Putting the "Super" into Superfund's Entry and Inspection Provisions: Outboard Marine Corp. v. Thomas

Mary Beth Miller

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Mary B. Miller, Putting the "Super" into Superfund's Entry and Inspection Provisions: Outboard Marine Corp. v. Thomas, 36 DePaul L. Rev. 437 (1987)
Available at: https://via.library.depaul.edu/law-review/vol36/iss3/8

This Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
PUTTING THE "SUPER" INTO SUPERFUND'S ENTRY AND INSPECTION PROVISIONS:  
OUTBOARD MARINE CORP. v. THOMAS

INTRODUCTION

Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund)1 in response to the dangers to public health and the environment from abandoned hazardous waste sites. The Environmental Protection Agency (EPA) interpreted CERCLA as conferring virtually unlimited enforcement powers upon it to enter private property in response to environmental hazards, even when those hazards present no imminent or substantial threat to health or the environment. Although the government has a substantial interest in protecting public health and the environment,2 the EPA's interpretation of the statute deprives property owners of fundamental rights guaranteed by the fourth and fifth amendments to the United States Constitution.

In Outboard Marine Corp. v. Thomas,3 the United States Court of Appeals for the Seventh Circuit declared that the EPA's expansive interpretation of its inspection and enforcement powers under CERCLA exceeded the authority actually conferred upon the EPA by Congress. The court construed the entry and inspection provisions of CERCLA to prohibit the EPA from entering private property, in nonemergency situations, to perform preconstruction activities prior to the actual cleanup of a hazardous waste site.


2. In 1979, the EPA estimated that 1,200 to 2,000 hazardous waste sites presented a serious risk to the environment. H.R. Rep. No. 1016, 96th Cong., 1st Sess. 6120 (1979). The Office of Technology Assessment now estimates that nationwide there may be as many as 10,000 abandoned hazardous waste sites eligible for cleanup under CERCLA. H.R. Rep. No. 253, 99th Cong., 1st Sess. 55 (1985). The number can be expected to grow. The EPA's Office of Solid Waste estimates that more than 650,000 businesses currently generate hazardous waste in the United States. Berkey & Brown, Spreading the Word About the Job Under RCRA, EPA J., Apr. 1986, at 15. There are over 60,000 chemicals in use in the United States and every year another 1,000 industrial chemicals, 200 pesticides, 80 food additives, and 200 drugs are developed as entirely new chemical entities. M. WOBOEK, TOXIC SUBSTANCES CONTROL PRIMER (1984).

3. 773 F.2d 883 (7th Cir. 1985).
In addition to invalidating the EPA's interpretation of its enforcement power, the decision illustrates deficiencies in CERCLA's entry and inspection provisions. In response to this decision, Congress has recently passed amendments to CERCLA which clarify and strengthen the EPA's authority to respond to environmental hazards. Although Congress seeks to give the EPA increased power and discretion to fully implement CERCLA, the amendments may deny property owners adequate substantive and procedural protection against arbitrary or unreasonable intrusions by the EPA. This Note analyzes the deficiencies Outboard Marine found in CERCLA's entry and inspection provisions. It also discusses whether the statutory amendments that correct these deficiencies satisfy the fourth and fifth amendments.

I. Background

A. Comprehensive Environmental Response, Compensation & Liability Act of 1980

Congress enacted CERCLA to protect public health and the environment from the dangers of the nation's worst abandoned hazardous waste sites. CERCLA directed the EPA to investigate the potential threat to the public posed by hazardous substances at those sites designated on the National

---


5. House Report No. 253 describes the purpose of the amendments to CERCLA's entry and inspection provisions:

The Committee has been concerned that EPA has had difficulty gaining access to facilities and gathering information or conducting cleanup activities necessary to achieve the goals of Superfund. This provision clarifies and strengthens the authority of EPA to achieve these tasks.


6. During the House debates held on September 19, 1980, Congressman Florio, sponsor of the Superfund legislation, stated:

The goals of the legislation are to eliminate unsafe inactive hazardous waste sites and to remove hazardous waste threats to public health and the environment in a cost effective manner . . . . [The bill] establishes an information gathering and analysis system. This system will enable Federal and State governments to characterize inactive site problems more accurately and develop priorities for investigation and response.


Priorities List. In the event of an imminent and substantial endangerment\(^8\)

---


9. CERCLA did not define "imminent and substantial endangerment." Under section 106(c), 42 U.S.C. § 9606(c) (1982), Congress has delegated to the EPA the authority to determine when an imminent and substantial endangerment exists. The meaning of "imminent and substantial endangerment" under section 106(c) is discussed in United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 845-46 (W.D. Mo. 1984) (discharge of highly toxic compounds presents an imminent and substantial endangerment when there is a substantial likelihood of human and environmental exposure), and United States v. Reilly Tar & Chem. Corp.; 546 F. Supp. 1100, 1109-10, 1114 (D. Minn. 1982) (discharge of toxic wastes and carcinogens into the city's drinking water supply presents an imminent and substantial endangerment). "Imminent and substantial endangerment" has been used in other environmental statutes. See, e.g., Clean Air Act, 42 U.S.C. § 7603 (1982); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1364 (1982); Resource Conservation & Recovery Act of 1976, 42 U.S.C. § 6973 (1982). The meaning of "imminent and substantial endangerment" is discussed in the House Committee Report accompanying section 1431 of the Safe Water Drinking Act, which states:

"[I]mminence' must be considered in light of the time it may take to prepare administrative orders or moving papers, to commence and complete litigation, and to permit issuance, notification, implementation, and enforcement of administrative or court orders to protect the public health.

Furthermore, while the risk of harm must be "imminent" for the Administrator to act, the harm itself need not be. Thus, for example, the Administrator may invoke this section when there is an imminent likelihood of the introduction into drinking water of contaminants that may cause health damage after a period of latency.

Among those situations in which the endangerment may be regarded as "substantial" are the following:

(1) a substantial likelihood that contaminants capable of causing adverse health effects will be ingested by consumers if preventive action is not taken;

(2) a substantial statistical probability that disease will result from the presence of contaminants in drinking water; or

(3) the threat of substantial or serious harm (such as exposure to carcinogenic agents or other hazardous contaminants . . . . .)

