ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6377 SENATE JUDICIARY

781

II. Another area of concern to insurers is the requirement to certify coverage to different entities such as states and countries, based on varying laws provided by these individual entities.

III. [redacted] allowed by the state of Alaska from $500 - $100,000 for the initial violation and then $5,000 per day for each day the violation continues up to a maximum overall limit of $100,000,000. These civil penalties can be assessed to a person who violates or causes or permits to be violated a provision of the Act or a regulation, a lawful order of the department, or a permit, or a term or cancellation of a permit issued under the Act. [redacted] insurance [redacted] there is danger of making payments under the law that will amount to windfall gains for the state of Alaska.

IV. Under AS46.04.020 (c), the department can require clean-up beyond that required by the U.S. Coast Guard.

> "If the department determined that containment or cleanup activities are not adequate, it may direct the person engaged in the activities to cease and may undertake the activities itself through contract or its own resources or both."

[redacted] financial responsibility of $1,000,000 since there is no check on type or nature of expense, or a lid on total expense. This is unlike a restoration for damages since 1) the determination of proper cleanup can be arbitrarily determined and, 2) there is no independent review in determining reasonable cost.

Distributed at our recent meeting was a letter addressed to me care of Christopher Arundell of Pettit-Morry Company, from Mr. Robert S. Lagattolla, President, of the Water Quality Insurance Syndicate (WQIS) dated December 15, 1981, stating the WQIS's position on oil spill statutes, including reasons for not issuing the "Alaska Endorsement" proscribed under the Alaska law. A copy of that letter is enclosed for reference. Similarly, I am also enclosing a copy of a letter from the American Institute of Marine Underwriters (AIMU) to Chris Arundell of Pettit-Morry Company dated January 14, 1982, expressing its views and the views of the American Marine Insurance Market on this subject.

As you know, it has been stated by P&I Club representatives that the London Market's reasons for being unable to comply with Alaska law are similar to those advocated by the U.S. Market. Representatives of the "International Group of P&I Clubs" met with you early last year to express their group's position on oil pollution law, including their concerns over the Alaska law.

The above comments and enclosures clearly indicate that certification under the Alaska Oil Pollution Control Law will not be provided by the world insurance markets. Both the United States and London markets have a commitment to Federal pre-emption in the area of pollution laws.

It is clear that the Alaska law imposes considerable additional requirements over and above the existing Federal Pollution laws and that the oil carrying barge operators are unable to meet these additional requirements.

While we do appreciate the assurances given in Mr. Mertz's letter of December 30, 1981, we request your assistance in obtaining meaningful and satisfactory responses to insurers' concerns noted above (Items I through IV), including possible changes in the law as it presently exists in order that the carriers can achieve compliance with financial responsibility provisions.

Your prompt attention to this letter will be greatly appreciated.

Very truly yours,

William D. Lawrence

William D. Lawrence
West Coast Manager
TRANSPORTATION INSTITUTE

WDL:lb
Enclosures

cc: Douglas Mertz
Members of Committee

MEMORANDUM State of Alaska

TO Ernst W. Mueller, Commissioner
Department of Environmental
Conservation

DATE May 13, 1982

FILE NO J-66-462-82

TELEPHONE NO 465-3600 x 54

FROM WILSON L. CONDON
ATTORNEY GENERAL

By:
Douglas K. Mertz
Assistant Attorney General

SUBJECT Financial Responsibility and the Insurance Industry (AS 46.04.040)

You have asked this office for an opinion on several questions concerning Alaska's oil spill laws, specifically the provisions dealing with proof of financial responsibility, AS 46.40.040 (§ 2, ch 116 SLA 1980). In conversations with representatives of various tank vessel and oil barge owners, it has become apparent that a good deal of confusion exists regarding the effect of AS 46.04.040. This opinion is intended to convey our interpretation of that statute as well as this department's policy regarding enforcement of it.

First, we want to make clear what the statute does not do: It does not create any new or increased liabilities whatsoever. Its role is limited to requiring proof that an owner or operator has the financial ability to compensate damages for which that person is liable under other state statutes. 1/ While those other statutes may expose an owner or operator to varying degrees of liability (see infra), AS 46.04.040 [illegible] the potential [illegible] those preexisting statutes.

Some concern has been expressed by the insurance industry as to the effect of the "direct action" provision of subsection (e) (. . . An action brought under AS 46.03.758, 64.03.760(a) or (e), or 46.04.822 may be brought in a state court directly against the insurer . . ."). Specifically, their question has been whether this provision may subject insurers to even greater liabilities than their insureds because the insurer could not assert defenses personal to the insured. Of most immediate concern is whether the insurer could take advantage of the federal Limitation of Liability Act of 1851, 46 U.S.C. § 181, et. seq., which

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1/ Specifically, AS 46.03.758, 46.03.760(a) and (e), and 46.03.822.

on its face is limited to vessel owners and demise charterers. The law on whether a [illegible] can deprive an insurer of the benefit of such defenses has never been settled 2/ Several jurisdictions besides Alaska allow direct actions against insurers in some circumstances. 3/

Of most direct relevance is the Louisiana statute, La. Rev. Stat. 22:655, which is a detailed provision clearly intending to work a fundamental change in the relationship between insurer, insured, and third-party claimant. At present, it appears that under the Louisiana statute an insurer may be successfully prevented from involving the insured's personal defenses. See Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969). In contrast is the federal Clean Water Act provision on financial responsibility, 33 U.S.C. § 1321(p), after which the Alaskan act is in part modeled, which allows direct actions against the insurer, but explicitly permits the insurer to invoke the insured's defenses.

The Alaska statute contains no detailed indicia of intent to deny the insured's defenses, as in the Louisiana statute, nor an explicit provision retaining the insured's defenses, as in the Clean Water Act. The legislative history contains little evidence, except for the testimony on behalf of the Department of Environmental Conservation, as prime sponser of the bill. William A. Publicover, Deputy Director of Environmental Quality Operations, testified that the bill's intent was

> . . . to provide an easy way for an individual Alaskan to collect for damages to his property or for loss of income due to an oil spill. . . We want the injured party to be able to go to state court, even small claims court, file his claim against someone who is

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2/ See Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954); Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969).

3/ See, e.g., N.Y. INS. LAW, (McKinney) Section 167; Louisiana Revised Statutes 22:655; California Insurance Code, Section 11580 (West 1977); Shingleton v. Bussey, 223 So.2d 713 (Fla. 19-69); Third Parties (Rights against Insurers) Act 1930 (United Kingdom).

attachable, someone who does business in Alaska, or who has an agent in Alaska, and we seek timely satisfaction of his claim.

Publicover went on to describe the costly and time-consuming process of identifying the responsible party and pursuing an action in a distant forum. The direct access provision, he said, was designed to provide a speedy remedy which as a practical matter could be secured by an Alaskan fisherman, for example, with a minor claim. Publicover did not mention any intent whatsoever to deny the insurer the insured's defenses.

[redacted] In short, as we read AS 46.04.040(e), although a claimant may proceed directly against the insurer under this statute, the insurer would "step into the shoes" of the insured by being able to assert any substantive defense available to the insured.

At the same time, the insurer would always retains an absolute limit to its liability, namely the policy limits. Since the insurer's liability is derivative, through the insured's policy, even with "direct access" we believe the courts would not hold the insurer liable for more than the amount contracted for in the policy. (This interpretation is confirmed in the implementing regulations, at 18 AAC 20.065: ". . . the insurer's liability does not exceed the limits of coverage . . . ").

In conversation with insurers it has also appeared that there is concern about multiple "certification" requirements, that is, about the insurers having to undertake the bureaucratic burden of supplying Alaska [redacted] federal government with a federal Maritime Commission certificate to comply with federal requirements. We would point out, however, that AS 46.04.040 contains no technical "certification" requirement; instead, it and the related regula-

tions (18 AAC 20.005 -- 18 AAC 20.900) [redacted] as to how a party may demonstrate the existence of requisite financial responsibility. As to insurance, for example, the party need only submit a suitable binder along with a copy of the underlying policy, or a certificate of entry. If financial responsibility is shown through a surety bond or guaranty sample forms are included in the regulations. If self-insurance is used, the regulations merely call for a set of financial statements and affidavits, in place of which a party may substitute forms already prepared for submission to the Securities and Exchange Commission or the Federal Energy Regulatory Commission (see 18 AAC 20.055). Thus, the regulations, far from imposing a rigid and extensive set of bureaucratic requirements, are quite flexible and easy to satisfy once the required financial responsibility is acquired.

Finally, we address the question of whether AS 46.04.040, or its related statutes, could ever result in a windfall recovery for the state [redacted] punitive penalty assessed against the insured. To answer the question it is necessary to review the four statutes to which the financial responsibility requirements of AS 46.04.040 apply:

AS 46.03.760(a) is a standard civil penalty provision providing for an assessment to the state of $500 to $100,000 for violations of various state pollution statute; the assessment is required to reflect "reasonable compensation in the nature of liquidated damages for any adverse environmental effects . . .," as well as state costs in investigating and correcting the violation. Subsection (b) states: "Actions under this section may not be used for punitive purposes, and sums assessed by the court must be compensatory and remedial in nature."

AS 46.03.760(e) provides for recovery by the state, in a civil action, of actual measurable damages caused by unlawful oil discharges, including cleanup and restoration costs. The prohibition in subsection (b) of punitive sanctions also applies to actions under subsection (e). We read subsections (a), (b), and (e) together to provide a scheme of alternative methods for securing compensation from oil spills, through either liquidated damages (subsection (a)) or actual damages (subsection (e)); in neither case could punitive sanctions be applied. Since both subsections have the same

purpose -- to provide full compensation -- we believe that a recovery under either one would be credited toward a recovery under the other, thus eliminating the possiblity of a double recovery.

AS 46.03.758 is yet another provision for securing compensation to the state for damages from oil spills. Specifically, amounts assessed under this provision are intended to compensate for those elements of damage which are not able to be measured or valuated directly. Under this method, a formula is used, taking into account the amount spilled, amount recovered, the toxicity, dispersibility, and degradability of the oil, and the sensitivity of the receiving environment, to generate a final figure which would compensate for the actual damage to the environment not directly measurable. The civil penalty is explicitly not to be punitive (AS 46.03.758(a)(3)), and a person may not be subjected to civil penalty assessments under both AS 46.03.758 and AS 46.03.760(a) (see AS 46.03.758(i)).

AS 46.03.822 is the general strict liability statute for damages caused by hazardous substances, including oil; it also provides for a number of defenses. This is the statute upon which private parties may rely to secure damages.

These are the only statutes for which financial responsibility must be shown, and to which AS 46.04.040 applies; we note particularly that it does not require proof of financial responsibility for sanctions under AS 46.03.790, the parallel criminal penalty provision. From the details of the four provisions to which the financial responsibility requirements apply, we conclude that (1) in no case would an insurer, providing coverage only under the four listed statutes, be liable for a punitive or criminal assessment; and (2) since all four of the listed provisons are basically compensatory in intent, amounts assessed under any one of them which were intended to compensate for a particular set of damages would necessarily be credited toward recoveries for the same damages under any of the other statutes, so there is no possibility of multiple recoveries for the same damages.

This discussion reflects our Department's view of the statutes and regulations in question and is the basis for any enforcement action to be taken under the law. It thus appears to us that the concerns expressed by the industry on these points are without foundation, and we are

pleased to be able to give our assurances that the State of Alaska's Department of Law intends to enforce these laws in a manner which should satisfy the industry as to its fairness.

Please let me know if you have any other questions.

DKM/jb

STATE OF ALASKA
1990 LEGISLATIVE SESSION

No. 3
Bill Version: CSHB 409(JUD)
Publish Date: HOUSE 2/26/90

FISCAL NOTE

REQUEST:

Revision Date 2/26/90
Agency Affected: Alaska Court System
Title: An Act relating to the reform of certain environmental conservation laws...
BRU: Trial Courts
Sponsor: Davis, Brown, Koponen, Navarre...
Components:
Requestor:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel
Phone: 264-8228
Division: Alaska Court System
Date: 02/26/90

Approved by: Arthur H. Snowden, II, Administrative Director
Date: 02/26/90
Agency: Alaska Court System

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)

CC

No. 1

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHB 409(Res)
PUBLISH DATE: HOUSE 2/9/90

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act relating to Environmental Law Reform
Sponsor: Representative Mike Davis
Requestor: House Resources

Agency Affected: Environmental Conservation
BRU: Environmental Quality
Administrative Services
Components: Administrative Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	112.0	112.0	112.0	112.0	112.0	112.0
TRAVEL	5.0	5.0	5.0	5.0	5.0	5.0
CONTRACTUAL	20.0	20.0	20.0	20.0	20.0	20.0
SUPPLIES	2.0	2.0	2.0	2.0	2.0	2.0
EQUIPMENT	10.0	10.0	10.0	10.0	10.0	10.0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	149.0	149.0	149.0	149.0	149.0	149.0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	149.0	149.0	149.0	149.0	149.0	149.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	149.0	149.0	149.0	149.0	149.0	149.0

POSITIONS:

FULL-TIME	2	2	2	2	2	2
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

The fiscal impact for FY 90 would be zero. Analysis is attached.

Prepared by: Gail Gatton
Phone: 465-2600
Division: Administrative Services
Date: 1/30/90

Approved by Commissioner: [signature]
Date: 30 Jan 90
Agency: Environmental Conservation

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

House Bill 409
1/29/90 Version

Section 3 of this bill gives the Department new authority to assess administrative penalties for violations of laws and regulations designed to protect the environment. Due process, under this bill, allows for a hearing to be held prior to the assessment of penalties. Since DEC does not currently have this authority, we do not have any positions capable of performing these functions. Therefore, the Department would need one hearing officer and a paralegal to conduct the hearings required before assessment of administrative penalties.

Contractual($12.0) includes court reporter, transcripts, and professional contracts.

Position	100	200	300	400	500	Total
Attorney III	68.0	5.0	8.0	1.0	5.0	$87.0
Paralegal Assistant II	44.0			1.0	5.0	$50.0
(Contractual)			12.0			$12.0
TOTALS	112.0	5.0	20.0	2.0	10.0	$149.0

No. 1
CSHB 409 (Res)
2/9/90

Position Title	No.of Positions	Range/Step	Barg. Unit
Attorney III	1	12A	N/A

Time Status	Staff Months	Location	Election District
PFT	12	Juneau	04

Type of Expenditure		Amount
1	2	3
Salary	52.3	
Benefits	15.7	
Premium Pay	0	
Other	0	
Total Personal Services		68.0 $
Travel		5.0
Contractual		8.0
Commodities		1.0
Equipment		5.0
Other		-
Total Cost		87.0 $
Funding Source for Total Cost		
Federal Receipts	1002	0
G. F. Match	1003	0
General Fund	1004	87.0
GF Program Receipts	1005	0
Other		0

Justification

This position will be necessary to perform the functions required in this legislation. The administrative penalty process allows for a hearing to be held prior to the assessment of penalties, if review is sought, within 30 days. This position will review these proposed penalties, do legal research, conduct hearings, evaluate the case, and make an assessment as to the appropriateness of penalties. We do not currently have anyone on staff qualified to perform this function.

Request For New Position

Agency: Environmental Conservation
BRU: Administrative Services
Component: Administrative Services

Revised Date

FY 91

No. 1
CSHB 405 (Res)
2/9/90

Position Title	No of Positions	Range/Step	Barg. Unit
Paralegal Assistant II	1	16A	CGU

Time Status	Staff Months	Location	Election District
PFT	12	Juneau	04

Type of Expenditure		Amount
1	2	
Salary	32.0	
Benefits	12.0	
Premium Pay	0	
Other	0	
Total Personal Services		44.0
Travel		0
Contractual		0
Commodities		1.0
Equipment		5.0
Other		0
Total Cost		50.0

Funding Source for Total Cost		
Federal Receipts	1002	0
G F Match	1003	0
General Fund	1004	50.0
GF Program Receipts	1005	0
Other		0

Justification

This position will assist the hearing officer to determine administrative penalties. Will perform research, help review cases, organize hearings and otherwise ensure that the hearing proce ` is carried out in an appropriate and timely manner.

Request For New Position

Agency Environmental Conservation
BRU Administrative Services
Component Administrative Services

FY 91

No. 2

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHB 409 (JUD)
PUBLISH DATE: HOUSE 2/26/90

FISCAL NOTE

REQUEST:

Revision Date: February 26, 1990
Title: "An Act relating to the reform of certain environmental conservation laws..."
Sponsor: House Judiciary
Requestor: House Judiciary

Agency Affected: Department of Law
BRU: Legal Services
Components: Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Please see the attached analysis.

Richard L. Pegues
Prepared by: Richard L. Pegues, Director
Phone: 465-3672
Division: Administrative Services
Date: February 26, 1990

Richard L. Pegues /FAX/
Approved by Commissioner: Douglas B. Baily, Attorney General
Date: February 26, 1990
Agency: Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 409 (JUD)

The committee substitute for HB 409 changes the state's environmental conservation laws in four important respects.

First, section 1 amends AS 46.03.020(6) to provide that the Department of Environmental Conservation may copy records during a voluntary inspection to investigate either actual or suspected pollution or contamination or to ascertain compliance or noncompliance with AS 46.03, AS 46.04, or AS 46.09. Section 2 adds a new paragraph to AS 46.03.020 that grants to the Department of Environmental Conservation the right to enter and inspect the property or premises of a pervasively regulated facility and copy records to investigate either actual or suspected sources of pollution or contamination or to ascertain compliance or noncompliance with AS 46.03, AS 46.04, or AS 46.09. The bill defines pervasively regulated facility as a facility where activities or operations are or were conducted that affect a significant public interest and that the Department of Environmental Conservation comprehensively regulates.

Second, section 4 amends AS 46.03 by adding a new section that establishes a system of administrative penalties for pollution. Under the section, an administrative penalty not to exceed $25,000 a day for each violation may be assessed against a person who violates or causes or permits to be violated a provision of AS 46.03, AS 46.04, or AS 46.09.

Third, section 5 repeals and reenacts AS 46.03.850 to give the Department of Environmental Conservation the power to issue binding compliance orders, coupled with a formal administrative review/appeal process. Under existing law, the department notifies a person of its determination that a violation exists, or is about to exist, and the person is given time to file a report stating measures have been and are being taken, or are proposed to be taken, to correct or control the conditions outlined in the determination notice. At this time, a compliance order can be issued only after all of these steps have been taken.

Fourth, section 6 would amend AS 46.03 by adding a new section that provides that the commissioner of environmental conservation may require a person to conduct an environmental audit and to prepare and submit an environmental audit report, as part of a judicial or administrative enforcement action.

It is impossible to predict what additional costs, if any, the Department of Law may experience if this bill is adopted. On the one hand, the bill's provisions greatly streamline existing enforcement procedures, thereby reducing attorney resources currently used for litigation and lengthy settlement negotiations. On the other hand, these improved procedures may result in increased enforcement and require additional resources. Nevertheless, to the extent that increased enforcement may outweigh the efficiencies provided by the bill, any resulting cost will be borne by the oil and hazardous substance fund, provided under AS 46.08 and AS 46.09, as well as federal fund sources such as the federal LUST Trust and the federal Superfund.

Bill would give DEC more search power

By BRIAN O'DONOGHUE
News-Miner Bureau

JUNEAU—A state legislator speculated last week that Rep. Mike Davis' efforts to increase the state's power to inspect oil facilities might enable a state employee to bomb the Alyeska pipeline terminal in Valdez.

"Could some saboteur who works for DEC (the Department of Environmental Conservation) go through the gate without someone accompanying him, go anywhere he wants and blow it up?" Rep. Ron Larson, D-Palmer, asked Davis at a hearing Thursday.

