

118. 452 U.S. at 598-606.

and violations could be easily concealed (*Donovan v. Dewey*), or that flexibility in the time, scope, and frequency of inspections is necessary to deter violations (*United States v. Biswell*).<sup>119</sup> Because periodic unannounced inspections of pollution control equipment and business premises reasonably could be found by Congress to be necessary to deter violations of pollution control and environmental protection standards, the provisions of each of the federal pollution control and environmental protection statutes analyzed in this article satisfy *Donovan v. Dewey*'s requirement that a warrantless inspection must be necessary to further federal interests.

According to *Donovan v. Dewey*, warrantless administrative inspections may be unreasonable searches that violate the Fourth Amendment if they occur so randomly, infrequently, or unpredictably "that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials."<sup>120</sup> The Court further stated that under the pervasively regulated industry exception, a statute must specify its procedures and reasonable legislative or administrative standards to guide inspectors.<sup>121</sup> The Court noted by example *Colonnade Catering Corp. v. United States*,<sup>122</sup> in which "the assurance of regularity provided by a warrant"<sup>123</sup> was unnecessary in administrative inspections of the alcoholic beverages industry because of the long-time close supervision and inspection of the industry.<sup>124</sup> The Court also recalled upholding the inspection pro-

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119. *Bionic Auto Parts and Sales, Inc. v. Fahner*, 518 F. Supp. 582, 585 n.1 (N.D. Ill. 1981), held that a legislature "can reasonably impose strict regulations on a legitimate industry in which the potential for illegal conduct is great." The court in *Fahner* held that the used automobile parts business was an industry that could be subjected to warrantless administrative inspections under *Donovan v. Dewey*, because of "(1) the large 'industry' in stolen motor vehicles (especially facilitated by the mobility of the vehicles themselves) and (2) the major problem of the so-called 'chop shops' with their ability to strip and disassemble vehicles with great speed. . . ." 518 F. Supp. at 585. The court, therefore, held that the statute in question subjecting used auto parts businesses to warrantless administrative inspections satisfied the "first requirement" of *Donovan v. Dewey*—"that of defining a regulatable industry where a 'warrant requirement clearly might impede the "specific enforcement needs" of the Act. . . ." 518 F. Supp. at 585 (citations omitted). *NRC v. Radiation Technology, Inc.*, 519 F. Supp. 1266, 1289 (D.N.J. 1981), interpreted *Donovan v. Dewey* as permitting a statute to provide for warrantless inspections when a warrant requirement might impede enforcement of the statute.

120. 452 U.S. at 599.

121. *Id.*

122. 397 U.S. 72 (1970).

123. 452 U.S. at 599.

124. *Id.* at 600.

visions of the Gun Control Act of 1968<sup>125</sup> in *United States v. Biswell*<sup>126</sup> on the basis of "a sufficiently comprehensive and predictable inspection scheme" and "the strong federal interest in conducting unannounced, warrantless inspections."<sup>127</sup>

On the other hand, the *Donovan* Court noted that warrantless inspections under section 8(a) of the Occupational Safety and Health Act (OSHA)<sup>128</sup> had been held unconstitutional in *Marshall v. Barlow's, Inc.*<sup>129</sup> because certain criteria had not been met. First, the OSHA provision failed to tailor administrative inspections to the particular health and safety concerns posed by the various businesses regulated by the statute. Instead, it authorized administrative inspections of any workplace and of all pertinent conditions and structures in a workplace.<sup>130</sup> Furthermore, it did not provide standards to guide inspectors in the exercise of their authority to select and to search establishments, instead providing only that such searches must be performed at reasonable times, within reasonable limits and in a reasonable manner.<sup>131</sup> Commenting on *Barlow's*, the *Donovan* Court recognized that that holding had curtailed the "almost unbridled discretion"<sup>132</sup> of OSHA officials by requiring warrants issued on the basis of neutral criteria, but *Donovan* emphasized that the *Barlow's* holding was expressly limited to the inspection provisions of OSHA, and stated that, under other statutes, the "reasonableness of a warrantless search . . . will depend upon the specific needs and privacy guarantees of each statute."<sup>133</sup>

Applying the criteria of *Colonnade*, *Biswell*, and *Barlow's*, the

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125. 18 U.S.C. §§ 921-928 (1976).

126. 406 U.S. 311 (1972). *Donovan v. Dewey* also quoted, at 452 U.S. at 600, the following passage from *Biswell*:

It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business . . . , he does so with knowledge that his records, firearms, and ammunition will be subject to effective inspection. . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task.

406 U.S. at 316.

127. 452 U.S. at 600.

128. 29 U.S.C. § 657(a) (1976).

129. 436 U.S. 307 (1978).

130. 452 U.S. at 601.

131. *Id.*

132. *Donovan v. Dewey*, 452 U.S. at 601 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. at 323).

133. *Donovan v. Dewey*, 452 U.S. at 601-02 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. at 321).

Supreme Court in *Donovan v. Dewey* held that the certainty and regularity of application of the Federal Mine Safety and Health Act's inspection program provided a constitutionally adequate substitute for a warrant,<sup>134</sup> finding that the Act is tailored to address the specific concerns of mining operations and that it imposes regulations sufficiently pervasive and defined that owners of subject property "cannot help but be aware" that their facilities will be inspected.<sup>135</sup> The Court stressed that the Act requires in-

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134. 452 U.S. at 603.

135. *Id.* at 603 (footnotes omitted) (quoting *United States v. Biswell*, 406 U.S., at 316). Justice Stewart argued in dissent that the "cannot help but be aware" limitation is "meaningless" because "the Court never explains how operators of stone quarries could possibly be aware that the quarries would be subject to warrantless inspections until Congress told them they would be." *Id.* at 611-12 n.3 (Stewart, J., dissenting).

