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During the course of fulfilling its duty to enforce the various environmental protection laws, the Environmental Protection Agency and its state equivalents are often called upon to perform searches of business facilities. The need for these searches, within the context of fulfilling enforcement responsibilities, raises the issue of whether the owners of these facilities suffer violations of their constitutional rights. Although one often thinks of constitutional violations in connection with the investigation of violent criminal offenses, the problem still exists under the rubric of the administrative agency search.

This note will first examine the situations in which an environmental protection agency has been required to obtain a search warrant and will then examine situations in which an agency has been permitted to conduct a warrantless search of business premises. The focus will be upon information which a practitioner would find useful in advising business entities.

I. THE FOURTH AMENDMENT

The Fourth Amendment to the United States Constitution provides that "no warrant 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."[1] Thus, "[a] search warrant must describe the objects of a search with reasonable specificity; general warrants are prohibited by the Fourth Amendment."[2] However, "a reasonably specific warrant does not mean that the

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[1] U.S. CONST. amend. IV.

[2] *In re* 949 Erie Street, 645 F. Supp. 55, 58 (E.D. Wis. 1986) (citing United States v. Pritchard, 745 F.2d 1112, 1121 (7th Cir. 1984)).

warrant must be 'elaborately detailed' . . . or enable authorities 'to minutely identify every item for which they are searching.'"[3] It is instead sufficient that a search warrant "particularly describe the things to be seized and prevent the seizure of one thing under a warrant describing another."[4]

The significance of ascertaining whether a Fourth Amendment violation has occurred is, of course, that evidence unconstitutionally seized is inadmissible against a defendant in a criminal trial.[5] Normally, both the direct and indirect products of an unlawful search may be excluded as evidence.[6]

II. ADMINISTRATIVE SEARCH WARRANTS

It is true that the government generally cannot enter private commercial property unless authorized by a valid search warrant.[7] A businessman "has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."[8]

An administrative agency, however, may obtain a search warrant under somewhat different standards than a police officer or prosecutor.[9] An administrative warrant may issue where there is specific evidence of an existing violation or where the search is part of a general neutral administrative plan.[10] It is well-settled that an administrative warrant does not require the same degree of probable cause as a criminal search warrant.[11]

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[3] *Id.* (quoting *Pritchard*, 745 F.2d at 1122).

[4] *Id.* (citing Marron v. United States, 275 U.S. 192, 195 (1927)).

[5] Weeks v. United States, 232 U.S. 383, 393-94 (1914), *overruled on other grounds by* Elkins v. United States, 364 U.S. 206 (1978); Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[6] Wong Sun v. United States, 371 U.S. 471, 484 (1963).

[7] See v. City of Seattle, 387 U.S. 541, 544-45 (1967).

[8] *Id.* at 543.

[9] *Id.* at 545.

[10] National Standard Co. v. Adamkus, 881 F.2d 352, 361 (7th Cir. 1989) (citing Marshall v. Barlow's, Inc., 436 U.S. 307, 320-21 (1978)).

[11] *Id.* (citing West Point-Pepperell, Inc. v. Donovan, 689 F.2d 950, 958 (11th Cir. 1982); In re Establishment Inspection of Gilbert & Bennett Mfg. Co., 589 F.2d 1335, 1339 (7th Cir. 1979); Weyerhauser v. Marshall, 592 F.2d 373, 377 (7th Cir. 1979)).

A. Evidence Sufficient to Obtain the Search Warrant

The "guiding rule in the analysis of probable cause under the Fourth Amendment is that affidavits for a search warrant must be treated in a common-sense and realistic manner, and warrants are not to be given a hypertechnical interpretation."[12] The Fourth Amendment requires that the facts described in the underlying affidavit be sufficient to allow a neutral magistrate to reasonably conclude that probable cause exists to issue a search warrant.[13]

A review of cases in which an administrative search warrant has been sought may be instructive in analyzing the amount and type of evidence which issuing magistrates have found persuasive. In *Weyerhauser Co. v. Marshall*,[14] the Occupational Safety and Health Administration ("OSHA") unsuccessfully sought a search warrant based upon an affidavit which only presented a generalized summary of the one complaint which the agency had received. The Seventh Circuit Court of Appeals held that that affidavit was insufficient for an administrative search warrant to issue.[15] The same court approved a warrant in *In Re Gilbert & Bennett Manufacturing Co.*,[16] where OSHA presented an extremely detailed affidavit which listed explicit site conditions and employee complaints registered against the facility.[17] One may find guidance on this issue by heeding the court's comment that "the need for the inspection must be weighed in terms of [the] reasonable goals of code enforcement."[18]

An affidavit containing a detailed explanation of the hazardous wastes known to be stored at a particular locale and the affiant's personal observations[19] from earlier visits to the facility was found

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[12] United States v. Myers, 553 F. Supp. 98, 101 (D. Kan. 1982) (citing In re Carlson, 580 F.2d 1365, 1377 (10th Cir. 1978); and United States v. Ventresca, 380 U.S. 102, 106 (1965)).