H.R. Rep. No. 1185, 93d Cong., 2d Sess. 35-36, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6454, 6487-88. Courts have interpreted this standard in applying other environmental statutes. See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1, 13 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976) ("endanger means something less than actual harm."); Reserve Mining Co. v. EPA, 514 F.2d 492, 529 (8th Cir. 1975) (en banc) (endangering the health or welfare of persons includes potential as well as actual harm); Environmental Defense Fund, Inc. v. Ruckelshaus,
to public health or the environment because of an actual or threatened release of hazardous substances, section 106\(^{10}\) of the Act authorized the EPA to issue an administrative order that directed the responsible party to implement removal or remedial action.\(^{11}\) The EPA could also apply for an injunction in federal court to compel the responsible party to clean up or abate the release or threat of release of hazardous substances. Alternatively, section 104\(^{12}\) authorized the EPA to perform the work itself through the use of funds from the Hazardous Substance Response Fund (Superfund).\(^{13}\) The EPA could then sue the responsible party for reimbursement.\(^{14}\)

CERCLA did not expressly provide the EPA with statutory authority to obtain access to private property in nonemergency situations to effectuate remedial action.\(^{15}\) The statute authorized EPA nonemergency access to private property to inspect records and to determine whether a release of hazardous substances had occurred.\(^{16}\) However, it was unclear whether and to what

---

439 F.2d 584, 597 (D.C. Cir. 1971) (hazard may be "imminent" even if its impact will not be apparent for many years); Environmental Defense Fund, Inc. v. Lampghier, 12 Env'l. L. Rep. (Envtl. L. Inst.) 20843 (E.D. Va. 1982) (no requirement that protective measures be limited to actions taken after a crisis has arisen); United States v. Vertac Chem. Corp, 489 F. Supp. 870, 876 (E.D. Ark. 1980) (determination of imminent and substantial endangerment must take into account the toxicity or the substance and the likelihood of human or environment exposure).


11. "Removal," which is defined by 42 U.S.C. § 9601(23), refers to emergency or crisis measures, including "spill containment measures; measures required to warn the public of, and protect it from acute damages; temporary evacuation and housing; [and] activities necessary to close an existing water supply system." See also S. Rep. No. 848, 96th Cong., 2d Sess. 53-54 (1980). SARA does not change this definition. "Remedial action" was defined as "those actions consistent with permanent remedy . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." 42 U.S.C. § 9601(24) (1982). Section 101(d) of SARA amends this to include the off-site transport of hazardous materials. "Response" includes both removal and remedial action. 42 U.S.C. § 9601(25) (1982), amended by SARA § 101(d), 100 Stat. 1613, 1615 (1986). See also Deju & Calland, Cleanup of Inactive Hazardous Waste, Nat. Resources & Envtl., Fall 1985, at 10.


13. The bulk of funding for the Hazardous Substance Response Trust Fund has been derived from revenues generated by a per barrel tax levied on domestic oil refinery operators and crude oil importers and a tax on manufacturers, producers, and importers of feedstock petrochemicals. Hazardous Substance Response Revenue Act of 1980, § 211, enacting in part I.R.C. § 4611 (1982). The effect of SARA is to increase the tax rate from 0.79 cent per barrel to 8.2 cents per barrel. SARA, § 512(b), 100 Stat. 1760, 1761 (amending I.R.C. § 4611 (1986)).


16. CERCLA § 104(e)(1), 42 U.S.C. § 9604(e)(1) (1982). The EPA was to perform an in-depth analysis of each site on the National Priorities List to determine whether remedial action was necessary. V. Yannonceme, B. Cohen & S. Davison, Environmental Rights and Remedies § 5.29, at 739 n.50.2 (Cum. Supp. 1985). If the EPA determined that the release of a hazardous
extent the EPA could enter private property and act beyond these limited purposes.

B. The Warrant Clause and Procedural Due Process

1. Fourth Amendment Considerations

The fourth amendment guarantees freedom from unreasonable searches and seizures. The drafters of the Constitution intended to prohibit unreasonable searches to protect the privacy and security of individuals against arbitrary intrusions by government officials. Without consent of the individual, a search of private property is presumptively unreasonable unless it is authorized by a valid search warrant. A warrant, however, may not be issued unless there is a showing of probable cause for the search or seizure and the warrant specifies the place to be searched and the persons or things to be seized.

In the 1967 companion cases of Camara v. Municipal Court and See v. City of Seattle, the Supreme Court required warrants when owners did not consent to administrative inspections of either commercial buildings or private homes. In Camara, the lessee of an apartment refused to consent to a warrantless inspection by a housing inspector. The Court found that such administrative searches constituted a significant intrusion upon privacy interests protected by the fourth amendment. Camara established that the standard of probable cause, which justifies the issuance of warrants for administrative searches, may be based not only on evidence of an existing violation, but also on a showing that "reasonable legislative or administrative

substance, pollutant or contaminant did not present an "imminent and substantial endangerment," no remedial action was to be taken. Eagle-Picher Indus. v. EPA, 22 Env't Rep. Cas. (BNA) 1657, 1666 (D.C. Cir. 1985). For SARA's amendments to section 104(e), see infra notes 133-38 and accompanying text.

17. The fourth amendment provides in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

18. See Dickerson, Writs of Assistance as a Cause of the American Revolution, in The Era Of the American Revolution 40 (R. Morris ed. 1939). Early cases held that the fourth amendment applied only when the search to be conducted was to procure evidence to be used in a criminal prosecution. See, e.g., In re Strouse, 23 F. Cas. 261 (D. Nev. 1871); In re Meador, 16 F. Cas. 1294 (N.D. Ga. 1869).


20. The fourth amendment states that "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.


23. Camara, 387 U.S. at 540; See, 387 U.S. at 543.

24. Camara, 387 U.S. at 534.
standards" for conducting the inspection have been satisfied. In See, the owner of a commercial warehouse refused to submit to a warrantless inspection of the building by fire department officials. The Supreme Court extended its holding in Camara and required a warrant for the entry of commercial buildings.

A major exception to the administrative warrant requirement was carved out in Colonnade Catering Corp. v. United States. The Court held that warrantless inspections of federally licensed alcoholic beverage dealerships were permissible, based upon the long history of federal regulation of the liquor industry. In Biswell v. United States the Court extended the Colonnade exception to include federally licensed gun dealerships. Although federal gun regulation did not have the deep historic roots found in Colonnade, the Court concluded that warrantless inspections were reasonable because the government could enforce the statute only through frequent unannounced inspections. In addition, such inspections posed only minimal threats to the privacy interests of gun shop owners because a person involved in a "pervasively regulated" business has no reasonable expectation of privacy.

In Marshall v. Barlow's, Inc., however, the Supreme Court reached a result contrary to that in Colonnade. The Court found that section 8(a) of the Occupational Safety and Health Act (OSHA), which authorized inspections of business premises without a warrant, violated the fourth amend-

25. Id. at 538. The Court disagreed that varying the probable cause standard from that applied in criminal cases would authorize a "synthetic search warrant." Id. at 538-39. Applying a reasonableness standard would insure that inspections of private property were justified by a valid governmental interest. Id. at 539.