*United States v. Gordon*, 655 F.2d 478 (2d Cir. 1981), held that the insurance business in the State of New York could be made subject to warrantless administrative inspections and seizure of business documents by state officials, because the insurance business had been "subject to a long-standing, complex, and pervasive pattern of regulation by the State of New York," so that a person engaged in the business has his "expectation of privacy . . . substantially reduced" and "is deemed to have consented to the regulatory restrictions placed upon him." 655 F.2d at 483. The majority in *Gordon* did not find that the warrantless entry and inspection of defendant's office was explicitly authorized by statute, although they indicated that the inspection was authorized by state law, 655 F.2d at 484. Judge Oakes, though concurring in *Gordon*, argued that *Donovan v. Dewey* was not applicable because the case did not involve a statute that provided for periodic inspections and that tailored the scope and frequency of administrative inspections to the particular health and safety concerns presented by the regulated businesses. 655 F.2d at 487. *See supra* text accompanying notes 49-53. (The Supreme Court has held that searches by state agents are governed by the same standards under the fourth amendment that govern federal agents. *Ker v. California*, 374 U.S. 23, 33 (1963) ("[T]he standard of reasonableness is the same under the Fourth and Fourteenth Amendments."). *See Bionic Auto Parts and Sales, Inc. v. Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981), which applied *Donovan v. Dewey* in holding unconstitutional a state statute subjecting used automobile part dealers to warrantless administrative inspections.)

*See United States v. Rucinski*, 658 F.2d 741 (10th Cir. 1981), where the court, after holding, as discussed in note 59 *supra*, that warrantless administrative inspections are not always required to be conducted pursuant to a regulatory scheme established by a statute, held that warrantless telescopic observations of operations of defendant's employees on the defendant's lumber company's private property, by Forest Service agents stationed on adjacent private property, did not violate the fourth amendment. After noting the federal interest in conducting this inspection through telescopic observations, *see supra* note 109, the court implicitly recognized the minimal intrusion on defendant's privacy by these observations by noting that no property was seized or molested and that the objects observed by the Forest Service agents were in plain view and were observed under circumstances in which the defendant could not contend that he could not anticipate the observations which were made. 658 F.2d at 745. "The defendant could not help being aware that the logs he had harvested under his contract with a government agency would be subject to unannounced inspections undertaken for the specific purpose of determining whether any manipulation of sample loads of logs was taking place. . . . Nor was this inspection so random, infrequent,

spection of all mines and specifically defines the frequency of inspection<sup>136</sup> rather than leaving that decision to the discretion of agency officials.<sup>137</sup> In upholding the constitutionality of the Act's

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or unpredictable that defendant, for all practicable purposes, had no real expectation that the logging operation would not be subjected to unannounced inspections from time to time by Forest Service officials." *Id.* (Citations omitted.)

136. 452 U.S. at 603-04. The Court noted that under the Act all surface mines must be inspected at least twice annually and all underground mines must be inspected at least four times annually, 30 U.S.C. § 813(a) (Supp. V 1981); all mining operations that generate explosive gases must be inspected at irregular 5, 10, or 15-day intervals, 30 U.S.C. § 813(i) (Supp. V 1981); the Secretary must conduct follow-up inspections of mines where violations of the Act previously have been discovered, 30 U.S.C. § 813(a) (Supp. V 1981); and the Secretary must inspect a mine immediately if notified by a miner or a miner's representative that a violation of the Act or an imminently dangerous condition exists, 30 U.S.C. § 813(g) (Supp. V 1981). 452 U.S. at 604. The Supreme Court has not addressed whether warrantless inspections may be made under the pervasively regulated industry exception when the inspection is not a routine one but is prompted by a belief that statutory or regulatory violations will be found. The several sections of the Federal Mine Safety and Health Act cited above, however, authorize warrantless inspections when violations have occurred previously or are suspected.

Some lower courts, on the other hand, have held that the pervasively regulated industry exception does not apply when the search that is being challenged was "not a routine, periodic search but rather, a search undertaken because government officials have 'cause to believe' they will find evidence of a crime . . .," *People v. Hedges*, 447 N.Y.S.2d 1008, 1012 (1982), because in such a case "the search is in the nature of a criminal search, rather than an administrative or regulatory search. As such, it cannot be said that the search is necessary to further a regulatory scheme. As a result, [such a search] fails to meet the *Biswell-Colonnade* exception." *Joe Flynn Rare Coins, Inc. v. Stephan*, 526 F. Supp. 1275, 1285 (D. Kan. 1981). In such cases, the search must be conducted pursuant to a warrant issued "upon a traditional showing of probable cause applicable to searches for evidence of crime." *People v. Hedges*, 447 N.Y.S.2d at 1012, quoting *Michigan v. Tyler*, 436 U.S. 499, 512 (1978). See *supra* text accompanying notes 25-27.

137. See *Bionic Auto Parts and Sales, Inc. v. Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981), which held that a state statute authorizing warrantless administrative inspections of the used automobile parts industry "at any reasonable time during the day or night" violated the fourth amendment and did not come within *Donovan v. Dewey's* pervasively regulated industry exception to the warrant requirement, because it gave unbridled discretion as to when to search and whom to search. The court in *Fahner* stated:

Essentially the Court's approach [in *Donovan v. Dewey*] embraces two equally necessary steps:

- (1) a legislative determination as to the specific regulatory needs of an industry; and
- (2) statutory establishment of inspection procedures and definition of their frequency, viewed as the functional equivalent of individualized search warrants (or as the Court put it, "a constitutionally adequate substitute for a warrant").