[13] *Id.* (citing United States v. Hittle, 575 F.2d 799, 801 (10th Cir. 1978)).

[14] 592 F.2d 373 (7th Cir. 1979).

[15] *Marshall*, 592 F.2d at 378.

[16] 589 F.2d 1335 (7th Cir. 1979).

[17] *Id.* at 1339-42.

[18] *Id.* at 1338 (quoting Camara v. Municipal Ct., 387 U.S. 523, 535 (1967)).

[19] The district court opinion contains a more detailed explanation of her observations than is found in the Seventh Circuit's opinion. The affiant described discolored soil, surface water body sediments, discontinuities in vegetation, and odors, all of which suggested that hazardous wastes had been released. National-Standard Co. v. Adamkus, 685 F. Supp. 1040, 1047 (N.D. Ill. 1988).

to be sufficient for obtaining a search warrant in *National Standard Co. v. Adamkus*.[20] The court was also influenced by the fact that the affidavit was accompanied by photographs of the site depicting dead vegetation and leaking barrels.[21]

The Eighth Circuit approved an administrative search warrant granted on the basis of a lengthy, detailed affidavit enumerating a wide variety of suspected illegal activity in *In re 4801 Fyler Avenue*.[22] This court reasoned that the firm's Fourth Amendment rights were adequately protected by the affidavit's specific description of numerous incidents of the company mixing contaminated waste oil with pure oil for resale, as well as evidence that sludge from clean-up activities had been buried on the site.[23] Company records pertaining to used oil and hazardous waste operations were properly seized based upon the affidavit issued.[24] Likewise, the Eleventh Circuit held in *West-Point Pepperell, Inc. v. Donovan*[25] that sufficent probable cause supported the issuance of an administrative search warrant where the agency seeking the warrant presented an affidavit based upon 70 interviews.[26]

A company's argument that a search warrant was an impermissible general warrant was rejected in *In re 949 Erie Street*.[27] The business in question provided environmental testing and consulting services with regard to compliance with EPA standards. The court found that the warrant was thoroughly supported by detailed allegations of information obtained in interviews with the firm's former employees and from a perusal of regulatory agencies' files.[28] Taken together, the information established numerous discrepancies between actual test results and what was reported to the agencies.[29]

Perhaps the best summary of when an affidavit will be sufficient to obtain an administrative search warrant is that expressed by an Illinois district court in *National Standard Co. v. Adamkus*.[30] This court noted that an affidavit is adequate to support a probable cause determination when "it provide[s] the magistrate with the

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[20] *Adamkus*, 881 F.2d 352, 361 (7th Cir. 1989).
[21] *Id.*
[22] 879 F.2d 385, 388 (8th Cir. 1989).
[23] *Id.*
[24] *Id.* at 390.
[25] 689 F.2d 950 (11th Cir. 1982).
[26] *Id.* at 958.
[27] 645 F. Supp. 55, 59 (E.D. Wis. 1986).
[28] *Id.*
[29] *Id.*
[30] 685 F. Supp. 1040 (N.D. Ill. 1988).

underlying factual data giving rise to the compliance officer's belief that a violation existed. In the end, of course, the ultimate test is reasonableness: is the inspection reasonable and is it justified?"[31]

B. Scope of the Search Warrant

When is the scope of an administrative search warrant overbroad? The party named in a warrant in *National Standard Co. v. Adamkus*[32] protested when the EPA collected background samples at its facility in order to determine the nature of any corrective action which might be necessary.[33] National Standard Company contended that § 6924(u) of the Resource Conservation and Recovery Act (RCRA)[34] did not authorize the EPA to conduct a "fishing expedition" at its facility.[35] The court rejected this argument and found that the warrant was not overbroad, stating that "[b]ackground sampling is a mode of 'inquiry and investigation traditionally employed' in the type of scientific sampling authorized [in RCRA]" and that there was "no indication in the statute that Congress intended to foreclose EPA from taking control of background samples in the ordinary course of scientific investigation."[36]

On the other hand, "a search warrant so broad that it allows seizure of all or almost all of the business papers of an entity is constitutionally permissible only if the government can show probable cause to believe that fraud permeated the entire business operation."[37]

Similarly, in *Pieper v. United States*,[38] it was held that when a warrant, whether administrative or criminal, is issued for the inspection of business records on the basis of one suspected violation, the search warrant must express, with some degree of particularity, the dates of the records sought.[39] Upon the facts of that particular case,[40] the court held that while the warrant issued improperly

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[31] *Id.* at 1047 (quoting Burkart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313, 1319-20 (7th Cir. 1980)) (internal citations omitted).