28. Id. at 77.
30. Id. at 316. The Court stated that an inspection may proceed without a warrant only when it is expressly authorized by statute. Id. at 317.
32. 406 U.S. at 316.
In *Barlow's*, an OSHA inspector tried to conduct a warrantless inspection of nonpublic employee working areas of an electrical and plumbing installation business. Relying on rights guaranteed by the fourth amendment, the company refused to admit the inspector without a valid search warrant. The Secretary of Labor argued that businesses involved in interstate commerce had long been subjected to close government supervision of employee safety and health conditions and that the inspection fell within the *Colonnade-Biswell* exception to the warrant requirement. The *Barlow's* Court, however, rejected this argument and distinguished *Colonnade* and *Biswell* on the ground that the employer's workplace was not a pervasively regulated or licensed business. The Court, therefore, required a warrant to insure


36. 436 U.S. at 314-15. The Court stated:

It is quite unconvincing to argue that the imposition of minimum wages and maximum hours on employers who contracted with the Government under the Walsh-Healey Act prepared the entirety of American interstate commerce for regulation of working conditions to the minutest detail. Nor can any but the most fictional sense of voluntary consent to later searches be found in the single fact
that the inspection was reasonable under the Constitution and was authorized by the statute. Finally, the warrant served to advise the owner of the scope of the inspection and the objects sought.

2. Fifth Amendment Considerations

The fifth amendment prohibits the issuance of a search warrant upon ex parte application, if the issuance will deprive the party to be searched of procedural due process. In Barlow's, the Secretary of Labor argued that ex parte warrants were necessary to enable the agency to examine working conditions without allowing the employer an opportunity to make alterations or to take precautions. The Court agreed, recognizing that the statutory scheme of the Occupational Safety and Health Act permitted the issuance of ex parte warrants.

The authority to procure such a warrant was disputed in Cerro Metal Products v. Marshall. The Third Circuit Court of Appeals required an adversary, rather than an ex parte, proceeding when the Secretary of Labor applied for an administrative search warrant. Recent decisions have upheld ex parte warrants when the government requires unannounced or emergency access to private property to inspect the premises for compliance with the law or for the presence of hazardous conditions. Such ex parte proceedings are justified on the ground that prior notice would alert the person to be that one conducts a business affecting interstate commerce; under current practice and law, few businesses can be conducted without having some effect on interstate commerce.

Id. at 314.
37. Id. at 323.
38. Id.
39. The fifth amendment states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.
40. 436 U.S. at 316.
42. 436 U.S. at 317-19, 320 n.15.
43. 467 F. Supp. 869 (E.D. Pa. 1979), aff'd, 620 F.2d 964 (3d Cir. 1980). The lower court held that existing OSHA regulations did not authorize the Secretary of Labor to procure an inspection warrant ex parte. 467 F. Supp. at 871. In response to the lower court's decision, OSHA, without notice and comment rulemaking, amended its regulations to provide for the issuance of ex parte warrants. See 29 C.F.R. § 1903.4(d) (1986).
44. 620 F.2d 954, 973 (3d Cir. 1980). The court further held that OSHA's amendment of its regulations to allow for the issuance of ex parte warrants without notice and comment rulemaking was not controlling. Id.
searched, who would then presumably bring himself into temporary com-
pliance with the law.46

C. Eminent Domain and the Just Compensation Clause

The power of eminent domain allows the federal government to appro-
priate private property for public use.47 This power, derived from national
sovereignty, is implicit in the fifth amendment's guarantee that no private
property will be taken for public use without just compensation.48 There are,
however, crucial preconditions to the use of such authority.

Eminent domain may only be exercised pursuant to legislative authoriza-
tion.49 Although the power may be implied from a statute, an administrative
agency may exercise eminent domain authority only if Congress's intent to
grant that power is unequivocal.50 The government may not appropriate
private property unless the taking is for a public use.51 A use is "public" if
it furthers health, welfare, safety, moral, social, economic, political, or
aesthetic goals.52 Courts view such uses as "public" if there is public ad-
vantage or benefit even though the property is not used by the public.53

46. 511 F. Supp. at 749-50. The Stauffer court found that an ex parte search warrant was
necessary to preserve the element of surprise in inspections conducted to determine the company's

47. "Eminent domain" is the right of the sovereign to acquire private property for public
use upon making just compensation. A. JAHR, LAW OF EMINENT
DOMAINT 2-3 (1953). The existence of federal eminent domain power was initially recognized by the Supreme Court in
Kohl v. United States, 91 U.S. 367, 373 (1876). Prior to that time, the federal government
pursued condemnation proceedings in state courts. Id.

48. Specifically, the fifth amendment states in part: "[P]rivate property [shall not] be taken
for public use, without just compensation." U.S. CONST. amend. V. The fifth amendment
restraint on eminent domain power is applicable to the states through the due process clause

49. Section 14 of title 41 of the U.S. Code specifically provides that "[n]o land shall be
purchased on account of the United States, except under a law authorizing such purchase." 41
(1928) (authority to condemn private property must be clearly expressed in statute).

50. 276 U.S. at 192. The Supreme Court stated, "[I]t is to be borne in mind that the
taking of private property for public use is deemed to be against the common right and authority
do so must be clearly expressed." Id. Accord United States v. 67.59 Acres of Land, 415 F.
Supp. 544, 547 (M.D. Pa. 1976); United States v. 20.53 Acres of Land, 263 F. Supp. 694, 696-


52. Id. at 32-33. The Court observed that:

"[T]he concept of the public welfare is broad and inclusive . . . . The values it
represents are spiritual as well as physical, aesthetic as well as monetary. It is within
the power of the legislature to determine that the community should be beautiful
as well as healthy, spacious as well as clean, well-balanced as well as carefully
patrolled."

Id. at 33 (citation omitted).

53. The view that "public use" is synonymous with "use by the public" was rejected by
the Supreme Court some time ago. Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama
Once it is determined that the taking is for a public use and is within the legislative grant of authority, the necessity of the taking is within the discretion of the agency and is not subject to judicial review.\(^5\)

In addition, a government agency may exercise eminent domain only if the agency gives the property owner full and adequate compensation.\(^5\) The fifth amendment's just compensation clause was designed to prevent the government from requiring individuals to bear public burdens which should be borne by the public as a whole.\(^6\) Thus, the government is obligated to pay just compensation when its activities constitute a "taking" within the meaning of the fifth amendment.\(^7\) The reported decisions\(^5\) establish no set

\(^{54}\) Berman, 348 U.S. at 33 (court will inquire only into whether Congress asserted that the taking was for the public good); Rindge Co. v. County of Los Angeles, 262 U.S. 700, 709 (1923) (necessity for exercise of eminent domain not a judicial question); Bragg v. Weaver, 251 U.S. 57, 58 (1919) (due process does not require hearing on state's method of determining necessity).

\(^{55}\) Backus v. Fort St. Union Depot Co., 169 U.S. 557, 573, 575 (1898). The just compensation required by the Constitution is that which constitutes "a full equivalent for the property taken." Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893). The compensation is to be measured by the owner's loss rather than the taker's gain. United States ex rel. TVA v. Powelson, 319 U.S. 266, 281 (1943).


\(^{57}\) It is important to distinguish between eminent domain and the government's police power. Eminent domain involves the taking of private property for public use while the police power involves the regulation of private property in the public interest. See 1 Nichols, The Law of Eminent Domain § 1.42 (3d ed. 1964). See also Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964).

formula to determine when a taking has occurred, and in addition, the Supreme Court has not clarified this area. It has merely inquired whether "justice and fairness" require that the government compensate for economic loss caused by government action. A taking is almost always found, however, when there is an actual appropriation or a permanent physical invasion of private property by the government.