"If we have a DEC employee who's also a saboteur, we're in a world of hurt," Davis said after a long pause. "We're also looking at a lot of liability."

Larson said later that he was not joking about his concern about the unrestricted access provided by the bill.

At issue was a provision in HB 409 allowing DEC to enter and inspect "pervasively regulated" facilities, such as the pipeline terminal, pump stations and refineries. The bill, which also grants DEC authority to assess administrative penalties of up to $25,000 a day against major polluters, has become a lightning rod of controversy in the debate over legislation introduced in response to the Exxon Valdez oil spill.

Earlier in the session, Rep. Bert Sharp, R-Fairbanks, sent out a letter warning constitutents that HB 409 would subject small businesses to "Gestapo-style" searches from the state's environmental agency.

According to Davis, the reference to "pervasively regulated industries" insures the increased inspection powers only apply to major facilities with great potential for environmental harm. For example, HB 409 would grant DEC the power to conduct an unannounced inspection of the Mapco refinery, but not a local photo lab.

Supporters of the bill said that DEC field inspectors have been delayed as long as 20 hours when seeking access to the oil terminal in Valdez. Inspectors need the new authority to make sure industry follows Alaska's environmental laws, they said.

"If the industry or firm is in compliance, it should have nothing to fear," said Riki Ott of the Oil Reform Alliance, a coalition of fishing and environmental groups.

The administrative fines also are needed, because present civil penalties require a lengthy court process, she said.

Critics, including representatives of Exxon, ARCO Alaska Inc. and Alyeska Pipeline Co., said the authority granted by HB 409 for warrantless inspections and new administrative fines is too broad.

ARCO attorney William Christian said the unscheduled inspections and unrestricted copying of company records permitted by HB 409 probably would violate the Alaska Constitution.

In a Feb. 20 memo, state attorney General Douglas Baily rejected the ARCO attorney's argument.

"In our view," Attorney General Douglas Baily wrote, "the inspection access provision of this bill is constitutional as limited to facilities or premises with a history of pervasive regulation and strong governmental interest in ensuring compliance with governmental laws."

Davis' bill and a host of other House spill legislation will be up for further consideration in House Finance Monday. Both the House and Senate are considering separate packages of spill bills. The major pieces of legislation under consideration have yet to win approval from either chamber.

DEC AND APA ADMINISTRATIVE PROCEDURES
SIDE-BY-SIDE COMPARISON

DEC PROCEDURES	APA PROCEDURES
1. Department serves decision via personal delivery, registered mail, or certified mail (rrr).	1. Department files an "accusation" to "determine whether a right, authority, license or privledge should be revoked, suspended, limited, or conditioned." Service by any means, but no right may be affected unless service is made personally or by registered mail.
2. Person has 30 days after service to request adjudicatory hearing. Person serves hearing request on commissioner.	2. Person has 15 days to file "notice of defense" and request for a hearing.
3. Within 10 days after service of the hearing request, department must serve its decision on the hearing request. Department must grant hearing request if requestor would be adversely affected by the decision, has raised a genuine issue of material fact, and has complied with procedures for filing the hearing request.	3. Hearing is granted if person denies accusation and follows procedures for filing hearing request. Failure to request a hearing waives the right to a hearing.
4. Department must publish notice of the hearing in a newspaper of general circulation.	4. N/A
5. Other interested persons have 10 days after notice publication to petition for intervention status. Any party has 10 days to object to the intervention petition. DEC must decide whether to grant or deny the intervention petition within 10 days.	5. N/A
6. Where multiple hearing requests are made on the same matter, the hearing may be consolidated. DEC must serve all parties with notice of the consolidation within 20 days after granting the last consolidation request.	6. N/A

7. Within 30 days after last party is added, each hearing requestor must serve summary of disputed issues, witness list, and evidence list upon DEC. Within 20 days after service of these materials, DEC must serve each requestor with its witness list and evidence list. Either party may request the deciding officer to grant further disccvery (e.g. depositions)	7. N/A. However, the department may amend or supplement its accusation at any time before the matter is submitted for decision. Respondent may not file further pleadings unless permission is granted.
8. Commissioner may appoint deciding officer to hear case.	8. Governor assigns impartial hearing officer (a lawyer); However, an agency with hearing officers may use them on an impartial basis.
9. Prehearing conference provided. At least 10 days notice of conference must be served on all parties. Perhearing conference must be recorded on the record.	9. No prehearing conference. Either party may seek issuance of subpoenas or undertake discovery (e.g. depositions).
10. Within 10 days after the prehearing conference, the deciding officer must serve a written prehearing order on all parties. The order must include a statement of the areas of disputed facts, the procedures to be used to develop the evidence, the procedural obligations of the parties, and the applicable deadlines.	10. Department gives 10 days notice of hearing.
11. Full adjudicatory hearing on the record provided. Hearing transcript prepared (available for use in subsequent judicial review).	11. Full adjudicatory hearing provided. Hearing must be recorded or other means used to preserve the record. [Agency may seek amendments to the accusation after submission for decision. However, if the amendments prejudice the respondent, the respondent may reopen the case.]
12. Deciding officer certifies record as soon as hearing transcript is prepared. Deciding officer must serve notice of record certification on all parties.	12. Hearing officer (acting alone) prepares the proposed decision and serves it on all parties. Hearing officer (acting for agency) assists agency in preparing decision.

13. Within 10 days after certification of the record, each party has opportunity to submit proposed findings of fact. The deciding officer may also order the parties to submit posthearing briefs.

14. Within 30 days after certification of the record, the deciding officer must serve his findings of fact and conclusions of law upon the parties.

15. The department's decision is not automatically stayed during the pendency of the hearing. However, any requestor may file a motion to stay the decision. Any other party may respond to the stay motion within 10 days. The decision on the stay motion must be served within 10 days after the response is due. The stay will be granted or denied based upon the following considerations: (1) the relative harm to the parties from the grant or denial of the stay; (2) the resources which would be committed during the pendency of the hearing if the stay were granted or denied; and (3) the likelihood that the person requesting the stay will prevail on the merits.

13. N/A

14. Hearing officer's decision is filed with Lt. Governor (if hearing officer is acting alone). If hearing officer proposes decision, department may accept or reject the decision. Agency can prepare its own decision on the record, but must give parties an opportunity to present argument. Decision must be in writing and include findings of fact.

15. Decision is effective 30 days after delivered or mailed unless reconsideration is ordered or agency orders an earlier effective date. Stay may be included and may include requirement that respondent comply with specific terms.

16. If respondent does not answer or appear, agency may take action based upon other evidence.

17. Department may order reconsideration on its own motion or at the request of any party within 30 days.

FEDERAL STATUTORY PROVISIONS COMPARISON

ADMINISTRATIVE PENALTIES

Clean Water Act

Sec. 309(g):

Class I Penalties: $10,000 per violation. $25,000 cap. Informal hearing procedures.

Class II Penalties: $10,000 per day per violation. $125,000 cap. APA formal hearing procedures.

RCRA

Sec. 3008(a) (42 USC 6928(a)):
$25,000 per day per violation. No cap.

Sec. 3008(h) (42 USC 6928(h)) (Interim Status Facilities):
$25,000 per day per violation. No cap.

Clean Air Act

Sec. 120 (42 USC 7420):
Penalty amount is function of violator's profits from non-compliance. No cap.

SARA Title III

Sec. 325(b) (42 USC 11045(b)) (Acc. Rels. Rpt. Viol):
Class I Penalties: $25,000 per violation.
Class II Penalties: $25,000 per day per violation. $75,000 per day per violation for 2nd time offender.

Sec. 325(c) (42 USC 11045(c)):
$25,000/$10,000 per violation.

Sec. 325(d) (42 USC 11045(d)) (false trade secret claims):
$25,000 per violation (claim).

FIFRA

Sec. 14(a) (7 USC 1361(a)) (Commercial violations):
$5,000 per violation.

Sec. 14(b) (7 USC 1361(b)) (Private violations):
$1,000 per violation.

COMPLIANCE ORDER AUTHORITY

CERCLA

Sec. 106(a):
Order effective 7 days after receipt. Recipient may request conference within 3 days. Imminent and substantial endangerment required. Judicial review limited (see Sec. 113(h) (42 USC 9613(h)).

Clean Air Act

Sec. 113(a) (42 USC 7413(a)):
Orders take effect after recipient has opportunity to "confer" with EPA. Judicial review of order only available when EPA brings action against the recipient for violation of the order. See Asbestec Const. Serv.Inc. v. EPA, 849 F.2d 765 (2nd Cir. 1988) (Immediate pre-enforcement review of compliance orders serves neither efficiency nor enforcement of CAA). Citizen suit enforcement available.

Clean Water Act

Sec. 309(a) (33 USC 1319(a)):
Orders take effect after recipient has opportunity to "confer" with EPA. Asbestec judicial review rule probably applies. Citizen suit enforcement available.

RCRA

Sec. 3008(a) and (h) (42 USC 6928(a) and (h)):
Order effective 30 days after issuance. Order stayed if hearing requested. Recipient entitled to a public hearing before order becomes final. See 42 USC 6928(b). Citizen suit enforcement available.

Sec. 7003 (42 USC 6973(a)):
Order effective upon receipt. Imminent and substantial endangerment required. Asbestec judicial review rule probably applies.

Sec. 3013(a) (42 USC 6934(a)):
Order becomes effective after recipient gets 30 days to produce compliance proposal and opportunity to "confer" with EPA. Asbestec judicial review rule probably applies. See DuPont v. Dagget, 610 F. Supp. 260 (N.D.N.Y. 1985).

TSCA

Sec.6 6 (15 USC 2605):
EPA can issue "rules" ordering a wide variety of actions to be taken respecting the manufacturing, distribution and disposal of certain chemical substances. APA informal rulemaking procedures apply (non-adjudicatory, notice and comment). However, EPA can make the rule immediately effective upon publication in the Fed. Register if there is "an unreasonable risk of serious or widespread injury." See 15 USC 2605(d). Citizen suit enforcement available.

ACCESS/INSPECTIONS

TSCA

Sec. 11 (15 USC 2610):
EPA may inspect "any establishment, facility, or other premises in which chemical substances...are manufactured, processed, stored or held before or after their distribution in commerce and any conveyance used to transport chemical substances...." Inspections extend to "all things within the premises or conveyance... bearing on the requirements this chapter". However, financial data, sales data, pricing data, personnel data and certain research data are excluded "unless the nature and extent of such data are described with reasonable certainty" in the inspection notice. Inspector must show credentials and present a written inspection notice. Inspections must be completed with reasonable promptness. (This was the section of TSCA that USEPA used to obtain information related to Alyeska's discharge of pollutants at the Valdez terminal. See USEPA v. Alyeska, 836 F.2d 443 (9th Cir. 1988).

RCRA

Sec. 3007 (42 USC 6927(a)):
EPA may "enter...any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from" to "inspect and obtain samples of any such wastes and...containers or labeling...."

CERCLA

Sec. 104(e) (42 USC 9604(e)):
EPA may "enter...any establishment or other place where...hazardous substances are or have been generated, stored, treated, or disposed of, or transported from" to "inspect and obtain samples from any person of any such substance and ... containers or labeling...." Inspections must be completed with reasonable promptness. In addition, the operator must furnish the EPA inspector with the "information related to such [hazardous] substances and permit such person at all reasonable times to have access to, and to copy all records relating to such substances."

FIFRA

Sec. 9 as amended (7 USC 136g(a)):
EPA may "enter at reasonable times (A) any establishment or other place where pesticides or devices are held for distribution or sale for the purpose of inspecting and obtaining samples of any pesticides or devices, packaged, labeled, and released for shipment...and containers or labeling..., or (B) any place where there is being held any pesticide the registration of which has been suspended or cancelled...."

(2) a copy of the citation indicating that the right to an appearance is waived, a plea of no contest is entered and the bail is forfeited.

(d) When bail has been forfeited under (c) of this section, a judgment of conviction shall be entered. Forfeiture of bail and all seized items is a complete satisfaction for the misdemeanor. The clerk of the court accepting the bail shall provide the offender with a receipt stating that fact.

(e) If the person cited fails to pay the bail amount established under (b) of this section or to appear in court as required, the citation is considered a summons for a misdemeanor.

(f) Notwithstanding other provisions of law, if a person cited for a misdemeanor for which a bail amount has been established under (b) of this section appears in court and is found guilty, the penalty that is imposed for the offense may not exceed the bail amount for that offense established under (b) of this section. (§ 6 ch 132 SLA 1984)

Sec. 16.05.170. Power to execute warrant. Each peace officer designated in AS 16.05.150 may execute a warrant or other process issued by an officer or court of competent jurisdiction for the enforcement of this title except AS 16.51 and AS 16.52, and may, with a search warrant, search any place at any time. The judge of a court having jurisdiction may, upon proper oath or affirmation showing probable cause, issue a warrant in all cases. (§ 21 art I ch 94 SLA 1959; am § 7 ch 132 SLA 1984)

Effect of amendments. — The 1984 amendment substituted "this title except AS 16.51 and AS 16.52" for "this chapter" in the first sentence.

Sec. 16.05.180. Power to search without warrant. Each peace officer designated in AS 16.05.150 may without a warrant search any thing or place if the search is reasonable or is not protected from searches and seizures without warrant within the meaning of art. I, § 14, Alaska State Constitution, which specifically enumerates "persons, houses and other property, papers and effects." However, before a search without warrant is made a signed written statement by the person making the search shall be submitted to the person in control of the property or object to be searched, stating the reason the search is being conducted. A written receipt shall be given by the person conducting the search for property which is taken as a result of the search. The enumeration of specific things does not limit the meaning of words of a general nature. (§ 22 art I ch 94 SLA 1959)

Opinions of attorney general. — This section is constitutional. 1959 Op. Att'y Gen. No. 15.

This section is tailored carefully to art. I, § 14, of the Alaska Constitution and is therefore valid. 1959 Op. Att'y Gen. No. 15.

There is no constitutional requirement that all searches be with warrant, and reasonable searches may be made without

warrant. A reasonable search is one made (a) upon probable cause that fruits of a crime or evidence relating to the crime will be found; (b) under circumstances which would make the securing of a warrant impracticable. 1961 Op. Att'y Gen. No. 19.

A search may be made pursuant to a valid arrest, providing that the arrest is made prior to the search. 1961 Op. Att'y Gen. No. 19.

The amendment requiring a written signed statement of the reason for the search is objectionable but valid. It is objectionable because it unnecessarily ties the hands of the field agents charged with enforcement of the fish and game laws, and is a provision which is quite uncommon, if not unique. 1959 Op. Att'y Gen. No. 15.

The statutory requirement that fish and game agents fill out a form stating the objects of search will not make an otherwise invalid search valid, but it may invalidate an otherwise valid search if not complied with. 1961 Op. Att'y Gen. No. 15.

In the case of a vessel, the limits of the area open to search probably include the entire vessel. 1961 Op. Att'y Gen. No. 19.

NOTES TO DECISIONS

Observation of items in plain view. — The mere observation of items which are in plain view or which are open and apparent, is not a search. Consequently, evidence based on such observations is admissible so long as the observing officer was legally in the position where the observations were made. Klockenbrink v. State, Sup. Ct. Op. No. 631 (File No. 1149), 472 P.2d 958 (1970).

This section requires that notice be given to the person "in control" of crab pots. Nathanson v. State, Sup. Ct. Op. No. 1310 (File No. 2541), 554 P.2d 456 (1976).

Failure to notify owner of crab pots was not a violation of this section where officers of the Department of Fish and Game approached the crab pots to conduct a search to check the extent of compliance with a regulation providing that fishermen could place their crab pots in the water up to 72 hours prior to the opening of the season and the owner was not present, attending to his crab pots; there being no "person in control of the property or object to be searched," the officers were unable to give the fisherman the required notice. Nathanson v. State, Sup. Ct. Op. No. 1310 (File No. 2541), 554 P.2d 456 (1976).

Notice required for search of vessel, building, etc. — The considerations leading to the conclusion that no notice was required for a search of crab pots would not apply to the search of a vessel, building or other effects in which the owner would have a reasonable expectation of privacy. Nathanson v. State, Sup. Ct. Op. No. 1310 (File No. 2541), 554 P.2d 456 (1976).

Crab pots outside prot of notice requirements. - re intended crab pots s to be outside the pro ie notice requirements o n. Wamser v. State, Sup. C . 1953 (File No. 3645), 600 (1979).

Officers' not violate section. — Ac state fish and wildlife officers in p defendant's gear, marking the con and seizing samples of the bai di violate this section although such ns were taken without giving defenc notice of the officers' intentions. Wa r v. State, Sup. Ct. Op. No. 1953 (Fil No. 3645), 600 P.2d 1359 (1979).

Applied in Dye v. State, Ct. App. Op. No. 125 (File No. 5599), 650 P.2d 418 (1982); Gudjonnson v. State, Ct. App. Op. No. 275 (File Nos. 7291, 7292), 667 P.2d 1254 (1983).

Sec. 16.05.190. Seizure and disposition of equipment. Guns, traps, nets, fishing tackle, boats, aircraft, automobiles or other vehicles, sleds, and other paraphernalia used in or in aid of a violation of this chapter or a regulation of the department may be seized under a valid search, and all fish and game, or parts of fish and game, or nests or eggs of birds, taken, transported, or possessed contrary to the provisions of this chapter or a regulation of the department shall be seized

Collateral references. — Wrongful pollution of stream by municipality as creating single cause of action or successive causes of action. 75 ALR 529.

Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency. 60 ALR3d 665.

Recovery in trespass for injury to land caused by airborne pollutants. 2 ALR4th 1054.

Sec. 46.03.830. Proof of financial responsibility required for petrochemical facility or hazardous waste disposal site operation. (a) A person may not operate a petrochemical facility or a hazardous waste disposal site unless the person has furnished proof to the commissioner of financial ability to control a hazardous waste that will be used in, produced by, or disposed of at the facility or the site. Proof of financial responsibility shall include responsibility for the hazardous waste after the facility or site is closed, and may be demonstrated by self-insurance, insurance, surety, or guarantee, under regulations adopted by the department.

(b) Acceptance of proof of financial responsibility under this section expires

(1) one year from its issuance for self-insurance;

(2) on the effective date of a change in the surety bond, guarantee, or insurance agreement; or

(3) on the expiration or cancellation of the surety bond, guarantee, or insurance agreement. (§ 13 ch 93 SLA 1981)

Sec. 46.03.833. Compliance with financial responsibility requirements. (a) A person whose proof of financial responsibility is accepted by the department under AS 46.03.830 or 46.03.100(c) shall notify the department at least 90 days before the effective date of a change, expiration, or cancellation in the surety bond, guarantee, or insurance agreement. Application for renewal of acceptance of proof of financial responsibility under AS 46.03.830 or 46.03.100(c) must be filed at least 90 days before the date of expiration.

(b) The department, after notice and hearing, may revoke acceptance of proof of financial responsibility if it determines that

(1) acceptance was procured by fraud or misrepresentation; or

(2) a change of circumstance has occurred that warrants revocation under regulations adopted by the department. (§ 13 ch 93 SLA 1981)

Sec. 46.03.840. Radiation penalties. [Repealed, § 12 ch 172 SLA 1978. For current provisions, see AS 18.60.475 — 18.60.545.]

Sec. 46.03.850. Compliance order. (a) When, in the opinion of the department, a person is violating or is about to violate a provision of this chapter or AS 46.04, or a regulation or lawful order of the department, or a permit or certificate, or a term or condition of a permit or certificate issued by the department under this chapter or AS 46.04, the department may notify the person of its determination

by personal service or certified mail. The determination and notice do not constitute an order under AS 46.03.820.