[32] 881 F.2d 352 (7th Cir. 1989).

[33] *Id.* at 354.

[34] 42 U.S.C. §§ 6901-92 (1988).

[35] *Adamkus*, 881 F.2d at 354.

[36] *Id.* at 362 (citing the unpublished district court memorandum opinion).

[37] In re 4801 Fyler Avenue, 879 F.2d 385, 391 (8th Cir. 1989) (McMillian, J., dissenting) (quoting United States v. Kail, 804 F.2d 441, 445 (8th Cir. 1986)).

[38] 604 F.2d 1131 (8th Cir. 1979).

[39] *Id.* at 1134.

[40] The defendant operated Bradley Exterminating Company. An EPA inspector

lacked such a limitation, the plaintiff had an adequate remedy at law for the violation and thus the court refused to invoke equitable jurisdiction.[41]

An attorney seeking to suppress evidence seized pursuant to a search warrant should carefully scrutinize the warrant itself in order to determine if the agency can be accused of overreaching the reasonable scope of the search warrant. If this is the case, then counsel should argue that the evidence obtained pursuant to the warrant should be excluded.

C. Obtaining the Warrant in an Ex Parte Proceeding

A search warrant, whether criminal or administrative, is typically obtained in an ex parte proceeding. The fact that the object of the desired warrant is not present does not in and of itself demonstrate bad faith.[42] The Fourth Amendment does not prohibit the issuance of an administrative search warrant on an ex parte basis.[43] Indeed, such a proceeding is authorized even if a related civil action is pending.[44] An attorney may thus have little to gain by raising this issue.

Whether one may challenge the factual basis supporting an administrative search warrant is a matter "committed to the sound discretion" of the issuing judicial officer.[45] Such an approach may be warranted depending upon the specific facts of the case the practitioner encounters.

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investigating a reported violation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) asked to see the company's records for the previous two-month period. Pieper offered to show the inspector the records pertaining to the allegation but refused him access to other company records. The inspector obtained a search warrant which did not limit the records to be searched. He subsequently seized 19 months of records. *Id.* at 1332.

[41] *Id.* at 1134.

[42] National Standard Co. v. Adamkus, 881 F.2d 352, 362 (7th Cir. 1989)(citing Midwest Growers Co-Op. v. Kirkemo, 533 F.2d 455, 464 (9th Cir. 1976); *In re* Stanley Plating Co., Inc., 637 F. Supp. 71, 72 (D. Conn. 1986)).

[43] Stoddard Lumber Co., Inc. v. Marshall, 627 F.2d 984, 989-90 (9th Cir. 1980).

[44] *Adamkus*, 881 F.2d at 363; *see also In re* Stanley Plating, 637 F. Supp. 71, 72 (D. Conn. 1986).

[45] *Adamkus*, 881 F.2d at 363 n.14 (quoting In re Gilbert & Bennett Mfg. Co., 589 F.2d 1335, 1340 (7th Cir. 1979)). *See also Illinois v. Gates*, 462 U.S. 213, 236 (1983) ("A magistrate's determination of probable cause should be paid great deference by the courts."), and *Donovan v. Mosher Steel Co.*, 791 F.2d 1535, 1537 (11th Cir. 1986) ("The reviewing court is charged with examining the magistrate's actual probable cause determination — not what he or she might have concluded based on information not presented in the warrant application.").

III. WARRANTLESS SEARCHES

It is also possible for an administrative agency to conduct a warrantless search of business premises under certain conditions. The rationale permitting such searches is that "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections."[46] In other words, the commercial property owner's interest "is not one in being free from any inspections."[47] This is due to the broad authority Congress possesses "to regulate commercial enterprises engaged in or affecting interstate commerce," and because "an inspection program may in some cases be a necessary component of federal regulation."[48] The *Donovan* court interpreted the decisions on this issue as providing "that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes."[49]

The ability of administrative agencies to conduct warrantless searches may be a significant factor in their success and efficiency in enforcing environmental protection laws. Thus, it will be useful to look at decisions permitting such warrantless searches by other agencies in an effort to distill the essential ingredients.