This is not of course to say that *advance notice* of the specific search is constitutionally required, for neither the *Donovan*-approved procedure nor a search warrant itself involves actual advance notice to the party searched of just when the search will take place.



general program of warrantless inspections, the Court had mentioned that "[t]he Act itself clearly notifies the operator that inspections will be performed on a regular basis,"<sup>138</sup> and indeed, the Court later stated that "it is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment."<sup>139</sup>

Furthermore, the Court emphasized that the standards applicable to mine operators are specifically set forth in the Act or in the Code of Federal Regulations,<sup>140</sup> thus establishing a predictable

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518 F. Supp. at 586.

Similarly, *Joe Flynn Rare Coins, Inc. v. Stephan*, 526 F. Supp. 1275 (D. Kan. 1981), held that a statute that authorized law enforcement officers to make warrantless inspections "at any time" of the business premises of pawnbrokers and precious metal dealers "to search for and to take into possession any article known or believed . . . to have been stolen," could not be upheld under the pervasively regulated industry exception, because, in part, "the regulatory presence is not sufficiently defined that the owner is aware that his property will be subject to periodic inspections undertaken for specific purposes. The owner has no knowledge of the law enforcement officer's investigations or hunches that might lead him to believe an item is stolen. . . . The searches could be as frequent as every day or as sparse as once a year." 526 F. Supp. at 1285.

*Cf.* *NRC v. Radiation Technology, Inc.*, 519 F. Supp. 1266 (D.N.J. 1981) which upheld as constitutional, under *Donovan v. Dewey*, warrantless administrative inspections of by-product material licensees under the Atomic Energy Act, which authorizes the NRC to provide by regulation for such inspections of a licensee's activities as are necessary to effectuate the purposes of the Act, 42 U.S.C. § 2201(o) (1976), and under NRC regulations promulgated under the Act, which provide for inspection of such licensees "at all reasonable times," 10 C.F.R. § 30.52(a). This holding in *Radiation Technology* is inconsistent with the holdings in *Donovan v. Dewey* and *Marshall v. Barlow's, Inc.*, which stress that statutes must require periodic warrantless inspections at specified intervals of all businesses regulated by a statute in order to fit within the pervasively regulated industry exception, and that statutes which authorize warrantless administrative inspections at any reasonable time violate the fourth amendment.

138. 452 U.S. at 605.

139. *Id.* at 606.

140. *Id.* at 604. The Court then stated: "Indeed, the Act requires that the Secretary inform mine operators of all standards proposed pursuant to the Act." *Id.* This statement should be interpreted as meaning that disclosure of proposed or promulgated regulatory standards to businesses subject to these standards is merely a relevant factor in determining whether warrantless administrative inspections under a statute violate the fourth amendment, not a prerequisite to compliance with the pervasively regulated industry exception. This conclusion is based upon the general principle that ignorance of the law is not a defense to criminal charges, unless the lack of knowledge of the relevant law negates the scienter element of the criminal offense. *See United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971). (Ignorance of the law, however, may be a defense to a criminal charge punishing a *mala prohibita* act of omission. *See Lambert v. California*, 355 U.S. 225 (1957).) If ignorance of the law is not a defense to criminal charges, ignorance of the law certainly would be neither a defense to a civil suit seeking a civil penalty nor a factor that would cause a court to decline to issue injunctive relief.

and guided federal regulatory presence.<sup>141</sup>

The Surface Mining Control and Reclamation Act of 1977 satisfies the periodic inspection requirement, because it requires that inspections "shall . . . occur on an irregular basis averaging not less than one partial inspection per month and one complete inspection per calendar quarter" for each permitted mine.<sup>142</sup> The Act also meets the specific-procedures requirement by directing the Secretary of Interior to promulgate regulations establishing procedures to insure that adequate and complete inspections are made.<sup>143</sup>

On the other hand, a number of federal environmental protection statutes contain provisions authorizing warrantless administrative inspections of regulated commercial premises at any "reasonable time." Such provisions are nearly identical to the warrantless inspection provision in OSHA that the Supreme Court held violated the fourth amendment in *Marshall v. Barlow's, Inc.* Federal statutes containing provisions that are likely to violate the fourth amendment by authorizing warrantless administrative inspections of regulated commercial premises at any "reasonable time" include the Clean Air Act,<sup>144</sup> the Federal Water Pollution Control Act,<sup>145</sup> the Safe Drinking Water Act,<sup>146</sup> the Federal Environmental Pesticide Control Act,<sup>147</sup> the Toxic Substances Control Act,<sup>148</sup> the Resource Conservation and Recovery Act,<sup>149</sup> the Superfund Act,<sup>150</sup> and the Endangered Species Act.<sup>151</sup> Regulations promulgated by the Nuclear Regulatory Commission under the Atomic Energy Act that authorize war-

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141. 452 U.S. at 604. Two paragraphs later, Justice Marshall, in a paragraph that concludes by stating that the general program of warrantless inspections under the Federal Mine Safety and Health Act does not violate the fourth amendment, similarly stated:

Moreover, the Act and the regulations issued pursuant to it inform the operator of what health and safety standards must be met in order to be in compliance with the statute. The discretion of government officials to determine what facilities to search and what violations to search for is thus directly curtailed by the regulatory scheme.

*Id.* at 605.

142. 30 U.S.C. § 1267(c) (Supp. V 1981).

143. 30 U.S.C. § 1267(h)(2) (Supp. V 1981).

144. *See supra* note 54.

145. *See supra* note 55.

146. *See supra* note 56.

147. *See supra* note 57.

148. *See supra* note 58.

149. *See supra* note 59.

150. *See supra* note 60.