(b) The recipient of the determination shall file with the department, within the time period specified in the notice, a report stating what measures have been and are being taken, or are proposed to be taken, to correct or control the conditions outlined in the notice.

(c) After the report is filed under (b) of this section or the time period specified for it has elapsed, the department may issue a compliance order in conformity with the authority of the department and the public policy declared in AS 46.03.010. A copy of the compliance order shall be served personally or sent by certified mail to the person affected. A compliance order is effective upon receipt.

(d) Within 30 days after receipt the recipient may request a hearing to review the compliance order. Failure to request a hearing within 30 days after the receipt of a compliance order constitutes a waiver of the recipient's right of review.

(e) The department shall hold a hearing within 20 days after receipt of a request for one under (d) of this section. After the hearing the department may rescind, modify or affirm the compliance order.

(f) The attorney general shall seek enforcement of a compliance order. (§ 14 ch 220 SLA 1976; am § 9 ch 266 SLA 1976; am § 113 ch 59 SLA 1982)

Collateral references. — Modern status of rules as to balance of convenience or social utility as affecting relief from nuisance. 40 ALR3d 601.

Sufficiency of evidence of violation in administrative proceeding terminating in abatement order. 48 ALR3d 795.

Article 8. General Provisions.

Collateral references. — 61A Am. Jur. 2d, Pollution Control, §§ 46-49, 110-125, 174-181, 263-265, 271-273, 287-292, 4-7-433, 589, 590.

39A C.J.S., Health and Environment, §§ 133-157.

Sec. 46.03.860. Inspection warrant. The department may seek search warrants for the purpose of investigating actual or suspected sources of pollution or contamination or to ascertain compliance or noncompliance with this chapter or a regulation adopted under this chapter. (§ 3 ch 120 SLA 1971)

Article 5. Adjudicatory Hearings

18 AAC 15.200. REQUEST FOR AN ADJUDICATORY HEARING. (a) Within 30 days after service of a decision under sec. 80 or 160 of this chapter, or AS 46.03.170, any person may serve a request on the commissioner for an adjudicatory hearing. The request must contain

(1) the name, mailing address, and telephone number of the person making the request;

(2) the names and addresses of all persons adversely affected by the decision whom the requestor represents;

(3) a clear and concise factual statement of the nature and scope of the interests of the requestor, and an explanation of how and to what extent those interests would be directly and adversely affected by the decision;

(4) a clear and concise statement of the genuine factual issues proposed for consideration at the hearing; and

(5) where applicable, specific reference to the contested terms or conditions of the decision, as well as suggested alternative terms and conditions, which, in the judgment of the requestor, would be required to implement applicable criteria.

(b) Where application was made solely for a permit amendment, requests for an adjudicatory hearing may not raise issues relating to the validity of the permit for which an amendment is sought, nor to unrelated terms and conditions of the permit for which no amendment has been sought. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.210. STAY OF DECISION. (a) The department's decision is not stayed during the pendency of the hearing. However, a requestor may, contemporaneous with the service of his request for a hearing under sec. 200 of this chapter, serve a motion (together with a supporting memorandum) upon the commissioner to stay the department's decision, or a portion of it, pending the hearing. The department will then serve the request upon all other requestors, and the

applicant. In reviewing a stay motion the commissioner or his designee will consider

(1) the relative harm to the person requesting the stay, the applicant, and the public health and environment from the granting or denial of a stay;

(2) the resources which would be committed during the pendency of the hearing if the stay were granted or denied; and

(3) the likelihood that the person requesting the stay will prevail on the merits.

(b) No stay will be granted on a denial of a permit application or request for certification for either a new operation, or an operation which commenced after the effective date of the statute or regulation requiring a permit, written approval, or certification.

(c) Within 10 days after service of the stay petition under (a) of this section, a requestor (or the applicant) may serve a responsive memorandum upon the commissioner and all other requestors.

(d) The department will serve its decision on a stay petition within 10 days after the expiration of the deadline for a responsive memorandum under (c) of this section. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.220. ACTION ON HEARING REQUESTS; INTERVENTION. Within 10 days after service of a request for an adjudicatory hearing, the department will serve its decision on the request upon the requestor. The department will grant a request for a hearing if the request discloses that the requestor would be adversely affected by the department's decision, that the requestor has raised a genuine issue of fact material to the decision, and that the requirements of sec. 200 of this chapter have otherwise been met. If the department grants an adjudicatory hearing request, it will publish notice of the action in a newspaper of general circulation for the affected area, and will serve notice on all persons who either submitted timely written comments or testified at a public hearing on the application. A person wanting to intervene in the proceedings may serve upon the commissioner and all parties a petition for intervention containing the information specified in sec. 200 of this chapter, within 10 days after publication of notice or mailing of notice under this section, whichever first occurs. Any party may serve an objection to the intervention petition within 10 days after service of the petition upon him. The department will reach a decision on the intervention request within 10 days after the expiration of the period for serving an objection according to the criteria established in this section. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.230. CONSOLIDATION. When more than one hearing request is granted, all requests will be joined in a single proceeding. Each requestor, the applicant, where the applicant has made no request, and the department will be made parties to the proceeding. Notice of consolidation will be given to all parties within 20 days after the granting of the last timely request for an adjudicatory hearing. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.240. DISCOVERY. (a) Immediately after the department determines that additional parties will be added to the proceeding, it will serve notice on each requestor that, within 30 days, each requestor must serve upon each respondent

(1) a complete and concise summary of the issues and factual matters which the requestor will present at the hearing;

(2) the name, address, telephone number, and occupation of each witness whom the requestor intends to call at the hearing, and the purpose of his testimony; and

(3) the nature, location, and custodian of any real or documentary evidence which the requestor intends to introduce at the hearing, and the purpose of its introduction.

(b) Within 20 days after service of the matters specified in (a) of this section, each respondent must serve upon each requestor

(1) the name, address, telephone number, and occupation of each witness which the respondent intends to call at the hearing, and the purpose of his testimony; and

(2) the nature, location, and custodian of any real or documentary evidence which the respondent intends to introduce at the hearing, and the purpose of its introduction.

(c) When a party is both a requestor and a respondent, he must serve the matters under (a) of this section as to those issues for which he is a requestor, and must serve the matters under (b) of this section as to those issues for which he is a respondent. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.250. PREHEARING CONFERENCE. (a) The deciding officer may direct the holding of a prehearing conference if he determines that a conference will substantially aid resolution of the case. At least 10 days' notice of the conference will be given to all parties. The time and place of the conference will be set by the deciding officer, with due regard for the convenience of the parties.

(b) At the prehearing conference, the deciding officer may explore and is empowered to make any appropriate order regarding

(1) the simplification, clarification, or limitation of the issues, the striking of immaterial issues, and the summary disposition of issues over which there is no genuine dispute;

(2) the admission of facts and the genuineness of documents, and stipulations with respect to facts and documents;

(3) objections to the introduction into evidence at the hearing of any written testimony, documents, papers, exhibits, or other submissions proposed by a party; however, the failure to raise an evidentiary objection at the conference does not preclude a party from raising the objection at the hearing;

(4) matters of which official notice will be taken;

(5) establishment of a schedule, including definite or tentative times relating to the progress of the hearing;

(6) the taking and introduction of depositions;

(7) the use of affidavits in place of oral testimony;

(8) accepting, on good cause shown, supplements to the witness and evidence lists provided under sec. 240 of this chapter (specifically including rebuttal evidence to matters submitted under sec. 240(b) of this chapter);

(9) the exclusion of unduly repetitive or irrelevant evidence; and

(10) any other matter which will expedite the hearing or aid disposition of the matter.

(c) The prehearing conference will be tape recorded.

(d) The deciding officer will prepare, and will serve upon all parties, within 10 days after holding the conference, a written prehearing order reciting the actions taken at the prehearing conference and setting out the schedule for the hearing. The order will include a written statement of the areas of factual agreement and disagreement and of the methods and procedures to be used in developing the evidence and the respective duties of the parties in connection therewith. The order will control the subsequent course of the hearing unless modified by the deciding officer for good cause shown. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.260. DECIDING OFFICER. The case will be heard and decided by the commissioner or his designee. The commissioner or his designee will, in his discretion, be accompanied during any proceeding, conference or deliberation by a representative of the Department of Law, other than an attorney who has been involved in the formulation of the agency's decision. The Department of Law representative and the deciding officer will be subject to the requirements and restrictions of AS 44.62.630. Notice of designation of the deciding officer will be served with the notification under sec. 240(a) of this chapter. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.270. HEARINGS. (a) The sequence of argument, examination, and summation shall conform to the prehearing order. The deciding officer may question a witness. The deciding officer, in multiparty proceedings, may limit cross-examination to one party on each side if he is satisfied that the cross-examination by one party will adequately protect the other parties. Other parties may, however, engage in cross-examination as to matters not covered by previous cross-examination.

(b) The deciding officer may admit any material evidence of the type on which a reasonable man might rely in the conduct of serious business affairs, except that which is unduly repetitious.

(c) The burden of proof and of going forward with the evidence is on the requestor.

(d) No issue, testimony or real or documentary evidence may be introduced or advanced at the hearing which was not previously disclosed under sec. 240 or 250(b)(8) of this chapter. The deciding officer may waive this prohibition if the failure to previously disclose was due to

(1) surprise;

(2) newly discovered evidence which by due diligence could not have previously been discovered and disclosed; or

(3) fraud misrepresentation, or other misconduct of an opposing party.

(e) The prohibition of (d) of this section does not apply to evidence offered solely to rebut or impeach matters first disclosed pursuant to sec. 250(b)(8) of this chapter. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.280. CERTIFICATION OF RECORD. As soon as the hearing transcript has been prepared, the deciding officer shall certify the record of the hearing and provide notice of the certification to all parties. Except for good cause shown, the cost of transcribing the hearing must be borne by the requestor. Where there is more than one requestor, the deciding officer may apportion the costs. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.290. FINDINGS AND BRIEFS. Within 10 days after notice of the certification of the record under 18 AAC 15.280, a party may serve upon the deciding officer, and all parties, proposed findings of fact. The deciding officer, at the close of the hearing, will, in his discretion, also order the submission of briefs if he determines that briefing will substantially aid his resolution of the case. The proposed findings are intended only as an aid to the deciding officer, and a ruling on the acceptance or rejection of the proposed findings is not required. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.300. DECISION. The deciding officer will serve his findings of fact and conclusions of law upon the parties within 30 days after notice of certification of the record under 18 AAC 15.280. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.310. RELAXATION OF REGULATIONS. The deciding officer may waive any requirement or deadline established in 18 AAC 15.240—18 AAC 15.300 if it appears to him that strict adherence to the deadline or requirement would work an injustice. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

which expires more than one year from the date of issuance of the permit.

(g) The department will, in its discretion, and upon written notification to the permittee, summarily revoke a permit to apply pesticides if it determines that violations of this chapter or of the stipulations of the permit have occurred, or if an unanticipated hazard to the public health or safety, or to the environment exists. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.330
AS 46.03.320 AS 46.03.730

18 AAC 90.060. DEFINITIONS. In this chapter

(1) "category of use" means a specialty category such as agricultural pest control, forest pest control, ornamental and turf pest control, seed treatment, aquatic pest control, right-of-way pest control, industrial, institutional, structural and health related pest control, regulatory pest control, mosquito and biting fly pest control, and aerial pest control;

(2) "commissioner" means the commissioner of the Department of Environmental Conservation;

(3) "certified applicator" means a person certified under sec. 10 of this chapter;

(4) "commercial applicator of restricted-use pesticides" means a certified applicator other than a private applicator of restricted-use pesticides;

(5) "department" means the Department of Environmental Conservation;

(6) "labeling" means the label affixed to a pesticide container and any other written, printed, or graphic matter to which reference is made on the label or in literature accompanying the pesticide or device, except current official publications of federal and state government agencies or institutions;

(7) "passing" means receiving 70 percent of the highest possible grade;

(8) "persons engaged in the custom, commercial, or contract spraying or application of pesticides" means persons who apply, or offer to apply pesticides for a fee;

(9) "pesticide" includes any chemical or biological agent intended for use as an insecticide, herbicide, rodenticide, fungicide, or other biocide;

(10) "private applicator of restricted-use pesticides" means a certified applicator who uses or supervises the use of restricted-use pesticides for purposes of producing any agricultural commodity either on property owned or rented by him or his employer, or, if applied without compensation (other than trading of personal services between producers of agricultural commodities), on the property of another person;

(11) "public pesticide project" means a project involving the application of a pesticide which affects properties owned separately by two or more persons and which is directed, conducted, or participated in by the state or a borough or city of any class;

(12) "restricted-use pesticides" means pesticides that are classified for restricted use under sec. 3(d)(1)(c) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. § 136a(d)(1)(c)); and

(13) "under direct supervision" means the application of a pesticide by a competent person acting under the instruction and control of a certified applicator who is responsible for the actions of that person and who is available if and when needed, even though the certified applicator is not physically present at the time and place the pesticide is applied. (Eff. 9/1/73, Register 47; am 11/25/77, Register 64)

Authority: AS 46.03.020(10)
AS 46.03.320
AS 46.03.900

CHAPTER 95. ADMINISTRATIVE ENFORCEMENT

Article
1. Compliance Orders (18 AAC 95.010 — 18 AAC 95.170)
5. Definitions (18 AAC 95.900)

Article 1. Compliance Orders

18 AAC 95.010. INITIATION OF COMPLIANCE ORDER PROCEEDINGS. (a) Compliance order proceedings are initiated by the service of a notice of intent to issue a compliance order upon the person or persons responsible for an actual or threatened violation. The notice of intent will be signed by the deputy commissioner.

(b) The notice of intent will

(1) recite the condition, activity or conduct which the deputy commissioner has determined is causing or is threatening to cause a violation;

(2) disclose the basis of the deputy commissioner's determination;

(3) specify the statute, regulation, order, permit or certificate which is being or threatens to be violated;

(4) request of the respondent a detailed report specifying what measures have been or are being taken, or are proposed to be taken, to correct, control or prevent the violation; and

(5) briefly describe the statutory procedures of compliance order proceedings, and the penalties and liabilities to which the respondent is exposed.

(c) A copy of this chapter, and an objection form, will accompany the notice of intent. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.020. RESPONDENT'S REPORT AND OBJECTION. (a) Unless otherwise specified, the respondent shall serve upon the regional office designated in the notice of intent the report requested under sec. 10(b)(4) of this chapter within 15 days of service of the notice of intent. The deadline for service of the report may be shortened by the deputy commissioner if necessary to protect the public health or environment. If a service period of less than 15 days is provided, the notice of intent will state the reasons for that.

(b) Respondent's report must be of sufficient detail to permit an informed judgment by the deputy commissioner as to the adequacy of the actual or proposed remedial or preventive measures. The report must be specific with regard to the precise equipment, facilities, materials or operations to be used, as well as deadlines and timetables. Maps, diagrams and the like should be used to promote clarity, and any germane surveys, reports or sampling or test results should be attached to the report.

(c) If the respondent believes that

(1) the violations specified in the notice of intent have not or do not threaten to occur;

(2) he is not responsible for the violations specified;

(3) no corrective or preventive action of any sort is necessary; or

(4) the notice of intent is so indefinite or uncertain that he cannot identify the transaction, prepare his defense or prepare the report under (b) of this section

he may serve an objection upon the deputy commissioner within 10 days of service of the notice of intent, or within a shorter time period specified in the notice of intent in cases where a time period of less than 15 days is provided for service of the report. Upon service of a

timely objection, the time period for service of the report will be held in abeyance pending action by the deputy commissioner under (e) or (g) of this section. If a defense specified in (1) – (3) of this subsection is raised, the objection must concisely state the basis for that defense.

(d) The failure to raise the defense specified in (c)(4) of this section in a timely served objection constitutes a waiver of that defense. All other defenses are preserved, and may be raised in a notice of defense following issuance of the compliance order under sec. 30 of this chapter.

(e) Upon service of a timely objection raising a defense specified in (c)(1) — (3) of this section, and after a review of the record, the deputy commissioner may

(1) if the record warrants, terminate the compliance order proceedings against the respondent;

(2) if he determines that a defense raises a serious and substantial issue, and that the public health or environment will not be unduly harmed or threatened by the delay inherent in a bifurcated hearing, treat the objection as a notice of defense and set the matter for hearing in conformity with secs. 50 — 130 of this chapter; or

(3) if he determines that the defenses do not raise a serious and substantial issue, or that the public health or environment would be unduly harmed or threatened by the delay inherent in a bifurcated hearing, notify the respondent of his determination, and provide the respondent with the unexpired portion of the service period for the report, or five days, whichever is greater, in which to serve his report; notification may be made orally.

(f) A determination by the deputy commissioner under (e)(3) of this section does not constitute final agency action. Findings of fact and, when appropriate, conclusions of law supporting the determination will be made in the compliance order issued under sec. 30 of this chapter, and the deputy commissioner's findings and conclusions may be contested in a hearing held after the issuance of the compliance order.

(g) If a timely served objection raises the defense specified in (c)(4) of this section, and the deputy commissioner determines that there is good cause for the objection, he shall serve a supplemental notice of intent within seven days of service of the objection. If the deputy commissioner determines that there is not good cause for the objection, he shall so notify the respondent within three days of service of the objection. Notification may be made orally. Upon notification, respondent will be afforded the unexpired portion of the service period for the report, or five days, whichever is greater, in which to serve his report.

(h) Upon service of a motion on the deputy commissioner within seven days of service of the notice of intent (or within three days of notification of a determination under (e)(3) or (g) of this section) the

deputy commissioner shall grant an extension for service of the report upon finding that

(1) good cause exists for the extension; and

(2) the public health or environment will not be unduly harmed or threatened by the extension.

(i) The time period specified in the notice of intent (or in a determination made under (e)(3) or (g) of this section) for service of the report will be held in abeyance from the date of service of a motion under this subsection until service of the decision by the deputy commissioner. If an extension request is denied, the respondent will be afforded the unexpired portion of the service period for the report, or five days, whichever is greater, in which to file the report.

(j) Neither the report, nor any evidence directly obtained as a result of exploitation of the report, will be used against a person providing the report in any criminal proceeding concerning the violation or violations to which the notice of intent is addressed.

(k) The report must contain the name and mailing address of the respondent, and, if respondent is represented by counsel, the name, mailing address and telephone number of the respondent's attorney. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.030. COMPLIANCE ORDER. (a) Upon receipt of respondent's report, or at the expiration of the service period if no report is served, the deputy commissioner shall review the record of the case, and shall, in his discretion, thereafter issue a compliance order.

(b) In addition to any findings and conclusions required by sec. 20(e)(3) of this chapter, the compliance order will contain findings of fact that

(1) there exists an actual or threatened violation which the respondent has caused or permitted;

(2) where a report has been submitted, and the corrective or preventive measures specified in the order differ from or supplement the measures proposed in the report, the measures specified in the report will not provide a reasonable assurance of correction of the actual violation or prevention of the threatened violation; and

(3) the measures specified in the order will provide a reasonable assurance of correction or prevention.

(c) The findings made in the notice of intent may be incorporated by reference.

(d) The order will specify the measures to be taken by the respondent. No deadline will be imposed which expires sooner than 30 days from the date of service of the order.

(e) The order will inform the respondent of his right to an adjudicatory hearing. It will also inform the respondent that his failure to serve upon the commissioner a notice of defense requesting a hearing within 30 days of service of the order constitutes a waiver of respondent's rights to judicial review of the order.

(f) The order will be accompanied by a notice of defense form.

(g) The order will designate the prosecuting office.
(Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.040. EFFECTIVE DATE OF ORDER. (a) A compliance order is effective upon receipt.

(b) A timely request for a hearing under sec. 30(e) of this chapter acts as a stay of the provisions of the order pending decision by the commissioner or his designee.