In *Colonnade Catering Corp. v. United States*,[50] a warrantless search was permitted because the alcoholic beverage industry had a lengthy history of governmental regulation. This search warrant exception is sometimes referred to as the "longstanding governmental regulation" exception.[51] In similar fashion, the Supreme Court, in *United States v. Biswell*,[52] approved the warrantless search of a gun dealer's business because of the strong federal interest in gun

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[46] Donovan v. Dewey, 452 U.S. 594, 598-99 (1981).
[47] *Id.* at 599.
[48] *Id.*
[49] *Id.* at 600.
[50] 397 U.S. 72, 77 (1970).
[51] New Jersey v. Santiago, 527 A.2d 963, 965 (N.J. Super. Ct. Law Div. 1986).
[52] 406 U.S. 311, 315 (1972).

control and the existence of a comprehensive inspection scheme. This exception is occasionally known as the "pervasive governmental regulation" exception.[53]

On the other hand, the *Marshall v. Barlow's, Inc.*[54] Court refused to uphold a warrantless search by OSHA. The Court found that there was no reasonable expectation that the subject property would actually be subjected to warrantless searches because the applicable OSHA regulations applied to all businesses engaged in interstate commerce.[55]

Warrantless administrative searches have now been upheld in a variety of regulated industries. Such searches have been upheld in the mining industry,[56] the food and drug industry,[57] the commercial fishing industry,[58] the shipping industry,[59] and the boating industry.[60]

The common thread in each of these cases appears to be a balancing of "the need for warrantless regulatory searches against the business owner's reasonable expectation of privacy."[61] Four factors have been significant in this analysis:

> (1) whether the business operator is on notice that he is engaged in activity which may subject him to warrantless searches;
> (2) whether the regulation of the industry is pervasive and regular, considering the history of the regulatory scheme;
> (3) whether there is a strong governmental interest in the search; and
> (4) whether there are reasonable legislative or administrative standards governing the search.[62]

As for the second factor, the history of the regulatory scheme may not be determinative, for otherwise even a carefully constructed warrantless search scheme would fail in the case of a new or emerging industry "because of the recent vintage of regulation."[63]

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[53] *Santiago*, 527 A.2d at 965.

[54] 436 U.S. 307 (1978).

[55] *Id.* at 314-15.

[56] Donovan v. Dewey, 452 U.S. 594, 606 (1981).

[57] United States v. Schiffman, 572 F.2d 1137, 1142 (5th Cir. 1978).

[58] United States v. Raub, 637 F.2d 1205, 1211 (9th Cir. 1980).

[59] United States v. Espinosa-Cerpa, 630 F.2d 328, 334 (5th Cir. 1980).

[60] United States v. Whitmire, 595 F.2d 1303, 1315 (5th Cir. 1979).

[61] Pennsylvania v. Lutz, 516 A.2d 339, 343 (Pa. 1986), *vacated*, 538 A.2d 872 (Pa. 1988).

[62] *Id.*

[63] *Id.* at 345.

A. A Case Holding A Warrantless Administrative Search Improper

Despite the apparently expansive nature of the jurisprudence permitting warrantless administrative searches, particular fact patterns may lead to different results. A recent Ohio Court of Appeals decision, *Ohio v. Denune*,[64] stands as a reminder of this proposition.

Harry Denune was the sole shareholder of Dixie Distributing, Inc. ("Dixie"), a corporation engaged in hazardous waste disposal.[65] An anonymous telephone caller to the Ohio Environmental Protection Agency (OEPA) warned that a tractor trailer containing polychlorinated biphenyls (PCBs) would be moved from Dixie's warehouse in Springfield, Ohio, immediately prior to a scheduled OEPA inspection of the warehouse.[66] OEPA inspectors arrived at the warehouse, witnessed the tractor trailer leave, and followed it to a salvage yard where it was parked next to six other trailers belonging to Dixie.[67]

The inspectors could see fifty-five gallon drums through holes in the six trailers already in the salvage yard, but could not see into the newly arrived trailer.[68] They contacted the caretaker of the salvage yard and told him that they would like to inspect the newly arrived trailer; the caretaker's supervisor did not object to this request.[69] The inspectors subsequently discovered ten transformers containing PCBs, with slight oil leakages from the seals on the drum.[70] Based upon the evidence obtained in this search, the inspectors obtained a search warrant for the other six trailers and discovered many leaking containers of hazardous substances.[71]

Denune and Dixie were convicted in a jury trial of illegal transportation, disposal, and storage of hazardous waste; failure to evaluate waste; failure to conduct analyses of waste; failure to prepare a uniform waste manifest; criminal endangering; and illegal operation of a hazardous waste facility.[72] The Ohio Court of Appeals re-