When private property is needed for a public purpose, Congress may authorize the taking of property either by proceedings in state court with the state's consent, or in federal courts, with or without the state's consent. Due process requires that, when exercising eminent domain, the government give the property owner reasonable notice and a reasonable opportunity to be heard. An agency upon which Congress has conferred eminent domain


59. A number of approaches have been suggested by both commentators and the courts. The principle approaches include: (1) the invasion theory (compensation will be granted only if the government has taken title or physical possession of the property); (2) the noxious use test (regulation without compensation is justified when the use is noxious, wrongful, or socially undesirable); (3) the cause of harm test (regulation without compensation is justified when the property owner created the harm); and (4) the diminution of value theory (legally acquired economic values may not be excessively diminished without just compensation). For a comprehensive discussion of these theories, see Sax, supra, note 57, at 46-60.

60. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). The Court has also stated that property is taken when it is destroyed, Pumpelly v. Green Bay Co., 80 U.S. 166, 177-78 (1872), or when its use is severely impaired to the extent that a servitude has been acquired by the government. United States v. Dickinson, 331 U.S. 745, 748 (1947).

61. See, e.g., Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (imposition of a navigational servitude resulted in a physical invasion requiring just compensation); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (taking more readily found when interference with property is a physical invasion). See also Tribe, supra note 56, at 461. Tribe suggests that a clear case of taking is a "physical takeover of a distinct entity, with an accompanying transfer of the legal powers of enjoyment and exclusion that are typically associated with rights of property." Id.


power is not always required to follow formal condemnation proceedings.\textsuperscript{44} Rather, the agency may follow alternative procedures.\textsuperscript{65} The agency may take the property pursuant to the Declaration of Taking Act,\textsuperscript{66} after filing a declaration of taking and depositing the amount of estimated compensation with the court. Alternatively, the agency may simply take physical possession of the property, leaving the property owner to pursue his remedies under the Tucker Act.\textsuperscript{67} The Tucker Act, however, does not provide a remedy for a taking that is not authorized by Congress.\textsuperscript{68} In addition, the federal Uniform Real Property Acquisition Act\textsuperscript{69} establishes guidelines for the valuation of property and determination of just compensation.


\textsuperscript{65} Formal condemnation proceedings are normally required under the Uniform Real Property Acquisition Act, 42 U.S.C. §§ 4651-4655 (1982), which provides:

If any interest in real property is to be acquired by the exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.


\textsuperscript{67} 28 U.S.C. § 1491 (1982). Historically, the sovereign immunity doctrine has been an obstacle to landowners seeking compensation. See Note, Eminent Domain, supra note 63, at 804-05. The doctrine provides that the United States may not be sued without its consent. Lynch v. United States, 292 U.S. 571, 581-82 (1934). Persons whose private property has been taken without formal condemnation proceedings may sue for damages under the Tucker Act, since the United States has waived its immunity in contract actions and actions founded upon the Constitution. The Tucker Act provides:

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.


\textsuperscript{68} Hooe v. United States, 218 U.S. 322, 335 (1910). The Court determined that the Tucker Act confers jurisdiction on the U.S. Court of Claims to determine claims against the government "founded upon the Constitution":

It cannot be said that any claim for a specific amount of money against the United States is founded on the Constitution, unless such claim be either expressly or by necessary implication authorized by some valid enactment of Congress. . . . If an officer of the United States assumes, by virtue alone of his office, and without the authority of Congress, to take such matters under his control, he will not in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of the Congress, cannot create a claim against the government, founded upon the Constitution.

\textit{Id.}

\textsuperscript{69} 42 U.S.C. §§ 4651-4655 (1982).
In enacting CERCLA, Congress did not expressly confer eminent domain authority upon the EPA. Thus, prior to the 1986 amendments, the EPA did not have the power to take physical possession of private property under any of the foregoing alternatives. *Outboard Marine* presented the Seventh Circuit Court of Appeals with the task of construing the underlying statutory language of CERCLA and reconciling its statutory interpretation with constitutional requirements.

II. FACTS AND PROCEDURAL HISTORY

Outboard Marine owned and operated a large industrial complex in Waukegan, Illinois. The complex was partially situated on a thirty acre tract of uncontaminated land directly adjacent to Waukegan harbor. In 1976, the EPA determined that bottom sediments in harbor slip no. 3 and in parts of Outboard Marine’s north property were contaminated with polychlorinated biphenyls (PCBs). Allegedly, Outboard Marine’s die cast operations were the source of the contamination.\(^7\)

Eight years later,\(^7\) the EPA decided to conduct remedial action pursuant to section 104\(^7\) of CERCLA, with the option of bringing a subsequent cost recovery action against Outboard Marine under section 107. In accordance with its remedial action plan, the EPA intended to construct large dewatering lagoons and batch plants on Outboard Marine’s uncontaminated harbor-front property. The agency planned to dredge sediments from the harbor and to transport them to the lagoons for treatment. After treatment, some of the sediments were to be shipped off site. The remaining sediments were to be permanently stored in a fifteen foot high containment cell which the EPA intended to construct on six acres of the company’s north property.\(^7\) The entire project was to take three and one half years.

Prior to undertaking the planned construction, the EPA sought to conduct “Phase 1” of the cleanup plan, which consisted of a “walk-through” inspection of the company’s premises to survey the site, set permanent markers, and collect numerous soil borings. The EPA intended to conduct

---

70. The Outboard Marine site was subsequently ranked forty-four on the National Priorities List and was the number one site in Illinois. There has been no judicial determination as to Outboard Marine’s liability for the PCB contamination.

71. In 1978, the EPA filed suit against Outboard Marine in federal court seeking to compel the company to dredge and remove PCBs from the harbor and its north property pursuant to section 106 of CERCLA. In 1983, after extensive discovery and sampling, the EPA voluntarily moved to dismiss the suit. The district court dismissed the case in 1984 over Outboard Marine’s objection. See United States v. Outboard Marine, 104 F.R.D. 405 (N.D. Ill. 1984), aff’d, 789 F.2d 497 (7th Cir. 1986).


74. Brief of Plaintiff-Appellant Outboard Marine Corp. at 9, Outboard Marine Corp. v. Thomas, 773 F.2d 883 (7th Cir. 1985) [hereinafter Brief of Plaintiff-Appellant].

75. See Brief of Plaintiff-Appellant, *supra* note 74, at 11-12.
this inspection over a seventy day period. The inspection alone would have required numerous personnel and equipment, including truck-mounted drilling rigs, pickup trucks, vans, water trucks, automobiles, a waste hauler, a job trailer, and a bulldozer.\textsuperscript{76} When Outboard Marine refused to permit access to its property, the EPA obtained an ex parte search warrant from a federal magistrate. Armed with the warrant, EPA inspectors appeared unannounced at the company's premises and demanded access. Outboard Marine again refused entry and moved to quash the warrant. When the magistrate denied the company's motion, Outboard Marine sued in federal court, seeking a reversal of the magistrate's order and a preliminary injunction to prevent the EPA from executing the warrant until evidence could be heard on the merits.