(c) If the respondent does not make a timely request for a hearing, no other action is necessary by the deputy commissioner or the commissioner or his designee. The deadlines of the order fall due as specified in the order. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.050. SCHEDULING OF HEARING. (a) Immediately upon service of a request for a hearing (or upon a determination under sec. 20(c)(2) of this chapter), the department will schedule a hearing to be held no later than 20 days after service of the request or determination. The location of the hearing will conform to AS 44.62.110. Notice of the hearing will be immediately served upon the respondent.

(b) At any time before the hearing, a party may serve upon the commissioner or his designee, and the opposing party, a request for postponement of the hearing. Postponements will only be granted by the commissioner or his designee in unusually complex cases, or when a failure to grant a postponement would pose a substantial hardship to the requesting party. No postponement will be granted when significant harm to the public health or environment will result from a delay.

(c) If the respondent served his request for a hearing more than 10 days after service of the compliance order, a request by the respondent for postponement of the hearing will be viewed with disfavor, and will be granted only in the most extraordinary of circumstances. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.060. HEARING OFFICER. (a) Immediately upon service of a request for a hearing, the department will arrange for the appointment of a hearing officer under AS 44.62.350.

(b) The department will hear the case with the hearing officer. The hearing officer will preside at the prehearing conference and the hearing, rule on the admission and exclusion of evidence, advise the department on matters of law, and be present during post hearing consideration of the case.

(c) The case will be heard by the commissioner or his designee. The commissioner or his designee will, in his discretion, be accompanied during any proceeding, conference or deliberation by a representative of the Department of Law other than an attorney who has been involved in the investigation or prosecution of the case. The Department of Law representative shall be subject to the requirements and restrictions of AS 44.62.630. The commissioner may designate any employee of the department, other than an employee involved in the investigation or prosecution of the case.

(d) Notice of designation under (c) of this section will be served upon the respondent no later than 10 days prior to the hearing. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.070. DISCOVERY. (a) At any time after service of the compliance order, and upon 24 hours' notice, the respondent may inspect and copy all documents and records pertaining to the case at the prosecuting office during normal working hours. Except for good cause shown, a fee of 10 cents per page of copied material must be paid by the respondent before he may take possession of the copies.

(b) Within seven days of service of a request for a hearing, the prosecuting office shall serve upon the respondent

(1) the names and addresses of witnesses whom the prosecuting office intends to call at the hearing to support the findings made under sec. 30(b) of this chapter (or the prosecuting office's position in hearings held under sec. 20(e)(2) of this chapter) and a brief summary of the purpose of their testimony;

(2) the nature, location and custodian of any real or documentary evidence which the prosecuting office intends to introduce at the hearing to support the findings made under sec. 30(b) of this chapter (or the prosecuting office's position in hearings held under sec. 20(e)(2) of this chapter); and

(3) matters of which the prosecuting office proposes to take official notice at the hearing.

(c) Within seven days of service of the matters specified in (b) of this section, the respondent shall serve upon the prosecuting office

(1) a specification of the issues, defenses and factual matters which respondent intends to introduce at the hearing either to contest the findings made under sec. 30(b) of this chapter (or the prosecuting office's position in hearings held under sec. 20(e)(2) of this chapter), or to argue affirmative matters of defense;

(2) the names and addresses of all witnesses whom the respondent intends to call at the hearing to support any matter specified in (1) of this subsection, and a brief summary of the purpose of their testimony; and

(3) the nature, location and custodian of any real or documentary evidence which the respondent intends to introduce at the hearing to support any matter specified in (1) of this subsection. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.080. PREHEARING CONFERENCE. (a) If the hearing officer determines that a prehearing conference will aid disposition of the case, he shall notify the parties no later than seven days before the scheduled date of the hearing of the date, time and location of the conference. The conference shall be held no later than two days before the hearing.

(b) At the conference, the hearing officer may make any order or ruling necessary or appropriate regarding

(1) the identification and simplification of disputed issues of fact and law;

(2) the entry of stipulations of fact and documents, and the exclusion of irrelevant or unduly repetitive matters;

(3) matters of which official notice will be permitted to be taken;

(4) scheduling an onsite inspection;

(5) accepting, on good cause shown, supplements to the discovery responses submitted under secs. 70(b) and (c) of this chapter (specifically including rebuttal evidence by the prosecuting office);

(6) limitation of the number of expert and other witnesses;

(7) procedure at the hearing; or

(8) any other matter that may expedite the hearing or aid in the disposition of the proceeding.

(c) No transcript or recording of any prehearing conference will be made unless a request for one by one of the parties is granted by the hearing officer. Except for good cause shown, the requesting party shall bear the cost of the taking of the transcript or recording. The hearing officer shall prepare and file for the record a prehearing order, which must incorporate any stipulations or agreements made by the parties at or as a result of the conference and all rulings upon matters considered at the conference. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.090. HEARING PROCEDURES. (a) The sequence of argument, examination and summation must follow that of a civil proceeding, except to the extent modified under sec. 80(b)(7) of this chapter. However, either the hearing officer may or the commissioner, in his discretion, will or the commissioner's designee may question a witness.

(b) No issue, defense, testimony or real or documentary evidence may be introduced at the hearing which was not previously disclosed pursuant to either secs. 70(b) or (c) or sec. 80(b)(5) of this chapter. This prohibition may be waived by the hearing officer if the introduction would not unduly prejudice the opposing party, and the failure to disclose was due to

(1) surprise or excusable neglect;

(2) newly discovered evidence which by due diligence could not have previously been discovered and disclosed; or

(3) fraud, misrepresentation or other misconduct of the opposing party.

(c) The prohibition in (b) of this section does not apply to evidence offered solely to impeach evidence or respond to new issues first disclosed pursuant to sec. 80(b)(5) of this chapter. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.100. PROPOSED FINDINGS. Within three days of the close of the hearing, a party may serve upon the commissioner or his designee and all other parties proposed findings of fact. The proposed findings are intended only as an aid to the commissioner or his designee, and a ruling on the acceptance or rejection of the proposed findings is not required. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.110. DECISION. (a) The commissioner or his designee will serve upon the parties an order rescinding, modifying or affirming the compliance order (or ruling on the defenses raised in hearings held under sec. 20(e)(2) of this chapter) within 30 days of the close of the hearing. The order serves as an automatic vacation of the stay under sec. 40(b) of this chapter, and any deadlines or timetables in the order run from the date of service of the affirmed or modified order.

(b) The order under (a) of this section must contain

(1) a brief summary of the nature and history of the case;

(2) findings of fact and conclusions of law; and

(3) a specification of the terms and conditions of the final compliance order; the requirements imposed under sec. 30(c) of this chapter may be incorporated by reference. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.120. PETITION FOR RECONSIDERATION. (a) Within 30 days of service of the order under sec. 110(a) of this chapter (except for a petition by the respondent pertaining to a hearing held under sec. 20(e)(2) of this chapter), a party may serve upon the commissioner, and the opposing party, a petition for reconsideration and supporting memorandum. If the commissioner did not hear the case himself, a copy of the transcript of the hearing, if available, shall also be served upon the commissioner and the opposing party.

(b) Within 10 days of service of the petition, the opposing party may serve upon the commissioner and the petitioning party a responsive memorandum.

(c) Neither the submission nor granting of a petition for reconsideration acts as a stay of any provision of the compliance order unless the commissioner otherwise directs. Applications for a stay will be granted only when the petition raises serious and substantial questions regarding the validity of the order, and no significant harm to the public health or environment will be caused by a delay.

(d) After granting a petition, and upon a review of the record, the commissioner will affirm, modify or reverse the order made under sec. 110(a) of this chapter within 20 days of the granting of the petition. The commissioner will, in his discretion, also order the taking of new evidence.

(e) A petition for reconsideration by the respondent pertaining to a hearing held under sec. 20(e)(2) of this chapter may be served only after service of the order under sec. 110 of this chapter affirming or modifying the compliance order. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.130. TRANSCRIPT OF HEARING. Hearings must be tape recorded. At any time after the close of the hearing, a party may request a transcript of the hearing from the department. Except for good cause shown, the party requesting the transcript shall pay the cost of the transcript and all requested copies of it before the party may take possession of the transcript. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.140. SERVICE. (a) Any matter required to be served under this chapter may be served by personal service, registered mail, or certified mail, return receipt requested.

(b) Proof of service must be made by an affidavit of service, or on appropriate forms if service is made by a peace officer. Upon the filing of a notice of defense, a copy of all matters subsequently served, and proof of service, must be mailed to the commissioner or his designee; and they become part of the administrative record.

(c) When a pleading or paper filed in a case discloses that a respondent is represented by counsel, service upon the respondent must be made upon his attorney.

(d) Where applicable, service of the notice of intent and compliance order must be delivered or mailed in conformity with Rule 4(d)(4) — (11) of the Alaska Rules of Civil Procedure.

(e) When mail is used for service, service occurs upon the date of postmark for the purpose of the serving party's obligations, and upon receipt for the purpose of commencing time limits upon the receiving party.

(f) All papers served by mail upon the department, must have the designation "COMPLIANCE ORDER NO....," in capital letters, typed on the face of the envelope. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.150. RELAXATION OF REGULATIONS. The hearing officer may, the commissioner in his discretion will, and the commissioner's designee may, in the interests of justice, relax or dispense with a deadline or requirement imposed by this chapter. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.160. CONSENT ORDERS. At any time during the compliance order proceedings, the parties may enter into a consent order. Any consent or compromise agreement must take the form of a stipulated compliance order, and must be signed and confirmed by the commissioner or his designee. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.170. RELATIONSHIP TO ADMINISTRATIVE PROCEDURE ACT. Secs. 50 — 160 of this chapter supplement, and

are not intended to diminish or restrict any right or privilege which a party may have under AS 44.62.410 — 44.62.540. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

Article 5. Definitions

Section
900. Definitions

18 AAC 95.900. DEFINITIONS. As used in this chapter, unless the context otherwise requires

(1) "commissioner" means the commissioner of the Department of Environmental Conservation;

(2) "department" means the Department of Environmental Conservation;

(3) "designee" means the employee of the department to whom the commissioner has delegated the power to hear and decide a particular case;

(4) "objection" means a submission by the respondent, in response to a notice of intent, which raises any matter specified in sec. 20(c) of this chapter;

(5) "party" means the respondent and the prosecuting office;

(6) "prosecuting office" means the division or regional office of the department primarily responsible for prosecution of a case;

(7) "reasonable assurance" means that, after taking into account predictable natural or human intervention, the remaining risk of violation is negligible, and the costs of further reducing the negligible risk are disproportionate to the remaining risk itself; a lowering of the risk beyond that level is not a "reasonable assurance";

(8) "report" means a detailed submission by the respondent, in response to a notice of intent, which specifies what measures have been or are being taken, or are proposed to be taken to correct or prevent the violation;

(9) "threatened violation" means that it is more likely than not that, unless corrective or preventive measures are taken, a violation will occur in the foreseeable future; and

(10) "violation" includes a violation of a provision of AS 46.03 or AS 30.25, or of a regulation, permit, certificate, order or term or condition of a permit, certificate or order issued or promulgated by the department under authority of AS 46.03 or AS 30.25. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

deputy commissioner shall grant an extension for service of the report upon finding that

(1) good cause exists for the extension; and

(2) the public health or environment will not be unduly harmed or threatened by the extension.

(i) The time period specified in the notice of intent (or in a determination made under (e)(3) or (g) of this section) for service of the report will be held in abeyance from the date of service of a motion under this subsection until service of the decision by the deputy commissioner. If an extension request is denied, the respondent will be afforded the unexpired portion of the service period for the report, or five days, whichever is greater, in which to file the report.

(j) Neither the report, nor any evidence directly obtained as a result of exploitation of the report, will be used against a person providing the report in any criminal proceeding concerning the violation or violations to which the notice of intent is addressed.

(k) The report must contain the name and mailing address of the respondent, and, if respondent is represented by counsel, the name, mailing address and telephone number of the respondent's attorney. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.030. COMPLIANCE ORDER. (a) Upon receipt of respondent's report, or at the expiration of the service period if no report is served, the deputy commissioner shall review the record of the case, and shall, in his discretion, thereafter issue a compliance order.

(b) In addition to any findings and conclusions required by sec. 20(e)(3) of this chapter, the compliance order will contain findings of fact that

(1) there exists an actual or threatened violation which the respondent has caused or permitted;

(2) where a report has been submitted, and the corrective or preventive measures specified in the order differ from or supplement the measures proposed in the report, the measures specified in the report will not provide a reasonable assurance of correction of the actual violation or prevention of the threatened violation; and

(3) the measures specified in the order will provide a reasonable assurance of correction or prevention.

(c) The findings made in the notice of intent may be incorporated by reference.

(d) The order will specify the measures to be taken by the respondent. No deadline will be imposed which expires sooner than 30 days from the date of service of the order.

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

deputy commissioner shall grant an extension for service of the report upon finding that

(1) good cause exists for the extension; and

(2) the public health or environment will not be unduly harmed or threatened by the extension.

(i) The time period specified in the notice of intent (or in a determination made under (e)(3) or (g) of this section) for service of the report will be held in abeyance from the date of service of a motion under this subsection until service of the decision by the deputy commissioner. If an extension request is denied, the respondent will be afforded the unexpired portion of the service period for the report, or five days, whichever is greater, in which to file the report.

(j) Neither the report, nor any evidence directly obtained as a result of exploitation of the report, will be used against a person providing the report in any criminal proceeding concerning the violation or violations to which the notice of intent is addressed.

(k) The report must contain the name and mailing address of the respondent, and, if respondent is represented by counsel, the name, mailing address and telephone number of the respondent's attorney. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.030. COMPLIANCE ORDER. (a) Upon receipt of respondent's report, or at the expiration of the service period if no report is served, the deputy commissioner shall review the record of the case, and shall, in his discretion, thereafter issue a compliance order.

(b) In addition to any findings and conclusions required by sec. 20(e)(3) of this chapter, the compliance order will contain findings of fact that

(1) there exists an actual or threatened violation which the respondent has caused or permitted;

(2) where a report has been submitted, and the corrective or preventive measures specified in the order differ from or supplement the measures proposed in the report, the measures specified in the report will not provide a reasonable assurance of correction of the actual violation or prevention of the threatened violation; and

(3) the measures specified in the order will provide a reasonable assurance of correction or prevention.

(c) The findings made in the notice of intent may be incorporated by reference.

(d) The order will specify the measures to be taken by the respondent. No deadline will be imposed which expires sooner than 30 days from the date of service of the order.

(e) The order will inform the respondent of his right to an adjudicatory hearing. It will also inform the respondent that his failure to serve upon the commissioner a notice of defense requesting a hearing within 30 days of service of the order constitutes a waiver of respondent's rights to judicial review of the order.

(f) The order will be accompanied by a notice-of-defense form.

(g) The order will designate the prosecuting office.

(Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.040. EFFECTIVE DATE OF ORDER. (a) A compliance order is effective upon receipt.

(b) A timely request for a hearing under sec. 30(e) of this chapter acts as a stay of the provisions of the order pending decision by the commissioner or his designee.

(c) If the respondent does not make a timely request for a hearing, no other action is necessary by the deputy commissioner or the commissioner or his designee. The deadlines of the order fall due as specified in the order. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.050. SCHEDULING OF HEARING. (a) Immediately upon service of a request for a hearing (or upon a determination under sec. 20(c)(2) of this chapter), the department will schedule a hearing to be held no later than 20 days after service of the request or determination. The location of the hearing will conform to AS 44.62.410. Notice of the hearing will be immediately served upon the respondent.

(b) At any time before the hearing, a party may serve upon the commissioner or his designee, and the opposing party, a request for postponement of the hearing. Postponements will only be granted by the commissioner or his designee in unusually complex cases, or when a failure to grant a postponement would pose a substantial hardship to the requesting party. No postponement will be granted when significant harm to the public health or environment will result from a delay.

(c) If the respondent served his request for a hearing more than 10 days after service of the compliance order, a request by the respondent for postponement of the hearing will be viewed with disfavor, and will be granted only in the most extraordinary of circumstances. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

search held unconst.

Rec - speed Argument & void

[436 US 307]

RAY MARSHALL, Secretary of Labor, et al., Appellants,

v

BARLOW'S, INC.

436 US 307, 56 L Ed 2d 305, 98 S Ct 1816

[No. 76–1143]

Argued January 9, 1978. Decided May 23, 1978.

SUMMARY

After a businessman refused to permit an inspector from the Occupational Safety and Health Administration to conduct a warrantless search of his business premises pursuant to § 8(a) of the Occupational Safety and Health Act of 1970 (29 USCS § 657(a)), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations, the Secretary petitioned the United States District Court for the District of Idaho for an order compelling admittance of the inspector. The requested order was issued, but the businessman again refused to permit the inspection, and sought injunctive relief against warrantless searches under the Act. Entering an injunction against searches and inspections pursuant to § 8(a), the three-judge District Court ruled that the Fourth Amendment required a warrant for the type of search involved, and that the statutory authorization for warrantless inspections was unconstitutional. (424 F Supp 437).

On direct appeal, the United States Supreme Court affirmed. In an opinion by WHITE, J. joined by BURGER, Ch. J. and STEWART, MARSHALL, and POWELL, JJ. it was held that (1) § 8(a) violated the Fourth Amendment insofar as it purported to authorize inspections without a warrant or its equivalent, but the Secretary was not prohibited from exercising the inspection authority conferred by § 8(a) pursuant to regulations and judicial process satisfying the Fourth Amendment, and (2) the entitlement of the Secretary to inspect, under a warrant or other process, pursuant to § 8(a) did not depend on his demonstrating probable cause to believe that conditions in violation of the Act existed on the premises but could be based on a showing that reasonable legislative or administrative standards for conducting an inspection were satisfied with respect to a particular establishment.

Briefs of Counsel, p 832, infra.

STEVENS, J., joined by BLACKMUN and REHNQUIST, JJ., dissented, expressing the view that (1) the warrantless inspection was not "unreasonable" within the meaning of the Fourth Amendment, and therefore was not prohibited by that Amendment, and (2) if such warrantless inspections were in fact unreasonable in the constitutional sense, the issuance of a warrant not based upon a true showing of particularized probable cause could not validate them.

BRENNAN, J., did not participate.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Search and Seizure § 25 — OSHA — inspection — warrant

1a, 1b, 1c. Section 8(a) of the Occupational Safety and Health Act of 1970 (29 USCS § 657(a)), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to

inspect for safety hazards and regulatory violations, violates the Fourth Amendment insofar as it purports to authorize inspections without a warrant or its equivalent; however, the Secretary is not prohibited from exercising the inspection authority conferred by § 8(a) pursuant to regulations and judicial process satisfying the Fourth Amendment. (Stevens, Blackmun, and Rehnquist, JJ., dissented from this holding.)

Search and Seizure § 25 — Fourteenth Amendment — warrant clause

2. The warrant clause of the Fourth Amendment protects commercial buildings as well as private homes.

Search and Seizure § 25 — Fourth Amendment — search warrant — particular industries

3. With regard to the search warrant requirement of the Fourth Amendment, certain industries have such a history of government oversight that no reasonable expectation of privacy can exist for a proprietor over the stock of such an enterprise; liquor and firearms are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of government regulation.

Search and Seizure § 25 — OSHA — warrantless search

4. With regard to inspections conducted pursuant to § 8(a) of the Occupational Safety and Health Act of 1970 (29 USCS § 657(a)), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations, the government inspector, without a warrant, stands in no better position than a member of the public—what is observable by the public being observable, without a warrant, by the government inspector as well; the owner of a business has not, by the necessary utilization of employees in his operation, scrutiny of government agents, and the fact that an employee is free to report, and the government is free to use, any evidence of noncompliance with the Act that the employee observes, furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search.