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[64] 612 N.E.2d 768 (Ohio Ct. App. 1992), *cert. denied*, 126 L. Ed. 2d 238 (1993).
[65] *Id.* at 770.
[66] *Denune*, 612 N.E.2d at 770.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 776.
[70] *Denune*, 612 N.E.2d at 770-71.
[71] *Id.* at 771.
[72] *Id.* at 770.

versed the convictions, holding that the evidence obtained in the searches should have been suppressed as unconstitutionally seized.[73]

Although the state argued this case in part as a permissible warrantless administrative search, the court rejected this theory completely, holding that nothing in the statutory language could fairly be read as abolishing the warrant requirement.[74] Indeed, the court cited one statutory provision specifically recognizing the existence of the warrant requirement.[75]

The state also relied upon other exceptions to the Fourth Amendment's warrant requirement to justify the search. First, the state asserted that the search was authorized under the "automobile" exception.[76] The court rejected this argument, reasoning that "the mere fact of a trailer being moved from a large warehouse early in the morning is [not] so unusual or indicative of criminal conduct as to give probable cause to search" or, alternatively, even if the anonymous caller's tip was proven true, that information was not sufficiently specific so as to provide probable cause to search the trailer.[77]

The court also rejected a similar argument that the manner in which the trailer was transported gave rise to a suspicion of criminal activity. The court stated that although the trailer was heavily laden and parked in an environmentally sensitive area this was not an indication that it contained hazardous waste.[78]

In addition, the *Denune* court rejected the argument that the appearance of the drums in the other six trailers pointed to criminal activity.[79] The court reasoned that the inspectors had no definite reason to suspect the trailers contained hazardous wastes or, alternatively, that even if the six trailers were suspicious, the inspectors did not have a reasonable basis upon which to search the newly arrived trailer.[80]

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[73] *Id.* at 777.

[74] *Id.* at 773, 776.

[75] *Id.* at 773.

[76] This exception was first articulated in Carroll v. United States, 267 U.S. 132, 153 (1925). Basically, this exception authorizes a warrantless search where there is probable cause to believe a vehicle contains contraband and the search is conducted under exigent circumstances. State v. Welch, 480 N.E.2d 384, 387 (Ohio 1985), *cert. denied*, 474 U.S. 1010 (1985).

[77] *Denune*, 612 N.E.2d at 774.

[78] *Id.*

[79] *Id.* at 774-75.

[80] *Id.* at 775.

The court also rejected the argument that the search was justifiable under the "mobility" exception[81] because at the time the search was conducted the trailer had already been disconnected from the tractor.[82] Thus, there was little danger that it would be transported from the salvage yard.[83] In addition, the court rejected the state's contention that the search was permissible because of the potential danger that the suspected hazardous substances posed to the environment.[84] Despite arguments stressing that the trailer was situated on a flood plain in close proximity to a wildlife refuge, the court found that there was no showing that environmental harm was imminent or that immediate action was necessary.[85]

An additional argument advanced by the state was that the search was valid pursuant to the consent exception to the search warrant requirement.[86] The court again rejected this argument, noting that access to the trailer was obtained by breaking a padlock because no one present at the salvage yard had a key to unlock it.[87] Thus, it was unreasonable for the inspectors to believe the salvage yard personnel had control over the trailer.[88]

It is certainly arguable that the court's reasoning on the fact pattern presented in the case was not persuasive and that the warrantless search should have been found permissible under one or more of the several exceptions argued. Indeed, Judge Young "vehemently disagree[d]" with the majority's opinion and would have found the search justified under the "automobile exception."[89] Nevertheless, the lesson to be learned from *Denune* is that some courts strictly adhere to the Fourth Amendment's warrant requirement and permit warrantless searches only in circumscribed situations. Per-

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[81] The "mobility" exception is an exigent circumstance relating to the rapid ability of a motorized vehicle to leave the jurisdiction in which a warrant would have to be sought. California v. Carney, 471 U.S. 386, 390-91 (1985).

[82] *Denune*, 612 N.E.2d at 775.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] The aspect of the consent exception upon which the state relied was that articulated in *Illinois v. Rodriguez*, 497 U.S. 177 (1990). *Rodriguez* held that a warrantless entry is valid when based on the consent of a third party whom the police, or here the OEPA officials, reasonably believe to possess authority over the property, but who in fact does not possess this authority. *Id.* at 188. The state argued that the inspectors reasonably believed that the salvage yard personnel possessed authority over the trailers. *Denune*, 612 N.E.2d at 775.