In the lower court, Outboard Marine argued that CERCLA did not authorize the EPA to enter private property for the purpose of conducting preconstruction work and that the proposed activities would constitute an unauthorized taking in violation of the fifth amendment.\textsuperscript{77} The district court held that, assuming the EPA's described activities did constitute a compensable taking under the fifth amendment, section 104(b) of the statute authorized the agency's entry to conduct these activities.\textsuperscript{78} Because the taking was authorized by the statute, the court reasoned that the company could pursue remedies available under the Tucker Act to obtain compensation.\textsuperscript{79} The EPA's victory, however, was short lived. Finding a complete lack of statutory authority for the EPA's entry under CERCLA, the Seventh Circuit Court of Appeals reversed.\textsuperscript{80}

III. THE COURT'S RATIONALE

The appellate court made several threshold determinations concerning the provisions of CERCLA and their interplay with existing constitutional safeguards. Initially, the court interpreted section 104(a)\textsuperscript{81} of the Act to be a

\textsuperscript{76} 773 F.2d at 885.
\textsuperscript{77} Outboard Marine Corp. v. Thomas, 610 F. Supp. 1234, 1238 (N.D. Ill. 1985).
\textsuperscript{78} Id. at 1240-42.
\textsuperscript{79} Id. at 1241.
\textsuperscript{80} 773 F.2d at 890.
\textsuperscript{81} Section 104(a)(l) provided:
Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of a release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the [EPA] is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the [EPA] deems necessary to protect the public health or welfare or the environment, unless the [EPA] determines
general grant of power which authorized the EPA to undertake remedial action to protect public health and the environment. Contrary to the lower court's finding, the court of appeals found that section 104(b), which authorized entry to investigate whether or not a release of hazardous substances had occurred, was inapplicable to this case because the EPA had already determined that PCBs had been released. The EPA had relied on section 104(b), which also authorized the EPA to undertake planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as it deemed necessary or appropriate "to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter." The EPA argued that, in order to plan response actions, it needed access to the site. Thus, the EPA contended that Congress had implicitly granted it the authority to enter private property. The court flatly disagreed with this statutory construction, and found that the Act did not entitle the EPA to enter the premises to conduct planning activities when it could not establish that it would ever be entitled to enter the property to undertake the actual response action. Since the EPA admitted that it would have to

—

that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party.

42 U.S.C. § 9604(a)(1) (1982) (emphasis added). SARA deleted the italicized portion and instead spells out more rigorous requirements for allowing an owner or operator to perform a cleanup.

SARA, § 104(a), 100 Stat. 1613, 1617-18 (1986).

82. 773 F.2d at 888-89.

83. Section 104(b) provided:

Whenever the [EPA] is authorized to act pursuant to subsection (a) of this section, or whenever the [EPA] has reason to believe that a release has occurred or is about to occur, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant or contaminant and that a release may have occurred or be occurring, [the EPA] may undertake such investigations, monitoring, surveys, testing, and other information gathering as [the EPA] may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment.

CERCLA § 104(b), 42 U.S.C. § 9604(b) (1982). Under SARA, this has been retained as section 104(b)(1) of CERCLA. 100 Stat. 1613, 1618 (1986).

84. 773 F.2d at 889.

85. Section 104 also provides:

In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

CERCLA § 104(b), 42 U.S.C. § 9604(b) (1982).

86. Brief for the Appellees at 27-28, Outboard Marine Corp. v. Thomas, 773 F.2d 883 (7th Cir. 1985) [hereinafter Brief for the Appellees].

87. The EPA acknowledged that section 104(b) provided no specific right of entry. 773 F.2d at 889.

88. Id.
petition a federal court for the right of entry before it could begin the actual construction, the court found it "difficult to conclude" that Congress implicitly granted (rather than failed to grant) a right of entry for the purposes of conducting preliminary construction work. In addition, the court found that section 104(e), the section most heavily relied upon by the EPA to establish its authority to enter the company's premises, did not authorize access by the EPA to effectuate a response. Section 104(e) expressly limited the EPA's authority to enter property and inspect records for "the purposes specified in the preceding sentence." Since the preceding sentence in the statute read "[f]or the purposes of ... determining the need for response ... or enforcing the provisions of this subchapter," the EPA creatively piggy-backed these two provisions and concluded that this language should be read as a broad grant of authority. The court, however, did not agree. Finding that section 104(e), read in its entirety, limited the EPA's authority to inspect records, obtain samples, and gather other information concerning the hazardous substance itself, the court

89. Counsel for the EPA advised the court that for the purpose of gaining access to Outboard Marine's property for the actual construction:

[We] probably would be filing an affirmative action in the district court ... maybe something in terms of a declaratory judgment, some action like that. I am not exactly sure of the exact form it would take ... But what it would be is something in aid of entry, and that defendants be ordered not to interfere with the construction. It would be a formal pleading filed with the district court.

Record at 3-4 (Apr. 24, 1985). In its brief, the EPA stated that it "fully acknowledge[ed], as it stated to the district court, that it will require further judicial process to obtain access to implement the actual remedy." Brief for the Appellees, supra note 86, at 17.

90. 773 F.2d at 889.

91. Section 104(e) provided:

For purposes of assisting in determining the need for response to a release under this subchapter or enforcing the provisions of this subchapter, any person who stores, treats, or disposes of, or, where necessary to ascertain facts not available at the facility where such hazardous substances are located, who generates, transports, or otherwise handles or has handled, hazardous substances shall, upon request of any officer, employee, or representative of the [EPA], or upon request of any duly designated officer, employee, or representative of a State, where appropriate, furnish information relating to such substances and permit such person at all reasonable times to have access to, and to copy all records relating to such substances. For the purposes specified in the preceding sentence, such officers, employees, or representatives are authorized—

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

(B) 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.


92. Id.

93. Id.
rejected the EPA's novel, expansive reading of this provision. The court noted that the statute specifically limited entry upon private property to those places where the hazardous substances are or have been generated, stored, treated, disposed of, or transported from. Thus, the court questioned whether the uncontaminated tract of Outboard Marine's property properly fit into that category.

Despite the EPA's interest in protecting public health and the environment, the court determined that, in nonemergency situations, the EPA's entry pursuant to an ex parte search warrant fell short of constitutional requirements. The court distinguished this case from an emergency situation, in which section 106(a) expressly provided the EPA with broad power to "secure such relief as may be necessary to abate a release or threat of release," and granted jurisdiction to district courts to order "such relief as the public interest and the equities of the case may require." Since Congress had expressly limited those powers to emergency situations, the court found that such powers did not extend to nonemergencies situations.