Search and Seizure § 25 — OSHA — inspections — warrant

5a, 5b. While § 8(a) of the Occupational Safety and Health Act of 1970 (29 USCS § 657(a)), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations, purports to authorize inspections without a warrant, nevertheless it does not forbid the Secretary from proceeding to inspect only by warrant or other process.

Search and Seizure § 27 — OSHA — inspection — probable cause

6. The entitlement of the Secretary of Labor to inspect under a warrant or other process with or without prior notice pursuant to § 8(a) of the Occupational Safety and Health Act of 1970 (29 USCS § 657(a)), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations, does not depend on his demonstrating probable cause to believe that conditions in violation of the Act exist on the premises, probable cause in the criminal sense not being required; for purposes of such an administrative search, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment; a warrant showing that a specific business has been chosen for a search on the basis of a general adminis-

as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, will protect an employer's Fourth Amendment rights. (Stevens, Blackmun, and Rehnquist, JJ., dissented from this holding.)

Search and Seizure § 25 — regulatory statutes — warrantless search — reasonableness

7. With regard to the constitutionality of warrantless search provisions in regulatory statutes, the reasonableness of such a search will depend upon the specific enforcement needs and privacy guarantees of each statute.

Search and Seizure § 25 — OSHA — document inspection — warrant

8a, 8b. During the course of an inspection conducted pursuant to § 8(a) of the Occupational Safety and Health Act of 1970 (29 USCS § 657(a)), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations, an inspection of those documents specified in 29 CFR § 1903.3, which includes among an Occupational Safety and Health Administration inspector's powers the authority "to review records required by the Act and regulations published in this chapter, and other records which are directly related to the purpose of the inspection," may not be effected without a warrant.

SYLLABUS BY REPORTER OF DECISIONS

Appellee brought this action to obtain injunctive relief against a warrantless inspection of its business premises pursuant to § 8(a) of the Occupational Safety and Health Act of 1970 (OSHA), which empowers agents of the Secretary of Labor to search the work area of any employment facility within OSHA's jurisdiction for safety hazards and violations of OSHA regulations. A three-judge District Court ruled in appellee's favor, concluding in reliance on Camara v Municipal Court, 387 US 523, 528–529, 18 L Ed 2d 930, 87 S Ct 1727, and See v Seattle, 387 US 541, 543, 18 L Ed 2d 943, 87 S Ct 1737, that the Fourth Amendment required a warrant for the type of search involved and that the statutory authorization for warrantless inspections was unconstitutional. *Held:* The inspection without a warrant or its equivalent pursuant to § 8(a) of OSHA violated the Fourth Amendment.

(a) The rule that warrantless searches are generally unreasonable applies to commercial premises as well as homes. Camara v Municipal Court, supra, and See v Seattle, supra.

(b) Though an exception to the search warrant requirement has been recognized for "closely regulated" industries "long subject to close supervision and inspection." Colonnade Catering Corp. v United States, 397 US 72, 74, 77, 25 L Ed 2d 60, 90 S Ct 774, that exception does not apply simply because the business is in interstate commerce.

(c) Nor does an employer's necessary utilization of employees in his operation mean that he has opened areas where the employees alone are permitted to the warrantless scrutiny of Government agents.

(d) Insofar as experience to date indicates, requiring warrants to make OSHA inspections will impose no serious burdens on the inspection system or the courts. The advantages of surprise through the opportunity of inspecting without prior notice will not be lost if, after entry to an inspector is refused, an ex parte warrant can be obtained, facilitating an inspector's reappearance at the premises without further notice; and appellant Secretary's entitlement to a warrant will not depend on his demonstrating probable cause to believe that conditions on the premises violate OSHA but merely that reasonable legislative or administrative standards for conducting an

inspection are satisfied with respect to a particular establishment.

(e) Requiring a warrant for OSHA inspections does not mean that, as a practical matter, warrantless search provisions in other regulatory statutes are unconstitutional, as the reasonableness of those provisions depends upon the specific enforcement needs and privacy guarantees of each statute.

424 F Supp 437, affirmed.

White, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, Marshall, and Powell, JJ., joined. Stevens J., filed a dissenting opinion, in which Blackmun and Rehnquist, JJ., joined. Brennan, J., took no part in the consideration or decision of the case.

APPEARANCES OF COUNSEL

Solicitor General **Wade H. McCree** argued the cause for appellants.

John L. Runft argued the cause for appellee.

Briefs of Counsel, p 832, infra.

OPINION OF THE COURT

[436 US 309]

Mr. Justice **White** delivered the opinion of the Court.

Section 8(a) of the Occupational Safety and Health Act of 1970 (OSHA or Act)[1] empowers agents of the Secretary of Labor (Secretary) to search the work area of any employment facility within the Act's jurisdiction. The purpose of the search is to inspect for safety hazards and violations of OSHA regulations. No search warrant or other process is expressly required under the Act.

On the morning of September 11, 1975, an OSHA inspector entered the customer service area of Barlow's, Inc., an electrical and plumbing installation business located in Pocatello, Idaho. The president and general manager, Ferrol G. "Bill" Barlow, was on hand; and the OSHA inspector, after showing his credentials,[2] informed Mr. Barlow that he wished to conduct

[436 US 310]

a search of the working areas of the business. Mr. Barlow inquired whether any complaint had been received about his company. The inspector answered no, but that Barlow's, Inc., had simply turned up in the agency's selection process. The inspector again asked to enter the nonpublic area of the business; Mr. Barlow's response was to inquire whether the inspector had a search warrant. The inspector had none. Thereupon, Mr. Barlow refused the inspector admission to the employee area of his business. He said he was relying on his rights as guaranteed by the Fourth Amendment of the United States Constitution.

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1. "In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

"(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

"(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee." 84 Stat 1598, 29 USC § 657(a) [29 USCS § 657(a)].

2. This is required by the Act. See n 1, supra.

Three months later, the Secretary petitioned the United States District Court for the District of Idaho to issue an order compelling Mr. Barlow to admit the inspector.[3] The requested order was issued on December 30, 1975, and was presented to Mr. Barlow on January 5, 1976. Mr. Barlow again refused admission, and he sought his own injunctive relief against the warrantless searches assertedly permitted by OSHA. A three-judge court was convened. On December 30, 1976, it ruled in Mr. Barlow's favor. 424 F Supp 437. Concluding that Camara v Municipal Court, 387 US 523, 528–529, 18 L Ed 2d 930, 87 S Ct 1727 (1967), and See v Seattle, 387 US 541, 543, 18 L Ed 2d 943, 87 S Ct 1737 (1967), controlled this case, the court held that the Fourth Amendment required a warrant for the type of search involved here[4] and that the statutory authorization for warrantless inspections was unconstitutional. An injunction against searches or inspections pursuant to § 8(a) was entered. The Secretary appealed, challenging the judgment, and we noted probable jurisdiction. 430 US 964, 52 L Ed 2d 354, 97 S Ct 1642.

[436 US 311]

I

[1a] The Secretary urges that warrantless inspections to enforce OSHA are reasonable within the meaning of the Fourth Amendment. Among other things, he relies on § 8(a) of the Act, 29 USC § 657(a) [29 USCS § 657(a)], which authorizes inspection of business premises without a warrant and which the Secretary urges represents a congressional construction of the Fourth Amendment that the courts should not reject. Regretably, we are unable to agree.

[2] The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, and the American colonial experience. An important forerunner of the first 10 Amendments to the United States Constitution, the Virginia Bill of Rights, specifically opposed "general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed."[5] The general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution.[6] The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists.[7] "[T]he Fourth Amendment's

3. A regulation of the Secretary, 29 CFR § 1903.4 (1977), requires an inspector to seek compulsory process if an employer refuses a requested search. See infra, at 317, and n 12, 56 L Ed 2d, at 314.

4. No res judicata bar arose against Mr. Barlow from the December 30, 1975 order authorizing a search, because the earlier decision reserved the constitutional issue. 424 F Supp 437.

5. H. Commager, Documents of American History 104 (8th ed 1968).

6. See, e.g., Dickerson, Writs of Assistance as a Cause of the Revolution, in The Era of the American Revolution 40 (R. Morris ed 1939).

7. The Stamp Act of 1765, the Townshend Revenue Act of 1767, and the tea tax of 1773 are notable examples. See Commager, supra, n 5, at 53, 63. For commentary, see 1 S. Morison, H. Commager, & W. Leuchtenburg, The Growth of the American Republic 143, 149, 159 (1969).

commands grew in large measure out of the colonists' experience with the writs of assistance . . . [that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." United States v Chadwick, 433 US 1, 7–8, 53 L Ed 2d 538, 97 S Ct 2476 (1977).

[436 US 312]

See also G. M. Leasing Corp. v United States, 429 US 338, 355, 50 L Ed 2d 530, 97 S Ct 619 (1977). Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence.

This Court has already held that warrantless searches are generally unreasonable, and that this rule applies to commercial premises as well as homes. In Camara v Municipal Court, supra, at 528–529, 18 L Ed 2d 930, 87 S Ct 1727, we held:

> "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."

On the same day, we also ruled:

> "As we explained in Camara, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." See v Seattle, supra, at 543, 18 L Ed 2d 943, 87 S Ct 1737.

These same cases also held that the Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations. Ibid. The reason is found in the "basic purpose of this Amendment . . . [which] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara, supra, at 528, 18 L Ed 2d 930, 87 S Ct 1727. If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or

[436 US 313]

regulatory standards. It therefore appears that unless some recognized exception to the warrant requirement applies, See v Seattle, would require a warrant to conduct the inspection sought in this case.

[3] The Secretary urges that an exception from the search warrant requirement has been recognized for "pervasively regulated business[es]," United States v Biswell, 406 US 311, 316, 32 L Ed 2d 87, 92 S Ct 1593 (1972), and for "closely regulated" industries "long subject to close supervision and inspection." Colonnade Catering Corp. v United States, 397 US 72, 74, 77, 25 L Ed 2d 60, 90 S Ct 774 (1970). These cases are indeed exceptions, but they represent re-

sponses to relatively unique circumstances. Certain industries have such a history of government oversight that no reasonable expectation of privacy, see Katz v United States, 389 US 347, 351–352, 19 L Ed 2d 576, 88 S Ct 507 (1967), could exist for a proprietor over the stock of such an enterprise. Liquor (Colonnade) and firearms (Biswell) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.

Industries such as these fall within the "certain carefully defined classes of cases," referenced in Camara, supra, at 528, 18 L Ed 2d 930, 87 S Ct 1727. The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. "A central difference between those cases [Colonnade and Biswell] and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him." Almeida-Sanchez v United States, 413 US 266, 271, 37 L Ed 2d 596, 93 S Ct 2535 (1973).

The clear import of our cases is that the closely regulated industry of the type involved in Colonnade and Biswell is the exception. The Secretary would make it the rule. Invoking

[436 US 314]

the Walsh-Healey Act of 1936, 41 USC §§ 35 et seq. [41 USCS §§ 35 et seq.], the Secretary attempts to support a conclusion that all businesses involved in interstate commerce have long been subjected to close supervision of employee safety and health conditions. But the degree of federal involvement in employee working circumstances has never been of the order of specificity and pervasiveness that OSHA mandates. 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 one conducts a business affecting interstate commerce; under current practice and law, few businesses can be conducted without having some effect on interstate commerce.

The Secretary also attempts to derive support for a Colonnade-Biswell-type exception by drawing analogies from the field of labor law. In Republic Aviation Corp. v NLRB, 324 US 793, 89 L Ed 1372, 65 S Ct 982, 157 ALR 1081 (1945), this Court upheld the rights of employees to solicit for a union during nonworking time where efficiency was not compromised. By opening up his property to employees, the employer had yielded so much of his private property rights as to allow those employees to exercise § 7 rights under the National Labor Relations Act. But this Court also held that the private property rights of an owner prevailed over the intrusion of nonemployee organizers, even in nonworking areas of the plant and

during nonworking hours. NLRB v Babcock & Wilcox Co. 351 US 105, 100 L Ed 975, 76 S Ct 679 (1956).

[4] The critical fact in this case is that entry over Mr. Barlow's objection is being sought by a Government agent.[8] Employees

[436 US 315]

are not being prohibited from reporting OSHA violations. What they observe in their daily functions is undoubtedly beyond the employer's reasonable expectation of privacy. The Government inspector, however, is not an employee. Without a warrant he stands in no better position than a member of the public. What is observable by the public is observable, without a warrant, by the Government inspection as well.[9] The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents. That an employee is free to report, and the Government is free to use, any evidence of noncompliance with OSHA that the employee observes furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search.[10]

II

The Secretary nevertheless stoutly argues that the enforcement scheme of the Act requires warrantless searches, and that the restrictions on search discretion contained in the Act and its regulations already protect as much privacy as a warrant would. The Secretary thereby asserts the actual reasonableness of OSHA searches, whatever the general rule against warrantless searches might be. Because "reasonableness is still the ultimate standard," Camara v Municipal

[436 US 316]

Court, 387 US, at 539, 18 L Ed 2d 930, 87 S Ct 1727, the Secretary suggests that the Court decide whether a warrant is needed by arriving at a sensible balance between the administrative necessities of OSHA inspections and the incremental protection of privacy of business owners a warrant would afford. He suggests that only a decision exempting OSHA inspections from the Warrant Clause would give "full recognition to the competing public and private interests here at stake." Ibid.

The Secretary submits that warrantless inspections are essential to the proper enforcement of OSHA because they afford the opportunity to inspect without prior notice and hence to preserve the advantages of surprise. While the dangerous conditions outlawed by the Act include

8. The Government has asked that Mr. Barlow be ordered to show cause why he should not be held in contempt for refusing to honor the inspection order, and its position is that the OSHA inspector is now entitled to enter at once, over Mr. Barlow's objection.

9. Cf. Air Pollution Variance Bd. v Western Alfalfa Corp. 416 US 861, 40 L Ed 2d 607, 94 S Ct 2114 (1974).

10. The automobile-search cases cited by the Secretary are even less helpful to his position than the labor cases. The fact that automobiles occupy a special category in Fourth Amendment case law is by now beyond doubt due, among other factors, to the quick mobility of a car, the registration requirements of both the car and the driver, and the more available opportunity for plain-view observations of a car's contents. Cady v Dombrowski, 413 US 433, 441–442, 37 L Ed 2d 706, 93 S Ct 2523 (1973); see also Chambers v Maroney, 399 US 42, 48–51, 26 L Ed 2d 419, 90 S Ct 1975 (1970). Even so, probable cause has not been abandoned as a requirement for stopping and searching an automobile.

structural defects that cannot be quickly hidden or remedied, the Act also regulates a myriad of safety details that may be amenable to speedy alteration or disguise. The risk is that during the interval between an inspector's initial request to search a plant and his procuring a warrant following the owner's refusal of permission, violations of this latter type could be corrected and thus escape the inspector's notice. To the suggestion that warrants may be issued ex parte and executed without delay and without prior notice, thereby preserving the element of surprise, the Secretary expresses concern for the administrative strain that would be experienced by the inspection system, and by the courts, should ex parte warrants issued in advance become standard practice.

[5a] We are unconvinced, however, that requiring warrants to inspect will impose serious burdens on the inspection system or the courts, will prevent inspections necessary to enforce the statute, or will make them less effective. In the first place, the great majority of businessmen can be expected in normal course to consent to inspection without warrant; the Secretary has not brought to this Court's attention any widespread pattern of refusal.[11] In those cases where an owner does insist

[436 US 317]

on a warrant, the Secretary argues that inspection efficiency will be impeded by the advance notice and delay. The Act's penalty provisions for giving advance notice of a search, 29 USC § 666(f) [29 USCS § 666(f)], and the Secretary's own regulations, 29 CFR § 1903.6 (1977), indicate that surprise searches are indeed contemplated. However, the Secretary has also promulgated a regulation providing that upon refusal to permit an inspector to enter the property or to complete his inspection, the inspector shall attempt to ascertain the reasons for the refusal and report to his superior, who shall "promptly take appropriate action, including compulsory process, if necessary." 29 CFR § 1903.4 (1977).[12] The

11. We recognize that today's holding itself might have an impact on whether owners choose to resist requested searches; we can only await the development of evidence not present on this record to determine how serious an impediment to effective enforcement this might be.

12. [5b] It is true, as the Secretary asserts, that § 8(a) of the Act, 29 USC § 657(a) [29 USCS § 657(a)], purports to authorize inspections without warrant; but it is also true that it does not forbid the Secretary from proceeding to inspect only by warrant or other process. The Secretary has broad authority to prescribe such rules and regulations as he may deem necessary to carry out his responsibilities under this chapter "including rules and regulations dealing with the inspection of an employer's establishment." § 8(g)(2), 29 USC § 657(g)(2) [29 USCS § 657(g)(2)]. The regulations with respect to inspections are contained in 29 CFR Part 1903 (1977). Section 1903.4, referred to in the text, provides as follows:

"Upon a refusal to permit a Compliance Safety and Health Officer, in the exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records, or to question any employer, owner, operator, agent, or employee, in accordance with § 1903.3, or to permit a representative of employees to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace in accordance with § 1903.8, the Compliance Safety and Health Officer shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The Compliance Safety and Health Officer shall endeavor to ascertain the reason for such refusal, and he shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall immediately consult with the Assistant Regional Director and the Regional Solicitor, who shall promptly take appropriate action, including compulsory process, if necessary."

regulation represents a choice to proceed

[436 US 318]

by process where entry is refused; and on the basis of evidence available from present practice, the Act's effectiveness has not been crippled by providing those owners who wish to refuse an initial requested entry with a time lapse while the inspector obtains the necessary process.[13] Indeed, the kind of process sought in this case and apparently anticipated by the regulation provides notice to the business operator.[14]

[436 US 319]

If this safeguard

When his representative was refused admission by Mr. Barlow, the Secretary proceeded in federal court to enforce his right to enter and inspect, as conferred by 29 USC § 657 [29 USCS § 657].

13. A change in the language of the Compliance Operations Manual for OSHA inspectors supports the inference that, whatever the Act's administrators might have thought at the start, it was eventually concluded that enforcement efficiency would not be jeopardized by permitting employers to refuse entry, at least until the inspector obtained compulsory process. The 1972 Manual included a section specifically directed to obtaining "warrants," and one provision of that section dealt with ex parte warrants:
"In cases where a refusal of entry is to be expected from the past performance of the employer, or where the employer has given some indication prior to the commencement of the investigation of his intention to bar entry or limit or interfere with the investigation, a warrant should be obtained before the inspection is attempted. Cases of this nature should also be referred through the Area Director to the appropriate Regional Solicitor and the Regional Administrator alerted." Dept. of Labor, OSHA Compliance Operations Manual V-7 (Jan. 1972).
The latest available manual, incorporating changes as of November 1977, deletes this provision, leaving only the details for obtaining "compulsory process" *after* an employer has refused entry. Dept. of Labor, OSHA Field Operations Manual, Vol V, pp V-4–V-5. In its present form, the Secretary's regulation appears to permit establishment owners to insist on "process"; and hence their refusal to permit entry would fall short of criminal conduct within the meaning of 18 USC §§ 111 and 1114 (1976 ed) [18 USCS §§ 111 and 1114], which make it a crime forcibly to impede, intimidate, or interfere with federal officials, including OSHA inspectors, while engaged in or on account of the performance of their official duties.