[87] *Denune*, 612 N.E.2d at 776.

[88] *Id.*

[89] *Id.* at 777 (Young, J., dissenting).

haps these courts come closer to providing corporate citizens with the level of constitutional protection to which they should be entitled. In any event, the practitioner whose client is confronted with a similar scenario may be well advised to consult *Denune* in preparing a motion to suppress.

B. Statutory Authorization for Warrantless Administrative Searches

Many statutes now provide explicitly for warrantless administrative searches, and courts have been generally unwilling to find these statutes constitutionally defective. The court in *Pennsylvania v. Blosenski Disposal Service*[90] was faced with a challenge to the constitutionality of a warrantless administrative search authorized by § 608 of Pennsylvania's Solid Waste Management Act.[91] Upholding the statute, the court noted that unlike the OSHA administrative search invalidated in *Marshall v. Barlow's, Inc.*,[92] the search at issue involved a single, heavily regulated industry.[93] The court believed that given the "vital public and statutory interest" in environmentally sound solid waste disposal, unannounced inspections could be anticipated.[94] Thus, this statutory warrantless search was held valid under the "*Colonnade*[95]*-Biswell*"[96] exception to the Fourth Amendment's search warrant requirement, as *Donovan v. Dewey*[97] had explained the doctrine.[98] The most recent pronouncement from the United States Supreme Court on the subject of warrantless inspections of a pervasively regulated business pursuant to a statute is *New York v. Burger*.[99] It appears that the analysis adopted by the Court is very similar to the four-factor analysis discussed above,[100] which courts have previously employed in determining whether warrantless searches were constitutionally proper. In order for a warrantless inspection of a heavily regulated business to be reason-

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[90] 566 A.2d 845 (Pa. 1989).

[91] 35 Pa. Cons. Stat. § 6018.608(3) (Supp. 1985).

[92] 436 U.S. 307 (1978).

[93] Blosenski Disposal Service was in the business of solid waste disposal. The action in this case was initiated because this firm was observed operating a transfer station without a permit. *Blosenski Disposal Serv.*, 566 A.2d at 845-46.

[94] *Id.* at 850.

[95] Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

[96] United States v. Biswell, 406 U.S. 311 (1972).

[97] 452 U.S. 594, 598-606 (1981).

[98] 566 A.2d at 848.

[99] 482 U.S. 691 (1987).

[100] *See supra* note 66 and accompanying text.

able:

> (1) There must be a substantial government interest that forms the basis of the regulatory scheme pursuant to which the inspection is made.
> (2) The warrantless inspections must be necessary to further the regulatory scheme; and
> (3) The statute's inspection program must provide a constitutionally adequate substitute for a warrant in terms of the certainty and regularity of its application.[101]

The third criterion determines whether the owner of the commercial premises has been sufficiently advised that the search is being made pursuant to the law, has a properly defined scope, and limits the discretion of the inspection officers.[102] Taken together, these criteria serve as a substitute for the Fourth Amendment's search warrant requirement.[103]

A decision applying the *Burger* standard to a warrantless environmental agency search authorized by statute is *New Jersey v. Bonaccurso*.[104] An inspector from the New Jersey Department of Environmental Protection responded to a complaint alleging that a red substance was polluting a stream.[105] Following the stream through public lands until it ended in a swamp only 200 feet from the defendant's slaughterhouse, the inspector went onto the premises and asserted his statutory authority to investigate the facility.[106] The company was found to be improperly discharging bloody waste materials into this water supply.[107] The firm apparently corrected this problem for a time.[108]

Two years later a different inspector responded to a similar complaint and conducted another warrantless search of the land surrounding the slaughterhouse.[109] When the defendant moved to suppress the evidence discovered, the state argued that the search was justified by either the long-standing governmental regulation exception to the warrant requirement or by the open fields doc-

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[101] *Burger*, 482 U.S. at 702-03 (citations omitted).
[102] New Jersey v. Bonaccurso, 545 A.2d 853, 856 (N.J. Super. Ct. Law Div. 1988).
[103] *Id.*
[104] 545 A.2d 853 (N.J. Super. Ct. Law Div. 1988).
[105] *Id.* at 854.
[106] *Id.* at 854-55.
[107] *Id.* at 855.
[108] *Id.*
[109] *Bonaccurso*, 545 A.2d at 855.

trine.[110]