151. *See supra* note 62.

rantless inspections of by-product licensees (including nuclear power plant licensees) "at all reasonable times"<sup>152</sup> are also likely to violate the fourth amendment,<sup>153</sup> as does the provision of the Uranium Mill Tailings Control Act of 1978 authorizing warrantless inspections of inactive uranium mill tailing sites "at any time."<sup>154</sup> These federal environmental protection statutes and regulations, however, appear to comply with *Donovan v. Dewey*'s requirement that a statute must specify the procedures and standards to be followed by administrative inspectors,<sup>155</sup> except for the Toxic Substances Control Act, which specifies only that inspections of chemical manufacturing and storage facilities must be conducted ". . . within reasonable limits, and in a reasonable manner."<sup>156</sup>

## 5. Privacy Concerns

In support of its holding that the warrantless administrative inspection provisions of the Federal Mine Safety and Health Act do not violate the fourth amendment, the Court in *Donovan v. Dewey* also noted that the Act provides a specific mechanism for accommodating any special or unusual privacy concerns that a specific mine operator might have, such as the desire to keep trade secrets confidential, by prohibiting forcible entries by inspectors.<sup>157</sup> The Act requires the Secretary of Labor to file a civil suit against a mine operator who refuses entry, in order to obtain an injunction against future denials of entry to federal inspectors.<sup>158</sup> The Court stated that court proceedings in such a civil suit provide "an adequate forum for the mine owner to show that a specific search is outside the federal regulatory authority, or to seek from the District Court an order accommodating any unusual privacy interests that the mine owner might have . . . ." <sup>159</sup> *Donovan v. Dewey* did

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152. 10 C.F.R. § 30.52(a) (1982).

153. *NRC v. Radiation Technology, Inc.*, 519 F. Supp. 1266 (D.N.J. 1981), however, held that these regulations comply with the fourth amendment as interpreted by *Donovan v. Dewey*.

154. *See supra* note 62.

155. *See supra* notes 54-57 and 59-62.

156. *See supra* note 58.

157. 452 U.S. at 604-05.

158. *Id.* at 604.

159. *Id.* at 605. The Court cited by way of example *Marshall v. Stroudt's Ferry Preparation Co.*, 602 F.2d 589, 594 (3d Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980), which affirmed a district court judgment that included an order imposing upon inspectors acting under the Federal Mine Safety and Health Act of 1977 a confidentiality requirement to protect a preparation plant owner's trade secrets.

not indicate whether statutory protection of special privacy concerns of regulated businesses is a constitutionally required element of all statutes providing for warrantless administrative inspections under the pervasively regulated industry exception, or merely a relevant factor. Language in the opinion supports both views: although the Court stated that "it is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the fourth amendment,"<sup>160</sup> it also stated that the *reasonableness* of a warrantless search depends on the specific needs and privacy guarantees of the statute.<sup>161</sup> Even if accommodation of special privacy concerns is constitutionally required, these concerns might be adequately protected by means other than those applied in *Donovan v. Dewey* (prohibition of forcible entries and requiring an injunction to obtain entry when consent is refused). Privacy concerns might be protected by prohibiting agency use and public disclosure of items or information seized by an inspector which the owner of the inspected premises claims are trade secrets or are not seizable under the relevant statute, pending review by a court. The Clean Air Act,<sup>162</sup> the Federal Water Pollution Control Act,<sup>163</sup> and the Federal Environmental Pesticide Control Act<sup>164</sup> may prohibit forcible entry without a warrant, and if that is so, these three federal environmental protection statutes would satisfy a possible requirement of accommodating special privacy concerns. Neither these statutes nor the other federal environmental protection statutes discussed in this article otherwise accommodate special privacy concerns, but such accommodation could be provided by administrative agency regulation or judicial order, if required by the fourth amendment.<sup>165</sup>

## 6. Seizures

Another issue which the Supreme Court has not addressed is whether the pervasively regulated industry exception authorizes statutory provisions that permit inspectors, during the course of a warrantless administrative inspection, to seize items that may be evidence of statutory or regulatory violations. Several federal en-

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160. 452 U.S. at 606.

161. See *supra* note 133.

162. *Dow Chem. Co. v. United States*, 536 F. Supp. 1355, 1362 (E.D. Mich. 1982) (dictum), which is discussed in note 54 *supra*.

163. *Id.*

164. See *supra* note 57.

165. See *supra* text accompanying notes 47-48.

vironmental protection statutes, including the Clean Air Act,<sup>166</sup> the Federal Water Pollution Control Act,<sup>167</sup> the Federal Environmental Pesticide Control Act,<sup>168</sup> the Resource Conservation and Recovery Act,<sup>169</sup> and the Superfund Act,<sup>170</sup> authorize inspectors conducting warrantless administrative inspections to seize samples of pollutant emissions or discharges, wastes, or products, apparently without a warrant. *Colonnade Catering Corp. v. United States*<sup>171</sup> implies that warrantless seizures of items relevant to enforcement of statutory or regulatory standards are permitted under the pervasively regulated industry exception. However, *Colonnade Catering Corp.* held that the warrantless seizure of liquor bottles by federal inspectors, after a warrantless forcible entry into a storeroom, violated the fourth amendment.<sup>172</sup> The Court stated in dictum that "Congress has broad authority to fashion standards of reasonableness for searches and seizures,"<sup>173</sup> thereby indicating that an authorized seizure would be permissible. Thus, the pervasively regulated industry exception may authorize the warrantless seizure of evidence such as wastewater samples, ambient air samples, stack gas samples, and soil samples obtained for purposes of testing pollutant concentrations. Certainly, seizure of evidence of statutory and regulatory violations may be as necessary as visual inspections of commercial property for proper enforcement of statutory and regulatory standards governing a pervasively regulated industry.<sup>174</sup> Furthermore, seizure of pollutant samples would not infringe upon expectations of privacy to a significantly greater extent than would visual observations by an inspector.<sup>175</sup>

If a warrantless seizure of an item of evidence or potential evi-

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166. *See supra* note 54.