14. The proceeding was instituted by filing an "Application for Affirmative Order to Grant Entry and for an Order to show cause why such affirmative order should not issue." The District Court issued the order to show cause, the matter was argued, and an order then issued authorizing the inspection and enjoining interference by Barlow's. The following is the order issued by the District Court:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the United States of America, United States Department of Labor, Occupational Safety and Health Administration, through its duly designated representative or representatives, are entitled to, entry upon the premises known as Barlow's Inc., 225 West Pine, Pocatello, Idaho, and may go upon said business premises to conduct an inspection and investigation as provided for in Section 8 of the Occupational Safety and Health Act of 1970 (29 USC §§ 651, et seq. [29 USCS §§ 651, et seq.]), as part of an inspection program designed to assure compliance with that Act; that the inspection and investigation shall be conducted during regular working hours or at other reasonable times, within reasonable limits and in a reasonable manner, all as set forth in the regulations pertaining to such inspections promulgated by the Secretary of Labor, at 29 CFR, Part 1903; that appropriate credentials as representatives of the Occupational Safety and Health Administration, United States Department of Labor, shall be presented to the Barlow's Inc. representative upon said premises and the inspection and investigation shall be commenced as soon as practicable after the issuance of this Order and shall be completed within reasonable promptness; that the inspection and investigation shall extend to the establishment or other area, workplace, or environment where work is performed by employees of the employer, Barlow's Inc., and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including but not limited to records, files, papers, processes, controls, and facilities) bearing upon whether Barlow's Inc. is furnishing to its employees employment and a place of employment that are free from

endangers the efficient administration of OSHA, the Secretary should never have adopted it, particularly when the Act does not require it. Nor is it immediately

[436 US 320]

apparent why the advantages of suprise would be lost if, after being refused entry, procedures were available for the Secretary to seek an ex parte warrant and to reappear at the premises without further notice to the establishment being inspected.[15]

[6] Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation[16] but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." Camara

[436 US 321]

v Municipal Court, 387 US, at 538, 18 L Ed 2d 930, 87 S Ct 1727. A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.[17] We doubt that the consump-

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recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether Barlow's Inc. is complying with the Occupational Safety and Health Standards promulgated under the Occupational Safety and Health Act and the rules, regulations, and orders issued pursuant to that Act; that representatives of the Occupational Safety and Health Administration may, at the option of Barlow's Inc., be accompanied by one or more employees of Barlow's Inc., pursuant to Section 8(e) of that Act; that Barlow's Inc., its agents, representatives, officers, and employees are hereby enjoined and restrained from in anyway whatsoever interfering with the inspection and investigation authorized by this Order and, further, Barlow's Inc. is hereby ordered and directed to, within five working days from the date of this Order, furnish a copy of this Order to its officers and managers, and, in addition, to post a copy of this Order at its employee's bulletin board located upon the business premises; and Barlow's Inc. is hereby ordered and directed to comply in all respects with this order and allow the inspection and investigation to take place without delay and forthwith."

15. Insofar as the Secretary's statutory authority is concerned, a regulation expressly providing that the Secretary could proceed ex parte to seek a warrant or its equivalent would appear to be as much within the Secretary's power as the regulation currently in force and calling for "compulsory process."

16. Section 8(f)(1), 29 USC § 657(f)(1) [29 USCS § 657(f)(1)], provides that employees or their representatives may give written notice to the Secretary of what they believe to be violations of safety or health standards and may request an inspection. If the Secretary then determines that "there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable." The statute thus purports to authorize a warrantless inspection in these circumstances.

17. The Secretary, Brief for Petitioner, 9 n 7, states that the Barlow inspection was not based on an employee complaint but was a "general schedule" investigation. "Such general inspections," he explains, "now called Regional Programmed Inspections, are carried out in accordance with criteria based upon accident experience and the number of employees exposed in particular industries. U. S. Department of Labor, Occupational Safety and Health Administration, Field Operations

tion of enforcement energies in the obtaining of such warrants will exceed manageable proportions.

[7] Finally, the Secretary urges that requiring a warrant for OSHA inspectors will mean that, as a practical matter, warrantless-search provisions in other regulatory statutes are also constitutionally infirm. The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute. Some of the statutes cited apply only to a single industry, where regulations might already be so pervasive that a Colonnade-Biswell exception to the warrant requirement could apply. Some statutes already envision resort to federal-court enforcement when entry is refused, employing specific language in some cases[18] and general language in others.[19] In short, we base

[436 US 322]

today's opinion on the facts and law concerned with OSHA and do not retreat from a holding appropriate to that statute because of its real or imagined effect on other, different administrative schemes.

[8a] Nor do we agree that the incremental protections afforded the employer's privacy by a warrant are so marginal that they fail to justify the administrative burdens that may be entailed.

[436 US 323]

The authority to make warrantless searches devolves almost unbridled discretion upon exec-

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Manual, supra, 1 CCH Employment Safety and Health Guide ¶ 4327.2 (1976)."

18. The Federal Metal and Nonmetallic Mine Safety Act provides: "Whenever an operator . . . refuses to permit the inspection or investigation of any mine which is subject to this chapter . . . a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the Secretary in the district court of the United States for the district . . . ." 30 USC § 733(a) [30 USCS § 733(a)]. "The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court . . . whenever such operator or his agent . . . refuses to permit the inspection of the mine . . . . Each court shall have jurisdiction to provide such relief as may be appropriate." 30 USC § 818 [30 USCS § 818]. Another example is the Clean Air Act, which grants federal district courts jurisdiction "to require compliance" with the Administrator of the Environmental Protection Agency's attempt to inspect under 42 USCA § 7414 (1977 pamphlet) [42 USCS § 7414], when the Administrator has commenced "a civil action" for injunctive relief or to recover a penalty. 42 USCA § 7413(b)(4)(1977 pamphlet) [42 USCS § 7413(b)(4)].

19. Exemplary language is contained in the Animal Welfare Act of 1970 which provides for inspections by the Secretary of Agriculture; federal district courts are vested with jurisdiction "specifically to enforce, and to prevent and restrain violations of this chapter, and shall have jurisdiction in all other kinds of cases arising under this chapter." 7 USC § 2146(c) (1976 ed) [7 USCS § 2146(c)]. Similar provisions are included in other agricultural inspection Acts; see, e.g., 21 USC § 674 (meat product inspection) [21 USCS § 674]; 21 USC § 1050 (egg product inspection) [21 USCS § 1050]. The Internal Revenue Code, whose excise tax provisions requiring inspections of businesses are cited by the Secretary, provides: "The district courts . . . shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction . . . and such other orders and processes, and to render such . . . decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." 26 USC § 7402(a) [26 USCS § 7402(a)]. For gasoline inspections, federal district courts are granted jurisdiction to restrain violations and enforce standards (one of which, 49 USC § 1677 [49 USCS § 1677], requires gas transporters to permit entry or inspection). The owner is to be afforded the opportunity for notice and response in most cases, but "failure to give such notice and afford such opportunity shall not preclude the granting of appropriate relief [by the district court]." 49 USC § 1679(a) [49 USCS § 1679(a)].

utive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria.[20] Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed.[21] These are important functions for a warrant to perform, functions which underlie the Court's prior decisions that the Warrant Clause applies to

[436 US 324]

inspections for compliance with regulatory statutes.[22] Camara v Municipal Court,

20. The application for the inspection order filed by the Secretary in this case represented that "the desired inspection and investigation are contemplated as a part of an inspection program designed to assure compliance with the Act and are authorized by Section 8(a) of the Act." The program was not described, however, or any facts presented that would indicate why an inspection of Barlow's establishment was within the program. The order that issued concluded generally that the inspection authorized was "part of an inspection program designed to assure compliance with the Act."

21. Section 8(a) of the Act, as set forth in 29 USC § 657(a) [29 USCS § 657(a)], provides that "[i]n order to carry out the purposes of this chapter" the Secretary may enter any establishment, area, work place or environment "where work is performed by an employee of an employer" and "inspect and investigate" any such place of employment and all "pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and . . . question privately any such employer, owner, operator, agent, or employee." Inspections are to be carried out "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner." The Secretary's regulations echo the statutory language in these respects. 29 CFR § 1903.3 (1977). They also provide that inspectors are to explain the nature and purpose of the inspection and to "indicate generally the scope of the inspection." 29 CFR § 1903.7(a) (1977). Environmental samples and photographs are authorized, 29 CFR § 1903.7(b) (1977), and inspections are to be performed so as "to preclude unreasonable disruption of the operations of the employer's establishment." 29 CFR § 1903.7(d) (1977). The order that issued in this case reflected much of the foregoing statutory and regulatory language.

22. [8b] Delineating the scope of a search with some care is particularly important where documents are involved. Section 8(c) of the Act, 29 USC § 657(c) [29 USCS § 657(c)], provides that an employer must "make, keep and preserve, and make available to the Secretary [of Labor] or to the Secretary of Health, Education and Welfare" such records regarding his activities relating to OSHA as the Secretary of Labor may prescribe by regulation as necessary or appropriate for enforcement of the statute or for developing information regarding the causes and prevention of occupational accidents and illnesses. Regulations requiring employers to maintain records of and to make periodic reports on "work-related deaths, injuries and illnesses" are also contemplated, as are rules requiring accurate records of employee exposures to potential toxic materials and harmful physical agents.

In describing the scope of the warrantless inspection authorized by the statute, § 8(a) does not expressly include any *records* among those items or things that may be examined, and § 8(c) merely provides that the employer is to "make available" his pertinent records and to make periodic reports.

The Secretary's regulation, 29 CFR § 1903.3 (1977), however, expressly includes among the inspector's powers the authority "to review records required by the Act and regulations published in this chapter, and other records which are directly related to the purpose of the inspection." Further, § 1903.7 requires inspectors to indicate generally "the records specified in § 1903.3 which they wish to review" but "such designations of records shall not preclude access to additional records specified in § 1903.3." It is the Secretary's position, which we reject, that an inspection of documents of this scope may be effected without a warrant.

The order that issued in this case included among the objects and things to be inspected "all other things therein (including but not limited to records, files, papers, processes, controls and facilities) bearing upon whether Barlow's, Inc. is furnishing to its employees

387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967); See v Seattle, 387 US 541, 18 L Ed 2d 943, 87 S Ct 1737 (1967). We conclude that the concerns expressed by the Secretary do not suffice to justify warrantless inspections under OSHA or vitiate the general constitutional requirement that for a search to be reasonable a warrant must be obtained.

[436 US 325]

III

[1b] We hold that Barlow's was entitled to a declaratory judgment that the Act is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent and to an injunction enjoining the Act's enforcement to that extent.[23] The judgment of the District Court is therefore affirmed.

So ordered.

Mr. Justice **Brennan** took no part in the consideration or decision of this case.

SEPARATE OPINION

Mr. Justice **Stevens**, with whom Mr. Justice **Blackmun** and Mr. Justice **Rehnquist** join, dissenting.

Congress enacted the Occupational Safety and Health Act to safeguard employees against hazards in the work areas of businesses subject to the Act. To ensure compliance, Congress authorized the Secretary of Labor to conduct routine, nonconsensual inspections. Today the Court holds that the Fourth Amendment prohibits such inspections without a warrant. The Court also holds that the constitutionally required warrant may be issued without any showing of probable cause. I disagree with both of these holdings.

The Fourth Amendment contains two separate Clauses, each

[436 US 326]

flatly prohibiting a category of governmental conduct. The first Clause states that the right to be free from unreasonable searches "shall not be violated";[1] the second unequivocally prohibits the issuance of warrants except "upon probable cause."[2] In this case the ultimate question is whether the category of warrantless searches authorized by the statute is "unreason-

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employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether Barlow's, Inc. is complying with . . ." the OSHA regulations.

23. [1c] The injunction entered by the District Court, however, should not be understood to forbid the Secretary from exercising the inspection authority conferred by § 8 pursuant to regulations and judicial process that satisfy the Fourth Amendment. The District Court did not address the issue whether the order for inspection that was issued in this case was the functional equivalent of a warrant, and the Secretary has limited his submission in this case to the constitutionality of a warrantless search of the Barlow establishment authorized by § 8(a). He has expressly declined to rely on 29 CFR § 1903.4 (1977) and upon the order obtained in this case. Tr of Oral Arg 19. Of course, if the process obtained here, or obtained in other cases under revised regulations, would satisfy the Fourth Amendment, there would be no occasion for enjoining the inspections authorized by § 8(a).

1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

2. "[A]nd 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."

able" within the meaning of the first Clause.

In cases involving the investigation of criminal activity, the Court has held that the reasonableness of a search generally depends upon whether it was conducted pursuant to a valid warrant. See, e.g., Coolidge v New Hampshire, 403 US 443, 29 L Ed 2d 564, 91 S Ct 2022. There is, however, also a category of searches which are reasonable within the meaning of the first Clause even though the probable-cauuse requirement of the Warrant Clause cannot be satisfied. See United States v Martinez-Fuerte, 428 US 543, 49 L Ed 2d 1116, 96 S Ct 3074; Terry v Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383; South Dakota v Opperman, 428 US 364, 49 L Ed 2d 1000, 96 S Ct 3092; United States v Biswell, 406 US 311, 32 L Ed 2d 87, 92 S Ct 1593. The regulatory inspection program challenged in this case, in my judgment, falls within this category.

I

The warrant requirement is linked "textually . . . to the probable-cause concept" in the Warrant Clause. South Dakota v Opperman, supra, at 370 n 5, 49 L Ed 2d 1000, 96 S Ct 3092. The routine OSHA inspections are, by definition, not based on cause to believe there is a violation on the premises to be inspected. Hence, if the inspections were measured against the requirements of the Warrant Clause, they would be automatically and unequivocally unreasonable.

[436 US 327]

Because of the acknowledged importance and reasonableness of routine inspections in the enforcement of federal regulatory statutes such as OSHA, the Court recognizes that requiring full compliance with the Warrant Clause would invalidate all such inspection programs. Yet, rather than simply analyzing such programs under the "Reasonableness" Clause of the Fourth Amendment, the Court holds the OSHA program invalid under the Warrant Clause and then avoids a blanket prohibition on all routine, regulatory inspections by relying on the notion that the "probable cause" requirement in the Warrant Clause may be relaxed whenever the Court believes that the governmental need to conduct a category of "searches" outweighs the intrusion on interests protected by the Fourth Amendment.

The Court's approach disregards the plain language of the Warrant Clause and is unfaithful to the balance struck by the Framers of the Fourth Amendment—"the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary strugg with England."[3] This preconstitu nal history includes the controversy in England over the issuance of general warrants to aid enforcement of the seditious libel laws and the colonial experience with writs of assistance issued to facilitate collection of the various import duties imposed by Parliament. The Framers' familiarity with the abuses attending the issuance of such general warrants provided the principal stimulus for the restraints on arbitrary governmental intrusions embodied in the Fourth Amendment.

3. J. Landynski, Search and Seizure and the Supreme Court 19 (1966).

"[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern. Far from

[436 US 328]

looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches . . . ."[4]

Since the general warrant, not the warrantless search, was the immediate evil at which the Fourth Amendment was directed, it is not surprising that the Framers placed precise limits on its issuance. The requirement that a warrant only issue on a showing of particularized probable cause was the means adopted to circumscribe the warrant power. While the subsequent course of Fourth Amendment jurisprudence in this Court emphasizes the dangers posed by warrantless searches conducted without probable cause, it is the general reasonableness standard in the first Clause, not the Warrant Clause, that the Framers adopted to limit this category of searches. It is, of course, true that the existence of a valid warrant normally satisfies the reasonableness requirement under the Fourth Amendment. But we should not dilute the requirements of the Warrant Clause in an effort to force every kind of governmental intrusion which satisfies the Fourth Amendment definition of a "search" into a judicially developed, warrant-preference scheme.

Fidelity to the original understanding of the Fourth Amendment, therefore, leads to the conclusion that the Warrant Clause has no application to routine, regulatory inspections of commercial premises. If such inspections are valid, it is because they comport with the ultimate reasonableness standard of the Fourth Amendment. If the Court were correct in its view that such inspections, if undertaken without a warrant, are unreasonable in the constitutional sense, the issuance of a "new-fangled warrant"—to use Mr. Justice Clark's characteristically expressive term—without any true showing of particularized probable cause would not be sufficient to validate them.[5]

[436 US 329]

II

Even if a warrant issued without probable cause were faithful to the Warrant Clause, I could not accept the Court's holding that the Government's inspections program is constitutionally unreasonable because it fails to require such a warrant procedure. In determining whether a warrant is a necessary safeguard in a given class of cases, "the Court has weighed the public interest against the Fourth Amendment interest of the individual . . . ." United States v Martinez-Fuerte, supra, at 555, 49 L Ed 2d 1116, 96 S Ct 3074. Several considerations persuade me that this balance should be struck in favor of the routine inspections authorized by Congress.

Congress has determined that regulation and supervision of safety in

4. T. Taylor, Two Studies in Constitutional Interpretation 41 (1969).

5. See v Seattle, 387 US 541, 547, 18 L Ed 2d 943, 87 S Ct 1737 (Clark, J., dissenting).

the work place furthers an important public interest and that the power to conduct warrantless searches is necessary to accomplish the safety goals of the legislation. In assessing the public interest side of the Fourth Amendment balance, however, the Court today substitutes its judgment for that of Congress on the question of what inspection authority is needed to effectuate the purposes of the Act. The Court states that if surprise is truly an important ingredient of an effective, representative inspection program, it can be retained by obtaining ex parte warrants in advance. The Court assures the Secretary that this will not unduly burden enforcement resources because most employers will consent to inspection.

The Court's analysis does not persuade me that Congress' determination that the warrantless inspection power as a necessary adjunct of the exercise of the regulatory power is unreasonable. It was surely not unreasonable to conclude that the rate at which employers deny entry to inspectors would increase if covered businesses, which may have safety violations on their premises, have a right to deny warrantless entry to a compliance inspector. The Court is correct that this problem could be avoided by requiring inspectors to obtain a warrant prior to every inspection visit. But the adoption of

[436 US 330]

such a practice undercuts the Court's explanation of why a warrant requirement would not create undue enforcement problems. For, even if it were true that many employers would not exercise their right to demand a warrant, it would provide little solace to those charged with administration of OSHA; faced with an increase in the rate of refusals and the added costs generated by futile trips to inspection sites where entry is denied, officials may be compelled to adopt a general practice of obtaining warrants in advance. While the Court's prediction of the effect a warrant requirement would have on the behavior of covered employers may turn out to be accurate, its judgment is essentially empirical. On such an issue, I would defer to Congress' judgment regarding the importance of a warrantless search power to the OSHA enforcement scheme.

The Court also appears uncomfortable with the notion of second-guessing Congress and the Secretary on the question of how the substantive goals of OSHA can best be achieved. Thus, the Court offers an alternative explanation for its refusal to accept the legislative judgment. We are told that, in any event, the Secretary, who is charged with enforcement of the Act, has indicated that inspections without delay are not essential to the enforcement scheme. The Court bases this conclusion on a regulation prescribing the administrative response when a compliance inspector is denied entry. It provides: "The Area Director shall immediately consult with the Assistant Regional Director and the Regional Solicitor, who shall promptly take appropriate action, including compulsory process, if necessary." 29 CFR § 1903.4 (1977). The Court views this regulation as an admission by the Secretary that no enforcement problem is generated by permitting employers to deny entry and delaying the inspection until a warrant has been obtained. I disagree. The regulation was promulgated against the background of a statutory right to immediate entry, of which covered em-

ployers are presumably
[436 US 331]
aware and which Congress and the Secretary obviously thought would keep denials of entry to a minimum. In these circumstances, it was surely not unreasonable for the Secretary to adopt an orderly procedure for dealing with what he believed would be the occasional denial of entry. The regulation does not imply a judgment by the Secretary that delay caused by numerous denials of entry would be administratively acceptable.