Using the *Burger* analysis, the court approved the warrantless search. It found that New Jersey had enunciated a substantial government interest and had responded by enacting a legislative scheme which attempted to alleviate the problem in a reasonable time, place, and manner.[111] Indeed, the defendant did not seriously dispute the extensive regulation of the meat packing industry or the statute's constitutionality, but focused instead on the argument that the proper regulatory body was the New Jersey Department of Agriculture and that, therefore, the Department of Environmental Protection could not properly conduct a warrantless search.[112] The court quickly disposed of this argument, holding that these departments had concurrent jurisdiction over the slaughterhouse and its operation.[113]

A court is unlikely to hold invalid a statute permitting a warrantless administrative search. The practitioner's best strategy may be to argue that the statute does not apply to a particular fact pattern or that it does not in fact dispense with the warrant requirement.[114]

C. Open Fields Doctrine

Another exception to the requirement for a search warrant is known as the "open fields" doctrine. There is no warrant requirement in these situations because there is no "search" within the meaning of the Fourth Amendment.[115] No justifiable expectation of privacy is present when the incriminating evidence or activities are readily observable by persons on adjacent lands.[116] The importance of this doctrine to an administrative agency's right to conduct inspections may be enormous, for environmental contamination is the type of violation which commonly occurs in areas readily accessible to the public.

The open fields doctrine was first explained by the United States Supreme Court in *Hester v. United States*.[117] Despite the fact that the police were trespassing, the Court held that no illegal

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[110] *Id.*

[111] *Id.* at 857.

[112] *Id.*

[113] *Id.* at 857-58.

[114] *See, e.g., Denune, supra* notes 79-80 and accompanying text.

[115] *See, e.g.*, Miller v. Illinois Pollution Control Bd., 642 N.E.2d 475, 483 (Ill. App. Ct. 1994).

[116] *Id.* (citing 1 W. LAFAVE, SEARCH & SEIZURE § 2.3(c), at 391 (2nd ed. 1987)).

[117] 265 U.S. 57 (1924).

search had occurred because the police testified as to what they had observed from outside the home.[118] The Fourth Amendment protection afforded people in their "persons, homes, papers, and effects" does not extend to the "open fields."[119]

A more recent explanation of the doctrine appears in *Oliver v. United States*:[120]

> [O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from governmental interference or surveillance. There is no societal interest in protecting the privacy of those activities . . . that occur in open fields. . . . [T]he asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable."[121]

In establishing the parameters of this doctrine, a bright line rule has been adopted which looks exclusively at the character of the land and does not permit "consideration of whether the landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy."[122]

The open fields doctrine was specifically applied in the context of outdoor commercial property in *Air Pollution Variance Bd. of Colorado v. West Alfalfa Corp.*[123] The defendant in that case challenged the constitutionality of a state health inspector's entry onto its land, in daylight, without consent and without a warrant, in order to conduct opacity tests[124] of smoke being emitted from chimneys. The United States Supreme Court reversed the Colorado Court of Appeals decision, holding that the inspection was well within the open fields exception to the Fourth Amendment.[125] The Court noted that the inspector did not enter the corporation's facility or offices but only based his findings on what anyone in the city near the plant could see.[126]

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[118] *Id.* at 58-59.

[119] *Id.* at 59.

[120] 466 U.S. 170 (1984).

[121] *Id.* at 179.

[122] New Jersey v. Bonaccurso, 545 A.2d 853, 859 (N.J. Super. Ct. Law Div. 1988)(citing *Oliver*, 466 U.S. at 181).

[123] 416 U.S. 861 (1974).

[124] An opacity test measures the extent to which a substance is opaque; that is, the extent to which it is impenetrable to light. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, 826 (1988).

[125] *West Alfalfa*, 416 U.S. at 865.

[126] *Id.*

The open fields doctrine was applied in another administrative agency setting in *Ohio v. Paxton*.[127] An inspector from the Toledo Health Department had conducted four separate warrantless searches of Paxton Recycling's facility in response to a complaint alleging that the company was burying garbage, trash, and demolition materials on the property.[128] The inspector walked around the premises and took videotapes and photographs.[129] The court held that the open fields doctrine was applicable in this case because the area inspected was easily accessible to the public and because the nature of the activity conducted on the premises (disposal of debris and other garbage) was not one in which the firm could reasonably demand or expect privacy, nor was it an expectation that society had an interest in protecting.[130] Indeed, the court held that it was irrelevant that the inspector may have been trespassing during the inspections.[131]

Perhaps the most interesting, or disturbing, application of the open fields doctrine to a business enterprise is found in *Dow Chemical v. United States*.[132] After an on-site EPA inspection of Dow Chemical Company's manufacturing facility in Midland, Michigan, the company denied the EPA's request for a second inspection.[133] Rather than seek an administrative search warrant, however, the EPA employed a commercial aerial photographer to take photographs of the facility from altitudes of 1,200, 3,000, and 12,000 feet.[134]