The court observed that, in effect, the EPA sought a temporary easement on Outboard Marine's property. The EPA, however, could not acquire such an easement because the statute did not expressly provide the agency with eminent domain authority. In refusing to imply authority, the court stated that only Congress could grant eminent domain power. Finally, because the agency had no eminent domain authority, the Tucker Act did not afford Outboard Marine a remedy for the taking.

IV. Analysis

The court's decision to reject the EPA's expansive interpretation of its entry and inspection powers was substantially consistent with the underlying statute, its legislative history, other judicial decisions, and public policy. The appellate court declared that CERCLA did not authorize the EPA to enter private property in nonemergency situations to undertake removal or remedial action. In nonemergency cases, the statute empowered the EPA to enter private property only to determine whether a release had occurred, and

---

94. 773 F.2d at 889.
95. Id. at 889-90.
96. Id. at 890 n.6. See supra note 91.
97. 773 F.2d at 890 n.6.
98. Id. at 890.
99. CERCLA § 106(a), 42 U.S.C. § 9606 (1982). This authority has not been changed by SARA.
100. 773 F.2d at 890.
101. Id.
102. Id.
103. Id. at 891.
limited the scope of the investigation to the hazardous substance itself.\textsuperscript{104} Based upon the court's findings in \textit{Outboard Marine}, the EPA could not remedy the admittedly hazardous conditions which existed at the site. Although the court's interpretation of the Act at first appears unduly narrow, this construction is consistent with Congress's stated priority of cleaning up the nation's worst abandoned hazardous waste sites before addressing less serious hazards.\textsuperscript{105} As evidenced by the legislative history, Congress directed the EPA to clean up those sites which presented an imminent and substantial endangerment to public health and the environment.\textsuperscript{106} The EPA was to establish a priority listing of hazardous waste sites to ensure that the worst sites were cleaned up first.\textsuperscript{107} This requirement is the genesis of the National Priorities List which sets out sites thought to present an imminent and substantial threat to health and the environment. Congress gave the EPA broad authority to act when there was an imminent and substantial threat to public health or the environment.\textsuperscript{108} The court noted, however, that Congress limited the EPA's powers to emergency situations. Conversely, the court found that Congress did not authorize the EPA to enter private property and to expend limited Superfund monies to carry out a project, absent the requisite substantial threat to health or the environment.

The court's decision at first appears inconsistent with its own statutory analysis. The Outboard Marine site initially ranked forty-four on the National Priorities List and was the highest priority site in Illinois.\textsuperscript{109} Why then did the court fail to find that the EPA had broad power under CERCLA to take remedial action at the site? The answer appears to be that the EPA conceded that the site presented no imminent or substantial endangerment to public health or the environment.\textsuperscript{110}

The location of most of the contamination in the harbor complicated the situation because it was substantially inaccessible to the EPA except from Outboard Marine's premises. CERCLA expressly allowed EPA entry only to those facilities\textsuperscript{111} where the hazardous substances were or had been generated, stored, treated, disposed, or transported.\textsuperscript{112} Because Outboard Marine's harbor-front property was neither contaminated nor contiguous to the remedial project, CERCLA did not authorize the EPA to enter that

\begin{itemize}
  \item \textsuperscript{104} CERCLA \textsection 104(b), 42 U.S.C. \textsection 9604(b) (1982).
  \item \textsuperscript{105} \textit{See supra} note 6.
  \item \textsuperscript{106} CERCLA \textsection\textsection 104, 106, 42 U.S.C. \textsection\textsection 9604, 9606 (1982).
  \item \textsuperscript{107} \textit{See supra} note 8 and accompanying text.
  \item \textsuperscript{108} CERCLA \textsection 104, 42 U.S.C. \textsection 9604 (1982).
  \item \textsuperscript{109} \textit{See supra} note 8.
  \item \textsuperscript{110} Outboard Marine Corp. v. Thomas, 773 F.2d 883, 886 (7th Cir. 1985). The appellate court agreed with EPA, stating that if there was an imminent and substantial endangerment to health or the environment, "it is almost ten years old." \textit{Id.}
  \item \textsuperscript{111} "Facility" includes "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. \textsection 9601(9) (1982).
  \item \textsuperscript{112} CERCLA \textsection 104(e)(1)(A), 42 U.S.C. \textsection 9604(e)(1)(A) (1982).
\end{itemize}
property. CERCLA failed to provide the EPA with statutory authority to enter property which was not actually a part of a site, even if access was necessary to clean up the site. The result is that Waukegan Harbor remains contaminated with PCBs.

The court's decision focuses narrowly on whether the statute authorized the EPA to enter Outboard Marine's property. Had the court found that the EPA was authorized by statute to enter the property, the court would have had to address a number of serious constitutional issues raised by the entry. For example, would the entry have been an unreasonable search or seizure in violation of the fourth amendment? While the EPA admitted that obtaining a search warrant would be insufficient to conduct the actual cleanup, it argued that it sought entry solely to determine the nature and extent of the remedial action required. The agency argued that, because the activities the EPA sought to perform were less intrusive, a warrant provided sufficient assurance that the proposed activities were reasonable. The court disagreed with the EPA's not too subtle distinction and stressed that the EPA was not seeking access to Outboard Marine's property simply to investigate whether a release had occurred. Rather, the EPA wanted to undertake extensive action under the guise of merely investigating the release. Both the lower court and the appellate court agreed that the EPA's use of a search warrant to take soil borings was unusual and without precedent. Furthermore, the appellate court found that the proposed activities were too intrusive to be merely investigatory and part of a "Phase 1" cleanup; rather, they were part of the "Phase 2" construction for which there was as yet no authorization.

An additional constitutional issue would have been whether the EPA's nonemergency entry pursuant to an ex parte warrant violated the company's due process rights under the fifth amendment. The Outboard Marine decision suggests that even if CERCLA had authorized the EPA to enter private

---

113. See infra note 127 and accompanying text.
114. See supra note 89.
115. Brief for the Appellees, supra note 86, at 2. The EPA stated, "The warrant contains no authorization to conduct the actual remedy itself, nor does the EPA seek access at this time for anything but the limited design activities specified in the warrant." Id.
117. 773 F.2d at 889.
118. 773 F.2d at 887; Outboard Marine Corp. v. Thomas, 610 F. Supp. 1234, 1234 (N.D. Ill. 1985).
119. 773 F.2d at 888. The court stated:

The EPA is alone in denying that surveying the site, placing survey monuments, locating utility lines, and taking weight-bearing subsurface test samples of soil are not, as a usual and practical matter, the customary first things to be done at a construction site. They are too construction-related to be labeled a mere walk-through, or to be considered as authorized under the ordinary and preliminary investigative provisions of the statute.

Id.
property to fashion a remedy, an ex parte warrant would not satisfy fifth amendment procedural due process requirements when no emergency existed. 120 CERCLA, even as amended, still does not expressly require that the EPA obtain a search warrant to conduct inspections of private property pursuant to section 104. 121 The constitutional dangers of allowing the EPA access pursuant to an ex parte warrant in nonemergencies are apparent from the EPA's conduct in Outboard Marine. The EPA appeared ex parte before a magistrate and alleged that the site was contaminated with PCBs and that the EPA required access to design a remedy. This procedure deprived the company of any opportunity to contest the reasonableness of the "search" or to assert the EPA's lack of statutory authority for such entry.