Even if a warrant requirement does not "frustrate" the legislative purpose, the Court has no authority to impose an additional burden on the Secretary unless that burden is required to protect the employer's Fourth Amendment interests.[6] The essential function of the traditional warrant requirement is the interposition of a neutral magistrate between the citizen and the presumably zealous law enforcement officer so that there might be an objective determination of probable cause. But this purpose is not served by the new-fangled inspection warrant. As the Court acknowledges, the inspector's "entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. . . . For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based . . . on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' " Ante, at 320, 56 L Ed 2d, at 316. To obtain a warrant, the inspector need only show that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived
[436 US 332]
from neutral sources . . . ." Ante, at 321, 56 L Ed 2d, at 316. Thus, the only question for the magistrate's consideration is whether the contemplated inspection deviates from an inspection schedule drawn up by higher level agency officials.

Unlike the traditional warrant, the inspection warrant provides no protection against the search itself for employers who the Government has no reason to suspect are violating OSHA regulations. The Court plainly accepts the proposition that random health and safety inspections are reasonable. It does not question Congress' determination that the public interest in workplaces free from health and safety hazards outweighs the employer's desire to conduct his business only in the presence of permittees, except in those rare instances when the Government has probable cause to suspect that the premises harbor a violation of the law.

What purposes, then, are served by the administrative warrant procedure? The inspection warrant purports to serve three functions: to inform the employer that the inspection is authorized by the statute, to advise him of the lawful limits of the inspection, and to assure him

6. When it passed OSHA, Congress was cognizant of the fact that in light of the enormity of the enforcement task "the number of inspections which it would be desirable to have made will undoubtedly for an unforeseeable period, exceed the capacity of the inspection force . . . ." Senate Committee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, 92d Cong, 1st Sess, 152 (Comm Print 1971).

that the person demanding entry is an authorized inspector. Camara v Municipal Court, 387 US 523, 532, 18 L Ed 2d 930, 87 S Ct 1727. An examination of these functions in the OSHA context reveals that the inspection warrant adds little to the protections already afforded by the statute and pertinent regulations, and the slight additional benefit it might provide is insufficient to identify a constitutional violation or to justify overriding Congress' judgment that the power to conduct warrantless inspections is essential.

The inspection warrant is supposed to assure the employer that the inspection is in fact routine, and that the inspector has not improperly departed from the program of representative inspections established by responsible officials. But to the extent that harassment inspections would be reduced by the necessity of obtaining a warrant, the Secretary's present enforcement scheme would have precisely the same effect.

[436 US 333]

The representative inspections are conducted "'in accordance with criteria based upon accident experience and the number of employees exposed in particular industries.'" Ante, at 321 n 17, 56 L Ed 2d, at 316. If, under the present scheme, entry to covered premises is denied, the inspector can gain entry only by informing his administrative superiors of the refusal and seeking a court order requiring the employer to submit to the inspection. The inspector who would like to conduct a nonroutine search is just as likely to be deterred by the prospect of informing his superiors of his intention and of making false representations to the court when he seeks compulsory process as by the prospect of having to make bad-faith representations in an ex parte warrant proceeding.

The other two asserted purposes of the administrative warrant are also adequately achieved under the existing scheme. If the employer has doubts about the official status of the inspector, he is given adequate opportunity to reassure himself in this regard before permitting entry. The OSHA inspector's statutory right to enter the premises is conditioned upon the presentation of appropriate credentials. 29 USC § 657(a)(1) [29 USCS § 657(a)(1)]. These credentials state the inspector's name, identify him as an OSHA compliance officer, and contain his photograph and signature. If the employer still has doubts, he may make a toll-free call to verify the inspector's authority. Usery v Godfrey Brake & Supply Service, Inc. 545 F2d 52, 54 (CA8 1976), or simply deny entry and await the presentation of a court order.

The warrant is not needed to inform the employer of the lawful limits of an OSHA inspector. The statute expressly provides that the inspection may enter all areas in a covered business "where work is performed by an employee of an employer," 29 USC § 657(a)(1) [29 USCS § 657(a)(1)], "to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner . . . all pertinent conditions, structures, machines, apparatus,

[436 US 334]

devices, equipment, and materials therein. . . ." 29 USC § 657(a)(2) [29 USCS § 657(a)(2)]. See also 29 CFR § 1903 (1977). While it is true that the inspection power granted by Congress is broad, the warrant procedure required by the Court

does not purport to restrict this power but simply to ensure that the employer is apprised of its scope. Since both the statute and the pertinent regulations perform this informational function, a warrant is superfluous.

Requiring the inspection warrant, therefore, adds little in the way of protection to that already provided under the existing enforcement scheme. In these circumstances, the warrant is essentially a formality. In view of the obviously enormous cost of enforcing a health and safety scheme of the dimensions of OSHA, this Court should not, in the guise of construing the Fourth Amendment, require formalities which merely place an additional strain on already overtaxed federal resources.

Congress, like this Court, has an obligation to obey the mandate of the Fourth Amendment. In the past the Court "has been particularly sensitive to the Amendment's broad standard of 'reasonableness' where . . . authorizing statutes permitted the challenged searches." Almeida-Sanchez v United States, 413 US 266, 290, 37 L Ed 2d 596, 93 S Ct 2535 (White, J., dissenting). In United States v Martinez-Fuerte, 428 US 543, 49 L Ed 2d 1116, 96 S Ct 3074,, for example, respondents challenged the routine stopping of vehicles to check for aliens at permanent checkpoints located away from the border. The checkpoints were established pursuant to statutory authority and their location and operation were governed by administrative criteria. The Court rejected respondents' argument that the constitutional reasonableness of the location and operation of the fixed checkpoints should be reviewed in a Camara warrant proceeding. The Court observed that the reassuring purposes of the inspection warrant were adequately served by the visible manifestations of authority exhibited at the fixed checkpoints.

[436 US 335]

Moreover, although the location and method of operation of the fixed checkpoints were deemed critical to the constitutional reasonableness of the challenged stops, the Court did not require Border Patrol officials to obtain a warrant based on a showing that the checkpoints were located and operated in accordance with administrative standards. Indeed, the Court observed that "[t]he choice of checkpoint locations must be left largely to the discretion of Border Patrol officials, to be exercised in accordance with statutes and regulations that may be applicable . . . [and] [m]any incidents of checkpoint operation also must be committed to the discretion of such officials." 428 US, at 559–560, n 13, 49 L Ed 2d 1116, 96 S Ct 3074. The Court had no difficulty assuming that those officials responsible for allocating limited enforcement resources would be "unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class." Id., at 559, 49 L Ed 2d 1116, 96 S Ct 3074.

The Court's recognition of Congress' role in balancing the public interest advanced by various regulatory statutes and the private interest in being free from arbitrary governmental intrusion has not been limited to situations in which, for example, Congress is exercising its special power to exclude aliens. Until today, we have not rejected a congressional judgment concerning the reasonableness of a category of regulatory inspections of commercial

premises.[7] While businesses are unquestionably entitled to Fourth Amendment protection, we have "recognized that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context."

[436 US 336]

G. M. Leasing Corp. v United States, 429 US 338, 353, 50 L Ed 2d 530, 97 S Ct 619. Thus, in Colannade Catering Corp. v United States, 397 US 72, 25 L Ed 2d 60, 90 S Ct 774, the Court recognized the reasonableness of a statutory authorization to inspect the premises of a caterer dealing in alcoholic beverages, noting that "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." Id., at 76, 25 L Ed 2d 60, 90 S Ct 774. And in United States v Biswell, 406 US 311, 32 L Ed 2d 87, 92 S Ct 1593, the Court sustained the authority to conduct warrantless searches of firearm dealers under the Gun Control Act of 1968 primarily on the basis of the reasonableness of the congressional evaluation of the interests at stake.[8]

The Court, however, concludes that the deference accorded Congress in Biswell and Colonnade should be limited to situations where the evils addressed by the regulatory statute are peculiar to a specific industry and that industry is one which has long been subject to Government regulation. The Court reasons that only in those situations can it be said that a person who engages in business will be aware of and consent to routine, regulatory inspections. I cannot agree that the respect due the congressional judgment should be so narrowly confined.

In the first place, the longevity of a regulatory program does not, in my judgment, have any bearing on the reasonableness of routine inspections necessary to achieve adequate enforcement of that program. Congress' conception of what constitute

[436 US 337]

urgent federal interests need not remain static. The recent vintage of public and congressional awareness of the dangers posed by health and safety hazards in the workplace is not a basis for according less respect to the considered judgment of Congress. Indeed, in Biswell, the Court upheld an inspection program authorized by a regulatory statute enacted in 1968. The Court there noted that "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry, but

7. The Court's rejection of a legislative judgment regarding the reasonableness of the OSHA inspection program is especially puzzling in light of recent decisions finding law enforcement practices constitutionally reasonable, even though those practices involved significantly more individual discretion than the OSHA program. See, e.g., Terry v Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383; Adams v Williams, 407 US 143, 32 L Ed 2d 612, 92 S Ct 1921; Cady v Dombrowski, 413 US 433, 37 L Ed 2d 706, 93 S Ct 2523; South Dakota v Opperman, 428 US 364, 49 L Ed 2d 1000, 96 S Ct 3092.

8. The Court held:

"In the context of a regulatory inspection system of business premises that is carefully in time, place, and scope, the legality of the search depends . . . on the authority of a valid statute.

. . . . . .

"We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute." 406 US, at 315, 317, 32 L Ed 2d 87, 92 S Ct 1593.

close scrutiny of this traffic is undeniably" an urgent federal interest. 406 US, at 315, 32 L Ed 2d 87, 92 S Ct 1593. Thus, the critical fact is the congressional determination that federal regulation would further significant public interests, not the date that determination was made.

In the second place, I see no basis for the Court's conclusion that a congressional determination that a category of regulatory inspections is reasonable need only be respected when Congress is legislating on an industry-by-industry basis. The pertinent inquiry is not whether the inspection program is authorized by a regulatory statute directed at a single industry, but whether Congress has limited the exercise of the inspection power to those commercial premises where the evils at which the statute is directed are to be found. Thus, in Biswell, if Congress had authorized inspections of all commercial premises as a means of restricting the illegal traffic in firearms, the Court would have found the inspection program unreasonable; the power to inspect was upheld because it was tailored to the subject matter of Congress' proper exercise of regulatory power. Similarly, OSHA is directed at health and safety hazards in the workplace, and the inspection power granted the Secretary extends only to those areas where such hazards are likely to be found.

Finally, the Court would distinguish the respect accorded Congress' judgment in Colonnade and Biswell on the ground that businesses engaged in the liquor and firearms industry "'accept the burdens as well as the benefits of their trade . . . .'"

[436 US 338]

Ante, at 313, 56 L Ed 2d, at 312. In the Court's view, such businesses consent to the restrictions placed upon them, while it would be fiction to conclude that a businessman subject to OSHA consented to routine safety inspections. In fact, however, consent is fictional in both contexts. Here, as well as in Biswell, businesses are required to be aware of and comply with regulations governing their business activities. In both situations, the validity of the regulations depends not upon the consent of those regulated, but on the existence of a federal statute embodying a congressional determination that the public interest in the health of the Nation's work force or the limitation of illegal firearms traffic outweighs the businessman's interest in preventing a Government inspector from viewing those areas of his premises which relate to the subject matter of the regulation.

The case before us involves an attempt to conduct a warrantless search of the working area of an electrical and plumbing contractor. The statute authorizes such an inspection during reasonable hours. The inspection is limited to those areas over which Congress has exercised its proper legislative authority.[9] The area is also one to which employees

[436 US 339]

have regular access without any suggestion that the work performed or the equipment used

9. What the Court actually decided in Camara v Municipal Court, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727, and See v Seattle, 387 US 541, 18 L Ed 2d 943, 87 S Ct 1737, does not require the result it reaches today. Camara involved a residence, rather than a business establishment; although the Fourth Amendment extends its protection to commercial buildings, the central importance of protecting residential privacy is manifest. The building involved in See was, of course, a commercial establishment, but a holding that

has any special claim to confidentiality.[10] Congress has determined that industrial safety is an urgent federal interest requiring regulation and supervision, and further, that warrantless inspections are necessary to accomplish the safety goals of the legislation. While one may question the wisdom of pervasive governmental oversight of industrial life, I decline to question Congress' judgment that the inspection power is a necessary enforcement device in achieving the goals of a valid exercise of regulatory power.[11]

I respectfully dissent.

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a locked warehouse may not be entered pursuant to a general authorization to "enter all buildings and premises, except the interior of dwellings, as often as may be necessary," 387 US, at 541, 18 L Ed 2d 943, 87 S Ct 1737, need not be extended to cover more carefully delineated grants of authority. My view that the See holding should be narrowly confined is influenced by my favorable opinion of the dissent written by Mr. Justice Clark and joined by Justices Harlan and Stewart. As Colonnade and Biswell demonstrate, however, the doctrine of stare decisis does not compel the Court to extend those cases to govern today's holding.

10. The Act and pertinent regulation provide protection for any trade secrets of the employer. 29 USC §§ 664–665 [29 USCS §§ 664–665]; 29 CFR § 1903.9 (1977).

11. The decision today renders presumptively invalid numerous inspection provisions in federal regulatory statutes. E.g., 30 USC § 813 (Federal Coal Mine Health and Safety Act of 1969) [30 USCS § 813]; 30 USC §§ 723, 724 (Federal Metal and Nonmetallic Mine Safety Act) [30 USCS §§ 723, 724]; 21 USC § 603 (inspection of meat and food products) [21 USCS § 603]. The fact that some of these provisions apply only to a single industry, as noted above, does not alter this fact. And the fact that some "envision resort to federal-court enforcement when entry is refused" is also irrelevant since the OSHA inspection program invalidated here requires compulsory process when a compliance inspector has been denied entry. Ante, at 321, 56 L Ed 2d, at 317.

[436 US 340]

UNITED STATES, Petitioner,

v

JOHN MAURO AND JOHN FUSCO (No. 76–1596)

UNITED STATES, Petitioner,

v

RICHARD THOMPSON FORD (No. 77–52)

436 US 340, 56 L Ed 2d 329, 98 S Ct 1834

[Nos. 76–1596 and 77–52]

Argued February 27, 1978. Decided May 23, 1978.

SUMMARY

In these two, consolidated cases, the major questions presented were whether a writ of habeas corpus ad prosequendum, issued by a Federal District Court to state prison authorities to secure the presence of a state prisoner in the federal court to stand trial on federal criminal charges, constituted either a "detainer" or a "written request for temporary custody" within the meaning of the Interstate Agreement on Detainers (see 18 USCS App)—which prescribes procedures by which a member state (including the United States) may obtain for trial a prisoner incarcerated in another member jurisdiction by filing a "detainer" and a "request" for temporary custody. In the first case (No. 76–1596), the United States District Court for the Eastern District of New York issued writs of habeas corpus ad prosequendum to New York prison authorities to secure the presence of two state prisoners for arraignment on federal criminal charges. After the prisoners pleaded not guilty, and after their trial dates were set, the District Court, because of overcrowded federal facilities, directed that the prisoners be returned to their respective state prisons to await their federal trials. Subsequently, the District Court granted the prisoners' motions to dismiss the indictments, holding that the Agreement governed their removal from state custody by means of the writs of habeas corpus ad prosequendum, and that the government had violated the Agreement's requirement that a prisoner must be tried in the receiving state before being returned to the

Briefs of Counsel, p 834, infra.

[8, 9] If a court does stay the statutory claim, it must nonetheless "consider the employee's [statutory] claim *de novo*." *Alexander*, 415 U.S. at 60, 95 S.Ct. at 1025. The findings of the arbitrator on factual matters "may be admitted as evidence and accorded such weight as the court deems appropriate." *Id.* In its consideration of the weight to be given the arbitrator's decision, the court should consider the adequacy of the record with respect to the section 510 claim, the procedures used in the arbitral forum, and the significance of new evidence that has been produced through pretrial discovery. *Cf. Alexander*, 415 U.S. at 60 n. 21, 95 S.Ct. at 1025 n. 21 (factors to consider in exercising discretion to accept arbitral findings in Title VII case). In the end, the court must exercise its discretion based on the circumstances of each individual case, while keeping in mind that the courts are the forum that must ultimately decide these statutory claims. *Id.*

CONCLUSION

We reverse the district court's finding that the decision on the first grievance is res judicata of the employees' statutory claim. We remand the case to the district court to decide whether the statutory claim should be stayed pending the determination of the August 13, 1981 grievance. When the employees proceed with their statutory claim, the claim must be considered *de novo*, subject to the appropriate deference due the arbitrator's findings on factual matters.

John R. BALELO, Andrew Castagnola, Leo Correia, Manuel S. Jorge, Bryan R. Madruga, Harold Medina, John A. Silva, Ralph F. Silva, Jr., George Sousa, Manuel S. Vargas, Jr., John B. Zolezzi, Jr., Plaintiffs-Appellees,

v.

Malcolm BALDRIGE, Secretary of Commerce of the United States, Richard A. Frank, Administrator, National Oceanic and Atmospheric Administration and Terry Leitzell, Assistant Administrator for Fisheries, National Marine Fisheries Service, Defendants-Appellants,

Environmental Defense Fund, Inc., et al., Intervenors-Defendants-Appellants.*

UNITED STATES of America, Plaintiff,

v.

$50,178.80, THE MONETARY VALUE OF 57 TONS OF TUNA, Defendant,

Gladiator Fishing, Inc., Claimant.**

Nos. 81-5806, 81-5807 and 82-5433.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted En Banc Sept. 15, 1983.

Decided Jan. 24, 1984.

Action was brought challenging validity of regulation requiring vessel owners to consent to placement of observers, who could collect data which could be used in civil or criminal penalty proceedings against owners, as condition of obtaining commercial fishing permit under the Marine Mammal Protection Act. The United States District Court for the Southern District of California, Gordon Thompson, Jr., J., 519 F.Supp. 573, granted declaratory judgment invalidating the regulation, and the Secretary of Commerce appealed. This appeal was taken en banc along with an appeal from an order of the United States District Court for the Central District of California,

* Appeal from the United States District Court for the Southern District of California Gordon Thompson, Jr., District Judge, Presiding.

** Appeal from the United States District Court for the Central District of California Laughlin Waters, District Judge, Presiding.

Laughlin E. Waters, J., on remand, 698 F.2d 1233, denying a motion to suppress evidence of observer-collected data in a civil forfeiture proceeding. The Court of Appeals, Alarcon, Circuit Judge, held that: (1) regulation, although not expressly authorized by the Act, was implicitly authorized by the broad rule-making power delegated to the Secretary by the Act, and (2) the closely regulated industry exception to the Fourth Amendment applied to the regulation.

Judgment of the Southern District reversed and remanded; judgment of Central District affirmed.

Pregerson, and Nelson, Circuit Judges, filed concurring opinions.

Tang, Circuit Judge, filed a dissenting opinion in which Ferguson, Circuit Judge, joined and Canby, Circuit Judge, joined in part.

Ferguson, Circuit Judge, filed a dissenting opinion.

1. Fish ⇐16

Regulation requiring vessel owners to consent to placement of observers, who could collect data which could be used in civil or criminal penalty proceedings against owners, as condition of obtaining commercial fishing permit under Marine Mammal Protection Act, although not expressly authorized by the Act, was valid where it was implicit in broad rule-making authority delegated to Secretary of Commerce to implement the Act and was consistent with objective and directives of the Act and where Congress amended the Act without disturbing the regulation. Marine Mammal Protection Act of 1972, §§ 103(a, f), 104, 104(d)(1), (f, h), as amended, 16 U.S.C.A. §§ 1373(a, f), 1374, 1374(d)(1), (f, h).