167. *See supra* note 55.

168. *See supra* note 57.

169. *See supra* note 59.

170. *See supra* note 60.

171. 397 U.S. 72 (1970). *See supra* text accompanying notes 76-78.

172. *See supra* note 77 and text accompanying notes 76-78.

173. 397 U.S. at 77 (emphasis supplied).

174. *See supra* text accompanying notes 109-19.

175. *Cf. Joe Flynn Rare Coins, Inc. v. Stephan*, 526 F. Supp. 1275 (D. Kan. 1981), which held that a statute that authorized law enforcement officers to make warrantless inspections of the business premises of pawnbrokers and precious metal dealers, and "to search for and to take into possession any article known or believed to have been stolen," violated the fourth amendment because it gave law enforcement officers "virtually unlimited discretion" as to what articles can be searched for or seized. 526 F. Supp. at 1286. The court also held that, because the statute authorized seizure of an article upon "mere belief" that it was stolen, the statute violated the fourth amend-

dence, such as a sample of a pollutant emission or discharge, is not authorized by a federal environmental protection statute or is not a permissible act by an inspector under the pervasively regulated industry exception, an inspector may not seize items encountered during a warrantless inspection of commercial premises unless the requirements of the "plain view" seizure doctrine are met.<sup>176</sup>

## 7. Penalties

Federal environmental protection statutes provide that an owner of commercial premises who refuses entry to an administrative inspector seeking to make a lawful administrative inspection is subject to criminal penalties, civil penalties, injunctive relief, or a

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ment requirement that there must be probable cause or reasonable belief that an article is stolen in order to seize the article. *Id.*

Warrantless seizures of business records or industrial equipment, the loss of which would significantly disrupt business operations, should not be permitted under the pervasively regulated industry exception, because such seizures would be unreasonable under the fourth amendment unless authorized by a warrant. *Cf. Hale v. Henkel*, 201 U.S. 43 (1906) (grand jury subpoena duces tecum requiring production of corporate documents will be quashed where it might be difficult for business operations to be carried on after requested documents have been turned over and where no necessity for examining all of requested documents has been shown).

176. A warrantless seizure of an item is permitted under the "plain view" seizure doctrine if three requirements are met. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Washington v. Chrisman*, 455 U.S. 1 (1982). First, the government agent making the seizure must have lawfully entered the premises where the seizure was made, pursuant either to a warrant or to one of the exceptions to the warrant requirement, *Coolidge*, 403 U.S. at 466, and must have discovered the seized item in a place in which the agent is authorized to be under a warrant or under one of the exceptions to the warrant requirement. *Chrisman*, 455 U.S. at 1. Second, it must be immediately apparent to the agent when he first discovers the items that there is probable cause (reasonable grounds) to believe that the item is evidence, contraband, or an instrumentality of crime, *Coolidge*, 403 U.S. at 466-67, or another object that is seizable under the fourth amendment (*see Warden v. Hayden*, 387 U.S. 294 (1967)), without any further testing or investigation of the item to determine if the item has a nexus to criminal activity. *See C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS* § 11.04 (1980). Finally, the discovery of the item must be inadvertent. *Coolidge*, 403 U.S. at 469-71 (i.e., prior to the seizure of the item the government agent must not have had probable cause to believe the seized item would be found on the premises. *See supra* C. WHITEBREAD, § 11.03). But the warrantless seizure of contraband and stolen or dangerous objects may be permissible under the "plain view" seizure doctrine even when the agent knows in advance that he will find the seized object in plain view on the premises and intends to seize the object. *See Coolidge*, 403 U.S. at 471, 472. Pollutants that might threaten public health or the environment arguably are "dangerous objects" within the meaning of this exception to the "inadvertent discovery" requirement of the "plain view" seizure doctrine.

combination of two or more such remedies.<sup>177</sup>

177. The Clean Water Act provides that a person who violates the provisions of 33 U.S.C. § 1318 (1976) with respect to entry, inspection, and sampling by EPA may be subject to injunctive relief, civil penalties, and criminal penalties of fines and imprisonment. 33 U.S.C. § 1319(c), (d) (1976). Similarly, the Toxic Substances Control Act provides that a person who fails or refuses to permit an entry or inspection authorized by 15 U.S.C. § 2610 (1976) can be subject to civil penalties and criminal penalties of fines and imprisonment. 15 U.S.C. §§ 2614, 2615 (1976). The Act does not explicitly authorize injunctive relief against a person denying an entry or inspection authorized by 15 U.S.C. § 2610, although the Act gives federal district courts jurisdiction in civil actions to "compel the taking of any action required by or under" the Act. 15 U.S.C. § 2616(a)(C) (1976). This latter section might authorize issuance of an injunction ordering a person to permit an entry and inspection authorized by 15 U.S.C. § 2610. Under the Federal Environmental Pesticide Control Act, a person who refuses to allow the inspection of any records or establishment pursuant to 7 U.S.C. § 136f, g (Supp. 1982), or refuses to allow an officer or employee of EPA to take a sample of any pesticide pursuant to 7 U.S.C. § 136g (Supp. 1982), may be subject to a civil penalty or criminal penalties of fines and imprisonment. 7 U.S.C. §§ 136j(2)(B), 1361 (Supp. 1982). The Act, however, does not explicitly authorize injunctive relief against a person who refuses to allow entry, inspection, or sampling that is authorized by the Act, although federal district courts are given jurisdiction to prevent and restrain violations of the Act. 7 U.S.C. § 136(c) (Supp. 1982). This section would appear to authorize federal district courts to enjoin a person from preventing entry, inspection, or sampling that is authorized under the Act. If a person violates a provision of a permit issued under the Marine Protection, Research and Sanctuaries Act providing for warrantless inspections of vessels transporting materials that will be dumped in ocean waters, he may be subject to civil penalties, criminal penalties of a fine or imprisonment, or equitable relief. 33 U.S.C. § 1415 (a), (b), & (d) (1976).