Finally, had the court sanctioned the EPA's entry, a further constitutional question would have been whether the EPA's activities constituted a taking in violation of the fifth amendment. CERCLA does not authorize the EPA to take private property. 122 The statute itself contains no provision which expressly confers eminent domain power upon the EPA. Nor does the statute's legislative history evidence the requisite unequivocal intent to imply a congressional grant of power to the EPA. 123 On the contrary, the Act's legislative history shows that Congress did not contemplate the EPA's entry onto uncontaminated private property for the purpose of treatment and storage of hazardous substances on the property. 124 The inclusion of express grants of eminent domain authority in other federal legislation, 125 and its absence from CERCLA, is persuasive evidence of a lack of congressional intent to give the EPA such authority.

---

120. Id. at 890.
121. See infra note 134 for the new section 104(e)(3).
122. 773 F.2d at 890.
124. See supra note 6.
Even a grant of eminent domain authority would not alleviate all of the constitutional obstacles to the EPA's proposed action. A property owner would be entitled to compensation if the EPA's activities constituted a "taking" within the meaning of the fifth amendment. While recognizing a conceptual distinction between a preliminary entry and a constitutionally compensable taking which requires condemnation procedures, courts have held that an agency may not effect an unauthorized taking simply by calling it a preliminary entry. In this case, the EPA made no arguments as to whether the remedial action would effect a taking of Outboard Marine's property. The reason for the EPA's silence is clear. Since the EPA knew it had no authority to take the company's property, the EPA argued that it was not seeking entry to undertake actual construction. Rather, the EPA tried to circumvent its lack of authority by claiming that its presence on the property was solely to undertake preliminary "Phase 1" activities. The

126. This issue is currently being litigated in a pending case, Hendler v. United States, 11 Cl. Ct. 91 (1986). The EPA obtained a court order requiring property owners near a contaminated site to grant the EPA access to drill wells and monitor the groundwater. The landowners alleged takings of their property based on (1) the mere issuance of the order, and (2) the bringing of contaminated water to the surface. The court granted the EPA's cross-motion for summary judgment of the first issue but requested further evidence on the second. Id.


128. See, e.g., County of Kane v. Elmhurst Nat'l Bank, 111 Ill. App. 3d 292, 443 N.E.2d 1149 (1982). In that case, the court denied a state agency access to property for the purpose of taking soil borings. The court found that the soil borings constituted a taking and that the agency was required to institute condemnation proceedings prior to the intrusion. The court stated:

A taking may not be allowed under the guise of a preliminary survey; the right of entry does not include the right to make permanent appropriation or cause more than minimal or incidental damage to property; and the entering party is free of liability only to the extent that the entry or occupation is incidental and incipient or preliminary.

Id. at 298, 443 N.E.2d at 1153-54 (citing Litchfield v. Bond, 186 N.Y. 66, 78, 78 N.E. 718, 723 (1906)).

129. Rather, the EPA argued that the taking was irrelevant to the EPA's right to enter the property. Brief for the Appellees, supra note 86, at 21-22.
appellate court, however, was not confused by this sophistry. It refused to separate the EPA's "Phase 1" activities from the "Phase 2" construction. If the court had sanctioned the EPA's initial entry, it would have been in an inconsistent position of allowing the EPA preliminary access to conduct extensive "Phase 1" preconstruction work when the EPA might never have been able to obtain authorization to carry out the final "Phase 2" construction.

V. IMPACT

The Outboard Marine decision graphically illustrated serious deficiencies in CERCLA's entry and inspection provisions. For instance, the Act did not empower the EPA to undertake remedial action absent an imminent and substantial endangerment to public health or the environment. Nor did CERCLA authorize the EPA to enter private property which was near or adjacent to a site even when the site itself was inaccessible and such entry was essential to effect cleanup. In addition, CERCLA did not designate the proper mechanism by which the EPA was to obtain access to private property, either to investigate whether a release had occurred or to conduct a response action. Finally, CERCLA conferred no authority upon the EPA to take private property when necessary to conduct remedial action at a Superfund site.

The Superfund Amendments and Reauthorization Act of 1986 (SARA) also does not clarify this problem. SARA is an attempt to resolve the deficiencies in CERCLA's entry and inspection provisions. The amendments grant the EPA expansive authority, in both emergency and nonemergency situations, to enter private property to investigate and respond to environmental hazards. These amendments, however, may not afford property owners adequate protection under the fourth and fifth amendments. Thus, SARA may not survive constitutional challenge, and Congress's intent to resolve existing statutory deficiencies will be frustrated.

Outboard Marine stands for the proposition that, absent an imminent and substantial endangerment, the EPA is authorized to enter private property solely to determine whether a release has occurred. SARA expressly authorizes the EPA to enter private property, not only for the purpose of determining the need for response but also for the selection of the response and its implementation. Such entry is authorized only if the EPA has a

---

131. For new section 104(j), see infra note 142.
132. See supra note 4.
133. Outboard Marine Corp. v. Thomas, 773 F.2d 883, 889 (7th Cir. 1985).
134. SARA amended CERCLA to include new section 104(e)(3), which reads as follows: ENTRY.—Any [EPA] officer, employee, or representative is authorized to enter
reasonable basis to believe that a release or threat of release exists. In addition, the amendments now expand the areas in which the EPA may enter to include any place from which or to which a hazardous substance may have been released, any place where a release is or may be threatened, and any place where entry is needed either to determine the need for response, to determine the appropriate response, or to effectuate a response.

The amendments do not address additional statutory deficiencies alluded to in *Outboard Marine*. For instance, at the investigatory stage, CERCLA does not require that the EPA obtain a warrant to inspect private property to determine whether a release has occurred. The amendments still do not contain a warrant requirement. Rather, they simply provide that the EPA may obtain access "in any other lawful manner." While ignoring the warrant requirement for entry, the amendments substantially strengthen the EPA's enforcement power in the event of noncompliance, including a refusal to grant access to property. Specifically, the EPA is now empowered to issue a compliance order and to commence a civil action to compel compliance, in which case a court would be empowered to assess civil penalties of up to $25,000 for each day of noncompliance.

The lack of a warrant requirement, coupled with the assessment of civil penalties for refusal to grant access, are contrary to prior precedent. The EPA's regulatory powers, like those of OSHA, extend to a broad heterogeneous group of industries. Therefore, businesses subject to EPA inspections, cannot be characterized as "pervasively regulated" within the meaning

---

135. Section 104(e)(1) now reads in part:

The authority [to enter, inspect and obtain samples] may be exercised only if there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant.

SARA, § 104(m), 100 Stat. 1613, 1622 (1986).