The United States Supreme Court held that the taking of aerial photographs of the facility from navigable airspace was not an unreasonable search under the Fourth Amendment.[135] More specifically, the Court held that the open areas of an industrial complex with numerous plant structures spread over a 2,000 acre area were not analogous to the curtilage of a house; instead, this area is properly comparable to an open field subject to the observations of persons in aircraft.[136]

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[127] 615 N.E.2d 1086 (Ohio Ct. App. 1992).
[128] *Id.* at 1088.
[129] *Id.*
[130] *Id.* at 1094.
[131] *Id.*
[132] 476 U.S. 227 (1986).
[133] *Id.* at 229.
[134] *Id.*
[135] *Id.* at 239.
[136] *Id.*

The Court reasoned that the photographs at issue were not so revealing of intimate details as to raise constitutional concerns.[137] The Court was also influenced by its perception that Dow had taken no precautions against aerial intrusions, even though the plant was near an airport.[138]

Despite these precedents, some courts have been reluctant to apply the open fields doctrine in the context of business property. These courts reason that the basic premise of the open fields doctrine, that there can be no reasonable expectation of privacy in an open field, is sometimes incompatible with the idea that a business owner has a reasonable expectation of privacy in his property.[139] This concern rings especially true in the context of businesses which, by their very nature, must be conducted outdoors.[140]

The open fields doctrine remains a constant weapon for an administrative agency to use in appropriate factual scenarios. The practitioner seeking a shield from its blows may have a difficult task. One might seek, however, to garner facts which demonstrate that the objectionable evidence was gathered by highly invasive means from a secluded, nonpublic area. Such an approach attacks the theoretical underpinnings which justify dispensing with the warrant requirement.

CONCLUSION

It is clear that the practitioner must be prepared to advise clients with more than a casual contact with environmental regulation that an environmental protection agency may be able to conduct judicially authorized searches as well as warrantless searches on their premises. Whether by explicit statutory authorization or by common law principles such as the "pervasive governmental regulation" or "open fields" doctrines, an agency inspector may well pay

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[137] *Dow Chemical*, 476 U.S. at 238.

[138] *Id.* at 237 n.4 (citing United States v. Dow Chemical Co., 749 F.2d 307,312 (6th Cir. 1984)). The dissent, however, expressed a belief that Dow had in fact included procedures in its security program designed to protect the facility from aerial photography. *Dow Chemical*, 476 U.S. at 241-42.

[139] Pennsylvania v. Lutz, 516 A.2d 339, 346 (Pa. 1986), *vacated*, 538 A.2d 872 (Pa. 1988).

[140] *Lutz*, 516 A.2d 346 (citing United States v. Swart, 679 F.2d 698, 701-02 (7th Cir. 1982)) (holding that a used car dealer's parking lot was part of the "business curtilage" and thus not subject to warrantless search after business hours); Allinder v. Ohio, 614 F. Supp. 282, 288 (N.D. Ohio 1985) (holding that the open fields doctrine cannot apply to a warrantless administrative search of a beekeeping facility)).

your client a surprise visit.

In an ideal world, even an unannounced visit would not be a problem because the business would be in complete compliance with all applicable environmental regulations. In reality, however, even the most diligent and conscientious client may have trouble keeping up with the complex and ever-changing body of environmental regulation. By impressing upon the client the possibility of the unexpected inspection visit, two worthwhile goals may be achieved. First, the otherwise environmentally-sound client will not risk stiff fines and perhaps stigmatization from the agency discovering a minor violation which the client might otherwise be slow to correct. Second, society as a whole should benefit from the *in terrorem* effect of possible unexpected regulatory visitors, as clients who might otherwise be lax are scared into compliance efforts.

Under our system of government, with its focus upon the preservation of individual rights and restrictions upon intrusive governmental activity, a warrantless search should be the exception, not the rule. If the environmental protection laws are to be enforced and the authority to inspect business premises is to remain an effective and credible deterrent to violations, however, the various agencies must be allowed to perform unannounced, even frequent, inspections.[141] The practitioner must be cognizant of this reality, but at the same time should emphasize the reasoning of cases like *Denune* when an argument for exclusion should be advanced. In an era of increasing environmental awareness and resultant governmental regulation, this may become more than a hypothetical concern.

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[141] New Jersey v. Santiago, 527 A.2d 963, 967 (N.J. Super. Ct. Law Div. 1986) (citing United States v. Biswell, 406 U.S. 311, 316 (1972)).