Other federal environmental protection statutes are not as comprehensive in the remedies they provide against a person who has denied access to administrative inspectors seeking to inspect commercial premises. The Clean Air Act provides that a person who fails or refuses to comply with any requirement of 42 U.S.C. § 7414 (Supp. V 1981) (which generally regulates inspections under the Act; *see supra* note 54) can be subject to permanent or temporary injunctive relief or a civil penalty, 42 U.S.C. § 7413(b)(4) (Supp. V 1981), but is not subject to criminal penalties. *See* 42 U.S.C. § 7413(c) (Supp. V 1981). In addition, the Clean Air Act provides that a person who fails or refuses to permit entry, testing, or inspection authorized under 42 U.S.C. § 7525(c) (Supp. V 1981) (which regulates manufacturers of automobiles and automobile engines; *see supra* note 54) is subject to a civil penalty. 42 U.S.C. §§ 7522(a)(2), 7524 (Supp. V 1981). Under the Surface Mining Control and Reclamation Act of 1977, a person who denies entry to inspectors seeking to make an authorized entry and inspection pursuant to the Act is subject to injunctive relief, 30 U.S.C. § 1271(c) (Supp. V 1981), and also is subject to a civil penalty if such action is a "violation" of a "provision" of the Act. 30 U.S.C. § 1268(a) (Supp. V 1981). Denial of entry and inspection, however, is not a criminal offense under the Act. *See* 30 U.S.C. § 1268(e) (Supp. V 1981). A person who refuses entry, inspection, or sampling that is authorized by the Resource Conservation and Recovery Act may be subject to a civil penalty if such conduct is considered to be a "violation of any requirement" of the hazardous waste subchapter of the Act, 42 U.S.C. § 6928(a)(3) (1976), although the Act does not provide for criminal penalties for such conduct, *see* 42 U.S.C. § 6928(d) (Supp. V 1981), or injunctive relief for such conduct. *Cf.* 42 U.S.C. § 6973 (Supp. V 1981). A person who refuses entry to an inspector seeking to make an inspection pursuant to NRC regulations, *see supra* note 66, is subject to revocation of

*Donovan v. Dewey* did not address the appropriate penalties to be imposed upon a person who denies entry to an inspector seeking to make a lawful administrative inspection, although earlier Supreme Court decisions have done so. The *Donovan* majority noted that a mine operator who denies entry to an inspector acting pursuant to the Federal Mine Safety and Health Act can be issued a citation and assessed civil penalties pursuant to regulations<sup>178</sup> promulgated by the Secretary of Labor pursuant to the Act.<sup>179</sup> But the Supreme Court did not discuss the constitutionality of imposing this civil penalty. Nor did the Court discuss the possibility of a criminal fine or imprisonment in *Donovan*. *United States v. Biswell*,<sup>180</sup> however, held that the provisions of the Gun Control Act of 1968<sup>181</sup> that made it a criminal offense to deny entry to administrative inspectors were constitutional.

In summary, under the fourth amendment, federal environmental protection statutes are permitted to subject a person who refuses entry to an inspector seeking to make a lawful administrative inspection to injunctive relief, civil penalties, or criminal penalties.

#### WARRANTLESS INSPECTIONS UNDER THE EMERGENCY EXCEPTION

The pervasively regulated industry exception is not the only exception to the general rule requiring a warrant to make a search or seizure:<sup>182</sup> warrantless administrative inspections may also be

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his license, 42 U.S.C. § 2236 (1976), to injunctive relief, *id.* at § 2280, and to civil penalties, *id.* at § 2282, but not to criminal penalties. *Id.* at §§ 2272-2277 (1976 & Supp. V 1981). A person who refuses entry to an inspector seeking to make an inspection authorized by the Endangered Species Act under 16 U.S.C. § 1538(d)(2)(B) is subject to civil penalties, *id.* at § 1540(a)(1) (Supp. 1982) and criminal penalties, *id.* at § 1540(b)(1) (Supp. 1982), but not to injunctive relief in a suit brought by the federal government. *Cf. id.* at § 1540(g) (1976). The Safe Drinking Water Act provides that a person who fails or refuses to allow the EPA Administrator or his representatives to enter premises and conduct an inspection that is authorized under the Act may be fined not more than \$5,000, 42 U.S.C. § 300j-4(c) (Supp. V 1981); the Act does not specify whether this fine is a civil penalty or a criminal penalty. The Act does not explicitly authorize injunctive relief against a person who refuses to allow entry or inspection authorized by the Act. *See* 42 U.S.C. § 300j-4 (Supp. V 1981).

The Superfund Act does not explicitly provide any remedies or penalties when a person denies entry to an inspector acting pursuant to 42 U.S.C. § 9604(e) (Supp. V 1981).

178. 30 C.F.R. § 100.4 (1982).

179. 452 U.S. at 597 n.3.

180. 406 U.S. 311 (1972). *See supra* text accompanying notes 79-82.

181. 18 U.S.C. §§ 921-928 (1976).

182. *See supra* text accompanying notes 49-50.



permissible in emergency situations. This exception has potential for application in the enforcement of federal environmental statutes.