136. See *supra* note 134.

137. Specifically, section 104(e)(6) now provides that "[n]othing in this subsection shall preclude the [EPA] from securing access or obtaining information in any other lawful manner."

SARA, § 104(m), 100 Stat. 1613, 1624 (1986). See *also supra* note 134.

138. See CERCLA, § 104(e)(5), 42 U.S.C. 9604(e)(5) (as added by section 104(m) of SARA, 100 Stat. 1613, 1623 (1986)).
of Colonnade and Biswell. Thus, the Supreme Court’s decision in Barlow’s is directly applicable to inspections conducted by the EPA under CERCLA. Under Barlow’s, the fourth amendment precludes the EPA from inspecting private property without a warrant, unless the owner consents. Furthermore, the lack of any provisions for an adversarial hearing in conjunction with the issuance of the warrant, makes the EPA’s intrusion in nonemergency situations constitutionally unreasonable. An ex parte warrant should be appropriate only where there is a reasonable basis to believe that documents may be destroyed or site conditions changed if notice was given.

As a result of the Outboard Marine decision and the EPA’s need for access to private property to effect cleanups in the future, Congress has included in the Superfund reauthorization a provision which confers eminent domain authority upon the EPA. This provision authorizes the EPA to


140. See supra notes 33-38 and accompanying text.

141. Senate Report No. 11 concerning the Superfund Improvement Act of 1985 states:

"[I]n exigent circumstances, where the [EPA] has a reasonable basis to believe that documents may be destroyed or site conditions changed if a request for access or information were made, the [EPA] may obtain an ex parte warrant for entry, access to documents, sampling or other needed activities."


142. New section 104(j) states:

(1) Authority.—The [EPA] is authorized to acquire, by purchase, lease, condemnation, donation or otherwise, any real property or any interest in real property that the [EPA] in [its] discretion determines is needed to conduct a remedial action under this Act. There shall be no cause of action to compel the [EPA] to acquire any interest in real property under this Act.

(2) State Assurance.—The [EPA] may use the authority of paragraph (1) for a remedial action only if, before an interest in real estate is acquired under this subsection, the State in which the interest to be acquired is located assures the [EPA], through a contract or cooperative agreement or otherwise, that the State will accept transfer of the interest following completion of the remedial action.

(3) Exemption.—No Federal, State, or local government agency shall be liable under this Act solely as a result of acquiring an interest in real estate under this
acquire any interest in real property that the EPA determines is needed to conduct remedial action under CERCLA.\textsuperscript{143} Before the EPA may acquire the property, however, the state must agree that it will accept transfer of the property when remedial action is completed.\textsuperscript{144} The provision prohibits a property owner from bringing an action to compel the EPA to acquire an interest in real property and provides that no government agency will be held liable as a result of acquiring a property interest.\textsuperscript{145} This grant of authority may be more sweeping than is needed. To guard against abuse, CERCLA should require that, prior to acquiring private property for a Superfund project, the EPA must show that a remedial investigation/feasibility study has been performed and that the study establishes that the cleanup cannot be properly effected by a less intrusive means.

In addition, the eminent domain provision should include express statutory guidelines for calculating compensation in a manner which is clear and comprehensible. Because of the complexities of the statute, ordinary eminent domain principles will not provide the courts with sufficient guidelines to ensure that property owners receive just compensation. In Superfund cases, the property's fair market value prior to cleanup may be an appropriate measure of compensation when the EPA seeks to take private property adjacent to a hazardous waste site. It is unclear in what manner compensation should be calculated when the property taken comprises all or part of a site and the property owner is a potentially responsible party.\textsuperscript{146} The fair market

\begin{flushleft}
SARA, \textsuperscript{143} § 104(j), 100 Stat. 1613, 1624-25 (1986).
Id.\textsuperscript{144}
Id.\textsuperscript{145}
Id.\textsuperscript{146}

143. In some instances, as in the case of a successor corporation, the owner of the site may not be a party potentially responsible for cleanup costs. This creates additional complications in calculating just compensation. Section 107(a)(2) of CERCLA provides that any owner or operator of a facility which releases a hazardous substance shall be liable for all necessary response costs resulting from such a release. 42 U.S.C. 9607(a)(2) (1982). Section 101(20)(A)(iii) of CERCLA clearly states that the term "owner or operator" as applied to abandoned facilities includes "any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment." 42 U.S.C. § 9601 (20)(A)(iii) (1982). The term "person" as defined in section 101(21) of CERCLA includes an individual, firm, corporation, partnership, or commercial entity. 42 U.S.C. 9601(21) (1982). None of these sections have been changed by SARA. Normally, it is the corporate entity that will be held accountable for cleanup costs under CERCLA. See C. Price, Liability of Corporate Shareholders and Successor Corporations for Abandonment Sites under the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) (June 13, 1984) (unpublished memorandum). The EPA has adopted the position that when corporate ownership is transferred from one corporation to another, the successor corporation is liable for the acts of its predecessor if the new corporation acquired ownership by merger or consolidation. Id. at 11. If, however, the acquisition was through the sale or transfer of assets, the successor corporation is not liable unless: (1) the purchasing corporation expressly or impliedly agrees to assume such obligations; (2) the transaction amounts to a "de facto" consolidation or merger; (3) the purchasing corporation is
value of a contaminated hazardous waste site will probably be negligible. The EPA may acquire the property to perform the cleanup and bring a subsequent section 107 action\textsuperscript{147} against the property owner, to obtain reimbursement for its cleanup costs. In the cost recovery action, the property owner, having received a negligible amount for the property, will be forced to bear part or all of the EPA's cleanup costs. The property will then be transferred to the state rather than to the property owner. Thus, the state could be the beneficiary of a windfall, a piece of property improved at the former owner's expense.

The eminent domain provision should also provide clear guidelines as to when the EPA must compensate the property owner. In emergencies, the Tucker Act\textsuperscript{148} would allow the EPA to respond quickly to environmental hazards, without awaiting the outcome of protracted litigation. The EPA could also circumvent formal condemnation procedures by taking the property pursuant to the Declaration of Taking Act,\textsuperscript{149} and determining the precise amount of compensation in subsequent proceedings. If the property owner will suffer undue hardship and no imminent or substantial endangerment exists, prior compensation should be made through formal condemnation proceedings.

CONCLUSION

\textit{Outboard Marine} illustrates serious defects in the entire statutory framework of the EPA's enforcement program under CERCLA. These defects affect all phases of an EPA response, from the initial investigatory inspection, until the time that remedial action is completed. In response to these deficiencies, Congress has amended CERCLA to clarify and strengthen the EPA's authority to respond to environmental hazards. Unfortunately, these amendments do not adequately protect property rights guaranteed by the fourth and fifth amendments. Unless these rights are adequately protected, the reauthorization will be subject to judicial challenge and the EPA's enforcement program will be further frustrated.

\textit{Mary Beth Miller}

\textsuperscript{147} CERCLA § 107, 42 U.S.C. § 9607 (1982).
\textsuperscript{149} 40 U.S.C. § 258a-f (1982).