The courts have held that government agents may conduct searches or seizures without a warrant in a variety of emergency situations.<sup>183</sup> The actions that can be taken by government agents without a warrant depend upon the nature of the emergency situation. In some cases, warrantless entry of premises and the warrantless seizure of items may be permitted under the fourth amendment, while in others the fourth amendment may only allow government agents to prevent persons from entering premises while other agents obtain a warrant authorizing entry of the premises and seizure of items therein.<sup>184</sup> One court has observed that there may be a broader emergency exception to the general rule requiring a warrant for a search or seizure in the case of administrative regulatory inspections than in the case of criminal investigations by law enforcement officers.<sup>185</sup>

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183. See generally 2 W. LA FAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §§ 6.5-6.6 (1978) (discussing warrantless entries, searches, and seizures). See also *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967) (dictum), citing *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908) (seizure of unwholesome food); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory smallpox vaccination); *Compagnie Francaise v. Board of Health*, 186 U.S. 380 (1902) (health quarantine); *Kroplin v. Truax*, 119 Ohio St. 610, 165 N.E. 498 (1929) (summary destruction of tubercular cattle).

184. See 2 W. LA FAVE, *supra* note 183, § 6.5(c).

185. *United States v. Syncon Resins, Inc.*, 16 Env't Rep. Cas. (BNA) 1305 (D.N.J. May 29, 1981).

This court indicated that a "more relaxed approach" may be taken under the emergency doctrine in the case of administrative regulatory inspections than in the case of criminal investigations and that:

. . . a finding of exigent circumstances is less demanding in the case of an administrative, non-criminal investigation than in the case of a criminal investigation. The reason for this is clear. In conducting a search pursuant to a criminal investigation, the government expressly intends to invade another's privacy. In this way the search is more likely to be effective. When a search is conducted in an emergency situation pursuant to a non-criminal investigation, it is not as likely that the government agents desired to invade another's privacy in order to better effectuate the search. Further, the primary intention is not to use the invasion of privacy against those persons whose privacy is invaded.

*Id.* at 1308 n.4. The court in *Syncon Resins* based this conclusion upon *Michigan v. Tyler*, 436 U.S. 499 (1978), which upheld the warrantless entry and search of a burning building by fire inspectors to determine the cause of the fire, both while the fire was being extinguished and four hours after the fire was extinguished; and upon *United States v. Miller*, 589 F.2d 1117 (1st Cir. 1978), which upheld the warrantless inspection by the Coast Guard of a seemingly abandoned boat.

The United States Supreme Court has not held explicitly that there is a broader, more relaxed, emergency exception to the general rule requiring a warrant for a

This difference in the scope of the emergency exception in the regulatory and criminal contexts presents problems in the case of enforcement of federal environmental protection statutes, because emissions and discharges of pollutants may be subject to both civil and criminal penalties under some federal environmental protection statutes, such as the Clean Air Act<sup>186</sup> and the Federal Water Pollution Control Act.<sup>187</sup> Consequently, it may be difficult to determine when an inspection of commercial property in a pollution or environmental emergency takes place in a criminal or non-criminal context. The fact that criminal charges are filed after entry of commercial property in an emergency situation should not automatically lead to a conclusion that the initial warrantless entry was a criminal investigation. The entry may have been a routine action to prevent or mitigate harm to the environment or public health,<sup>188</sup> and the criminal charges may result because unanticipated evidence of a crime is discovered after entry.<sup>189</sup>

The fourth amendment permits warrantless conduct by government agents where there is probable cause to believe that evidence of a crime is on particular premises and that the evidence will disappear or be destroyed during the time it would take to get a warrant. In such an emergency, government agents may enter the premises and seize the evidence pursuant to a criminal investigation.<sup>190</sup> Under this emergency exception to the general warrant

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search or seizure in non-criminal administrative regulatory inspections than in criminal investigations. The Supreme Court, however, did rely upon the difference between criminal investigations and administrative regulatory inspections in adopting a less strict probable cause standard for issuance of warrants for administrative regulatory inspections and in permitting area-wide warrants to be issued for such regulatory inspections. *Camara v. Municipal Court*, 387 U.S. 523, 534-39 (1967). See *supra* text accompanying notes 31-33. This distinction between criminal investigations and administrative regulatory inspections also may be relevant in defining when warrantless administrative inspections are reasonable searches under the fourth amendment.

186. 42 U.S.C. § 7413(b), (c) (Supp. V 1981).

187. 33 U.S.C. § 1319(c), (d) (1976 & Supp. V 1981).

188. See, e.g., 33 U.S.C. § 1321(c) (1976 & Supp. V 1981) (National Contingency Plan for removal of discharged oil and hazardous substances and minimization of damage from such discharges).

189. See, e.g., *Michigan v. Tyler*, 436 U.S. 499 (1978) (evidence of arson discovered by fire inspectors while fire was being extinguished); *United States v. Syncon Resins, Inc.*, 16 Env't Rep. Cas. (BNA) 1305 (non-criminal investigation of oil spills led to criminal charges of unlawful discharge of pollutants).

190. See, e.g., *Schmerber v. California*, 384 U.S. 757 (1966) (warrantless taking of blood sample, from person lawfully arrested for driving while under the influence of intoxicating liquor, to determine blood alcohol content, held not to violate the fourth amendment, because alcohol would dissipate from blood during the time it would take to get a search warrant). See also 2 W. LA FAVE, *supra* note 183, § 6.5. Some courts require governmental agents to obtain a warrant in order to enter premises and

requirement, government agents may lawfully seize samples of pollutants when the agents have probable cause (reasonable grounds) to believe that the samples are evidence of criminal violations of federal environmental protection statutes and when the pollutants to be seized would disperse or flow to other, unknown locations, or mix with pollutants from other sources, during the time required to obtain a warrant.

There also may be emergency situations involving threats of harm to public health or safety or to the environment, in which entry and inspection of commercial premises and seizures of evidence by administrative officials may be conducted without a warrant.<sup>191</sup> In *United States v. Syncon Resins, Inc.*,<sup>192</sup> Coast Guard officers without a warrant entered commercial property and seized four wastewater samples after other Coast Guard officers had observed, from adjacent property, oil running into a river from the property. The court found no fourth amendment violation, noting that Congress had adopted a policy prohibiting the discharge of oil into waters of the United States,<sup>193</sup> and that the Coast Guard had a statutory duty to prevent and abate oil pollution.<sup>194</sup> The court found that if cleanup of the oil had been delayed, there would have been continued discharge of oil and more severe, and possibly irreversible, damage to the environment and to public health and safety.<sup>195</sup> The court held that this situation was an emergency justifying prompt investigation without a warrant, and that the seizure of the wastewater "was obviously necessary" to that investigation.<sup>196</sup> Alternatively, the court held that the wastewater could be properly seized because it was in plain view once the officers had properly entered the commercial property.<sup>197</sup> Be-

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seize evidence when disappearance or destruction of the evidence can be prevented by guarding the premises and preventing persons from entering the premises. *Id.* § 6.5(c).

191. *Cf.* *Michigan v. Tyler*, 436 U.S. 499 (1978) (warrantless entry and inspection of burning premises by fire inspectors to determine cause of fire held not to violate fourth amendment).

192. 16 Env't Rep. Cas. (BNA) 1305.

193. 33 U.S.C. § 1321(a)(8), (c)(1) (1976 & Supp. V 1981), cited at 16 Env't Rep. Cas. (BNA) at 1307.

194. *Id.*

195. 16 Env't Rep. Cas. (BNA) at 1307-08.

196. *Id.* at 1307 (citation omitted).

197. *Id.* The court was apparently applying the "plain view" seizure doctrine. *See supra* note 176. The court in *Syncon Resins* did not discuss the "inadvertent discovery" requirement of the "plain view" seizure doctrine; however, even if seizure of oil in the wastewater samples was anticipated and not inadvertent, the oil in the wastewater samples might be held to be a "dangerous" object and thus seizable under the

cause the entry of the commercial property and the seizure of the wastewater samples were found to be part of a non-criminal investigation,<sup>198</sup> the agents' actions were held to be permissible under the emergency exception to the general warrant requirement. The court stated in dictum, however, that "the search and seizure here actually fits more neatly within the exigent circumstances exception narrowly drawn in investigating criminal matters . . . ."<sup>199</sup>

### CONCLUSION

Businesses, and in particular individual industries, may be made subject to warrantless administrative inspections under federal environmental protection standards pursuant to the pervasively regulated industry exception to the general fourth amendment warrant requirement. This exception is based on the fact that violations of pollution control and environmental protection standards can easily be concealed by disconnecting or bypassing pollution control equipment or by discharging, emitting, or dumping unlawful amounts of pollutants. Warrantless inspections are therefore necessary to deter violations of such standards.<sup>200</sup> But only businesses within a *single* industrial category can be made subject to warrantless inspections under this exception. Statutes that provide for warrantless inspection of all types of businesses that emit pollutants into the ambient air,<sup>201</sup> discharge pollutants into waterways,<sup>202</sup> or generate hazardous wastes<sup>203</sup> do not satisfy the exception and therefore cannot be up-

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"plain view" seizure doctrine without compliance with the "inadvertent discovery" requirement. See *supra* note 176. Alternatively, inadvertent discovery may not be required when there are exigent circumstances. See *Coolidge v. New Hampshire*, 403 U.S. 443, 470-71 (1971).

198. 16 Env't Rep. Cas. (BNA) at 1307-08. The court did not provide any supporting analysis for this conclusion, although earlier in the opinion the court had stated that the purpose of the warrantless entry by the Coast Guard was to investigate the source of the pollution and bring about its immediate abatement. *Id.* at 1307. Although *Syncon Resins* was a case involving criminal charges for the unlawful discharge of pollutants, this does not mean that the warrantless entry and inspection of the commercial property by the Coast Guard was pursuant to a criminal investigation. See *supra* text accompanying note 33.

199. 16 Env't Rep. Cas. (BNA) at 1307. The court did not provide supporting analysis for the conclusion, although the court may have been referring to the emergency destruction or disappearance of evidence doctrine. See *supra* text accompanying note 190.

200. See *supra* text accompanying notes 109-19.

201. See *supra* text accompanying notes 100-01.

202. See *supra* text accompanying notes 100-02.

203. See *supra* text accompanying notes 103-05.

held under the fourth amendment. The federal environmental protection statutes, other than the Surface Mining Control and Reclamation Act,<sup>204</sup> fail in various respects to satisfy the criteria of the pervasively regulated industry exception, but these statutory shortcomings can be cured by promulgation of appropriate administrative regulations. Even if appropriate regulations are not adopted and no warrant is obtained, administrative agencies may enter and inspect commercial property and take pollutant samples without a warrant in emergency situations. The reasonableness standard of the fourth amendment, now almost 200 years old, provides sufficient flexibility to allow effective enforcement of recently enacted statutes which seek to prevent harm to public health and the environment from modern industry's wastes.

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204. See *United States v. Ray*, 652 F.2d 670 (6th Cir. 1981); *Andrus v. P-Burg Coal Co.*, 495 F. Supp. 82 (S.D. Ind. 1980), *aff'd per curiam*, 644 F.2d 1231 (7th Cir.); and *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301 (D.D.C. 1978), *aff'd in part and rev'd in part on other grounds*, 627 F.2d 1346 (D.C. Cir. 1980).