2. Fish ⇐16

Fact that Congress authorized funds only for program placing observers on vessels for which fishing permits under the Marine Mammal Protection Act had been obtained did not indicate intent to ban observer program at end of the two years porpoise but thereafter Secretary of Commerce was authorized to waive moratorium and to adopt appropriate regulations. Marine Mammal Protection Act of 1972, §§ 101, 101(a)(2), (a)(3)(A), 103, as amended, 16 U.S.C.A. §§ 1371, 1371(a)(2), (a)(3)(A), 1373.

3. Fish ⇐16

Fact that bill to authorize use for enforcement purposes of data collected from observers placed on vessels which had obtained commercial fishing permits under the Marine Mammal Protection Act was introduced but not enacted did not demonstrate congressional disapproval of observer program where subsequent amendment of the Act did not alter power of Secretary of Commerce to continue the program. Marine Mammal Protection Act of 1972, § 101, as amended, 16 U.S.C.A. § 1371.

4. Searches and Seizures ⇐7(1)

Search within meaning of Fourth Amendment involves governmental prying into hidden places for that which is concealed by persons exhibiting legitimate expectation of privacy. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures ⇐7(10)

Regulation requiring vessel owner to consent to placement of observers, who could collect data which could be used in civil or criminal penalty proceedings against owners, as condition of obtaining commercial fishing permits under Marine Mammal Protection Act, did not violate Fourth Amendment since it was authorized by closely regulated industry exception to warrant requirement and was reasonable. Marine Mammal Protection Act of 1972, § 101, as amended, 16 U.S.C.A. § 1371; U.S.C.A. Const.Amend. 4.

Raymond F. Zvetina, Haskins, Nugent, Newham, Kane & Zvetina, San Diego, Cal., Shirli Fabbri Weiss, Gray, Cary, Ames &

Wayne S. Braverman, Tuttle & Taylor, Dept. of Justice, Washington, D.C., for defendants-appellants in Nos. 81-5806 and 81-5807; William N. Kammer, Gray, Cary, Ames, & Frye, San Diego, Cal., for defendants-appellants in No. 82-5433.

Appeals from the United States District Courts for the Southern and Central Districts of California.

Before BROWNING, SNEED, KENNEDY, ANDERSON, TANG, SCHROEDER, PREGERSON, ALARCON, FERGUSON, NELSON and CANBY, Circuit Judges.

ALARCON, Circuit Judge:

In *Balelo v. Klutznick*, 519 F.Supp. 573 (S.D.Cal.1981), plaintiffs-appellees, who are captains of tuna purse seiners (hereinafter the Captains), instituted this action against defendants-appellants (hereinafter the Secretary) seeking declaratory and injunctive relief.[1] The district court granted a declaratory judgment invalidating subsection (f) of regulation 50 C.F.R. § 216.24 (1981) promulgated by the Secretary of Commerce[2] pursuant to the Marine Mammal Protection Act (hereinafter MMPA), 16 U.S.C. § 1371.

Under the regulation, the Captains are permitted to take porpoise during commercial fishing operations only if they comply with certain conditions.[3] They must allow government observers to board and accompany the vessel on regular fishing trips "for the purpose of research or observing operations." 50 C.F.R. 216.24(f). The regulation further authorizes the collection of data which may be used in MMPA enforcement proceedings. *Id.* The district court ruled that the regulation was unconstitutional only insofar as it permitted the use of observer collected data in MMPA enforcement proceedings.

In *United States v. $50,178.80, the Monetary Value of 57 Tons of Tuna and Gladiator Fishing, Inc.*, Cv. No. 79-4466-LEW (MX) (C.D.Cal. April 21, 1982), a civil forfeiture proceeding, the district court denied a motion to suppress evidence of observer collected data.

We have taken these matters en banc to consider whether the regulation is valid under the MMPA, and if so, whether it violates the fourth amendment. For the reasons set forth below, we have concluded that: (1) the regulation was authorized under the broad rule-making power delegated by Congress to the Secretary; (2) the regulation is consistent with the policies and objectives of the MMPA; and (3) the regulation falls within the pervasively regulated industry exception to the warrant requirement of the fourth amendment.

FACTUAL AND STATUTORY BACKGROUND

The Captains utilize a method of fishing for yellow-fin tuna which results in the incidental taking[4] of certain species of por-

1. Defendants-appellants include: the Secretary of Commerce; the Administrators of National Oceanic and Atmospheric Administration (NOAA) and National Marine Fisheries Service (NMFS), the Assistant Administrator for Fisheries; the Environmental Defense Fund, Inc.; and the Defenders of Wildlife.

2. The Secretary delegated authority to carry out the provisions of the MMPA to the NOAA Administrator and the Assistant Administrator for Fisheries of the NMFS.

3. *See*, e.g., 50 C.F.R. § 216.24(a)(1) (1981): which states that:

> No marine mammals may be taken in the course of a commercial fishing operation unless: The taking constitutes an incidental catch . . ., a general permit and certificate(s) of inclusion have been obtained and such taking is not in violation of such permit, certificate(s) and regulation.

Section (c)(2) provides that "[i]n order to receive a certificate of inclusion, the operator shall have satisfactorily completed required training." 50 C.F.R. § 216.25(c)(2) (1981). The certificate of inclusion must be renewed annually.

4. 50 C.F.R. § 216.3 (1981) provides that:

> "Take" means to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill, any marine mammal, including, without limitation, any of the following: The collection of dead animals, or parts thereof; the restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; or the negligent or intentional operation of an aircraft or ves-

poise. Porpoise tend to swim in association with yellow-fin tuna in the eastern tropical Pacific. The porpoise is larger and more active on the ocean's surface. Thus, the Captains can locate yellow-fin tuna by spotting porpoise. Purse seine nets are then set around schools of porpoises. The tuna swimming beneath them are encircled when the net is closed or "pursed" around them. During this operation, significant numbers of porpoise are injured or drowned. Their carcasses are discarded into the sea. In the two years preceding the enactment of the MMPA in 1972, the incidental taking resulted in more than 600,000 porpoise mortalities. *Committee for Humane Legislation Inc. v. Richardson*, 414 F.Supp. 297, 300 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C.Cir.1976).

Congress' overriding purpose in enacting the MMPA was the protection of marine mammals. Congress declared the immediate goal of the MMPA to be "that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." 16 U.S.C. § 1371(a)(2) (1976–1982). To accomplish this goal, Congress imposed a moratorium on the taking and importing of marine mammals. 16 U.S.C. § 1371(a) (1976–1982). A two-year exemption from the moratorium for the taking of marine mammals incidental to commercial fishing operations was allowed. 16 U.S.C. § 1371(a)(2) (1976), *amended by* 16 U.S.C. § 1371(a)(2) (1982). The legislative history indicates that the exemption was provided "for the refinement of these fishing gear modifications" which industry representatives proffered as a solution to the porpoise mortality problem. *Committee for Humane Legislation*, 414 F.Supp. at 301.[5] In addition, the Act directed the "immediate" undertaking of a research and development program to devise improved fishing methods and gear so as to reduce the incidental taking of marine mammals in connection with commercial fishing. 16 U.S.C. § 1381(a) (1976).

Although the commercial fishing industry was exempted for two years from the moratorium, the incidental taking of mammals during this time was conditioned on industry compliance with section 1381.[6] *See,*

sel, or the doing of any other negligent or intentional acts which result in the disturbing or molesting of a marine mammal.

5. The testimony quoted by the court is that of Captain Joe Medina who reported the results of a new and old tests and asserted that the problem was "licked." *Committee for Humane Legislation, Inc. v. Richardson*, 414 F.Supp. at 301 n. 8 (quoting *Hearings on H.R. 10420 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 1st Sess., part 1, at 348 (testimony of Captain Joe Medina)). Thus, "Congressman Pelly . . . proposed a temporary moratorium . . . 'to give the tuna fisheries association an opportunity to develop what they indicate is certainly a solution.'" *Committee for Humane Legislation*, 414 F.Supp. at 301 n. 9 (quoting *Hearing on H.R. 10420, supra*, at 407).

6. 16 U.S.C. § 1381 (1976) provides:
Commercial fisheries gear development
(a) *Research and development program; report to Congress; authorization of appropriations.*
The Secretary of the department in which the National Oceanic and Atmospheric Administration is operating (hereinafter referred to in this section as the "Secretary") is hereby authorized and directed to immediately undertake a program of research and development for the purpose of devising improved fishing methods and gear so as to reduce to the maximum extent practicable the incidental taking of marine mammals in connection with commercial fishing. At the end of the full twenty-four calendar month period following the date of the enactment of this Act [enacted Oct. 21, 1972], the Secretary shall deliver his report in writing to the Congress with respect to the results of such research and development. For the purposes of this section, there is hereby authorized to be appropriated the sum of $1,000,000 for the fiscal year ending June 30, 1973, and the same amount for the next fiscal year. Funds appropriated for this section shall remain available until expended.
(b) *Reduction of level of taking of marine mammals incidental to commercial fishing operations.*
The Secretary, after consultation with the Marine Mammal Commission, is authorized and directed to issue, as soon as practicable, such regulations, covering the twenty-four-month period referred to in section [1371] of this title as he deems necessary or advisable, to reduce to the lowest practicable level the taking of marine mammals incidental to com-

e.g., 16 U.S.C. § 1371(a)(2) (1976), *amended by* 16 U.S.C. § 1371(a)(2) (1982). Subsection (d) of section 1381 requires the industry to allow agents of the Secretary "to board and to accompany any commercial fishing vessel ... on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section." 16 U.S.C. § 1381(d) (1976–1982). Since expiration of this two-year exemption in 1974, the taking of marine mammals incidental to commercial fishing must be pursuant to a permit issued by the Secretary, 16 U.S.C. § 1371(a)(2), "subject to regulations prescribed by the Secretary in accordance with section 1373." 16 U.S.C. § 1371(a)(2) (1976–1982).

Section 1373 requires the Secretary to consider, in promulgating the regulations, the "existing and future levels of marine mammal species and population stocks," 16 U.S.C. § 1373(b)(1) (1976–1982), and the "marine ecosystem and related environmental considerations," 16 U.S.C. § 1373(b)(3) (1976–1982). The regulations may also restrict the taking of porpoise by species, number, age, sex, or other factors. 16 U.S.C. § 1373(c) (1976–1982). In addition to the rule-making authority conferred upon the Secretary, 16 U.S.C. § 1373, the MMPA provides for the imposition of civil and criminal penalties for violations of the provisions of the Act or the regulations or permits issued thereunder. 16 U.S.C. § 1375(a) (1982).

In 1974, the Secretary promulgated a regulation, 50 C.F.R. § 216.24(f) (1974), in language virtually identical to that set forth in section 1381,[7] the statutory observer program, that required the placement of observers on vessels.

Pursuant to the powers granted under the MMPA, the Secretary promulgated the regulation at issue here. The challenged regulation, effective January 1, 1981, requires as a condition of engaging in fishing operations that vessel owners:

> (1) ... [S]hall, upon the proper notification by the [NMFS], allow an observer duly authorized by the secretary to accompany the vessel on any or all regular fishing trips for the purpose of conducting research and observing operations, *including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions.*
>
> * * * * * *
>
> (4) The Secretary shall provide for the payment of all reasonable costs directly related to the quartering and maintaining of such observers on board such vessels. A vessel certificate holder who has been notified that the vessel is required to

mercial fishing operations. Such regulations shall be adopted pursuant to section 553 of title 5, United States Code. In issuing such regulations, the Secretary shall take into account the results of any scientific research under subsection (a) of this section and, in each case, shall provide a reasonable time not exceeding four months for the persons affected to implement such regulations.

* * * * * *

(d) *Research and observation.*
Furthermore, after timely notice and during the period of research provided in this section, duly authorized agents of the Secretary are hereby empowered to board and to accompany any commercial fishing vessel documented under the laws of the United States, there being space available, on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section. Such research and observation shall be carried out in such manner as to minimize interference with fishing operations. The Secretary shall provide for the cost of quartering and maintaining such agents. No master, operator, or owner of such a vessel shall impair or in any way interfere with the research or observation being carried out by agents of the Secretary pursuant to this section.

7. 50 C.F.R. § 216.14(f) (1974), *amended by* 50 C.F.R. § 216.14(f) (1981) provides in part:

> Any duly authorized agents of the Secretary may from time to time, after timely oral or written notice to the vessel owner ..., board and/or accompany commercial fishing vessels ... on regular fishing trips, for the purpose of conducting research or observing operations ....

To compare the text of section 1381(d), the statutory observer program, *see* note 6 *supra*.

carry an observer, via certified letter from the National Marine Fisheries Service, shall notify the office from which the letter was received at least five days in advance of the fishing voyage to facilitate observer placement. *A vessel certificate holder who has failed to comply with the provisions of this section may not engage in fishing operations for which a general permit is required.*

50 C.F.R. § 216.24(f) (1981) (emphasis added).[8]

The Captains appear to have no objection to the observers' scientific role on board ship. Their objection is directed solely at those provisions of the 1981 regulation which authorize the use of observer collected data in enforcement proceedings. In the Captain's opening brief we are told that: "The District Court's injunction properly stripped the observer program of its unauthorized and impermissible *search* function and restored it to its pristine role of pure scientific fact-gathering." Appellees' opening brief at 9 (emphasis added).

IMPLIED CONGRESSIONAL AUTHORIZATION

[1] The first issue we must address is whether the 1981 regulation is authorized by the rule-making power delegated by Congress to the Secretary. *See FCC v. Schreiber*, 381 U.S. 279, 290, 291, 85 S.Ct. 1459, 1467, 1468, 14 L.Ed.2d 383 (1965) (Court first addressed whether regulation promulgated by agency was authorized by statute); *Haig v. Agee*, 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981) (same).

The Captains argue that the regulation prescribing the observer program is invalid because it was not expressly authorized by Congress. The Captains contend that the observer program is a constitutionally questionable method of enforcing regulatory schemes and that under *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) authorization for such a rule cannot be found absent an explicit congressional grant. *Greene* does not stand for the proposition that Congress must expressly authorize any action which might be challenged on constitutional grounds. Rather, the case indicates that Congress will not be presumed to have authorized agency methods which depart radically from accepted norms. In the matter before us, we are being asked to decide whether a particular warrantless search is authorized by Congress and whether that search violates the fourth amendment. Merely because some warrantless searches may violate the fourth amendment, it does not follow that no warrantless search may be undertaken pursuant to federal law absent express congressional authorization. Unlike the types of procedures at issue in *Greene*, certain types of warrantless searches have traditionally

8. Subsections (2) and (3) and section (g) provide:

(2) Research and observation duties shall be carried out in such a manner as to minimize interference with commercial fishing operations. The navigator shall provide true vessel locations by latitude and longitude, accurate to the nearest minute, upon request by the observer. No owner, master, operator, or crew member of a certified vessel shall impair or in any way interfere with the research or observations being carried out.

(3) Marine mammals killed during fishing operations which are accessible to crewmen and requested from the certificate holder or master by the observer shall be brought aboard the vessel and retained for biological processing, until released by the observer for return to the ocean. Whole marine mammals designated as biological specimens by the observer shall be retained in cold storage aboard the vessel until retrieved by authorized personnel of the National Marine Fisheries Service when the vessel returns to port for unloading.

* * * * * *

(g) *Penalties and rewards:* Any person or vessel subject to the jurisdiction of the United States shall be subject to the penalties provided for under the Act for the conduct of fishing operations in violation of these regulations. The Secretary shall recommend to the Secretary of the Treasury that an amount equal to one-half of the fine incurred but not to exceed $2,500 be paid to any person who furnishes information which leads to a conviction for a violation of these regulations. Any officer, employee, or designated agent of the United States or of any State or local government who furnishes information or renders service in the performance of his official duties shall not be eligible for payment under this section.

50 C.F.R. § 216.24(f), (g) (1981).

been recognized as constitutionally valid. *See Henderson v. United States*, 390 F.2d 805 (9th Cir.1967) (border searches); *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) (search incident to arrest); *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) (inventory searches); *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) (exigent circumstances); *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (regulated industry searches). Nothing in *Greene* prohibits us from determining whether Congress implicitly authorized the observer program. In our discussions below, we reject the contentions that the observer program substantially departs from accepted methods of enforcing regulatory schemes, and the *Greene* case is therefore inapplicable.

To determine whether the regulation was authorized by Congress, we must analyze the language of the statute. *Haig v. Agee*, 453 U.S. 280, 289–90, 101 S.Ct. 2766, 2773, 69 L.Ed.2d 640 (1981). Section 1371 of the MMPA provides in pertinent part:

> There shall be a moratorium on the taking and importation of marine mammals.... Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 1374 ... subject to regulations prescribed by the Secretary in accordance with section 1373.... The Secretary ... is authorized and directed ... to determine when, *to what extent, if at all, and by what means, it is compatible with this chapter to waive the requirements of this section so as to allow taking, or importing of any marine mammal*, ... and to adopt suitable regulations, issue permits, and make determinations ... permitting and governing such taking and importing....

16 U.S.C. § 1371 (1976–1982) (emphasis added).

Section 1373 provides that the Secretary "shall prescribe such regulations with respect to the taking ... as he deems *necessary and appropriate to insure* that such taking will not be to the disadvantage of those species ... and will be consistent with the purposes and policies set forth in section 1361." 16 U.S.C. § 1373(a) (1976–1982) (emphasis added). The Secretary is required to report to Congress every twelve months on the status of the species and "to describe those actions taken and those measures believed necessary, including where appropriate, the issuance of permits ... to assure the well being of such marine mammals." 16 U.S.C. § 1373(f).

Section 1374 provides that the Secretary may issue permits and that he "shall prescribe such procedures *as are necessary to carry out this section.*" 16 U.S.C. § 1374(d)(1) (emphasis added). In addition, the applicant for any permit "*must demonstrate to the Secretary that the taking ... under such permit will be consistent with the purposes of this Chapter ... and the applicable regulations established under section* [1373]." *Id.* at § 1374 (emphasis added). The Secretary may issue general permits for the "taking of marine mammals" together with regulations to cover the use of such permits which are "[c]onsistent with the regulations prescribed pursuant to section 1373 ... and the requirements of section 1371." 16 U.S.C. § 1374(h).

It is quite true that the MMPA does not expressly confer upon the Secretary a power to impose, as a condition of obtaining a permit, the stationing of an observer on a vessel. In our view, however, that power is implicit in the broad rule-making authority expressly delegated to the Secretary. *See Haig v. Agee*, 453 U.S. at 291, 101 S.Ct. at 2773–2774 (Secretary of State's power to revoke passports is implicit in broad rule-making authority conferred upon the Secretary by the Passport Act).

The Supreme Court has admonished that even though a statute does not explicitly delegate a specific action, "particularly in light of the 'broad rule-making authority granted' ... a consistent administrative construction of that statute must be followed by the courts " 'unless there are compelling indications that it is wrong' " ...." *Haig v. Agee*, 453 U.S. at 291, 101 S.Ct. at

2774. (citations omitted.) Accordingly, the specific content of the regulation need not be expressly authorized. The regulation is proper so long as it conforms to the fundamental objective of the Act, rationally complements its remedial scheme, *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11, 12, 100 S.Ct. 883, 890, 891, 63 L.Ed.2d 154 (1980), and "the policy [thereby] announced ... is 'sufficiently substantial and consistent' to compel the conclusion that Congress approved it." *Haig*, 453 U.S. at 307, 101 S.Ct. at 2782 (quoting *Zemel v. Rusk*, 381 U.S. 1, 12, 85 S.Ct. 1271, 1279, 14 L.Ed.2d 179 (1965)). *Accord Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660–61, 36 L.Ed.2d 318 (1973); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177, 88 S.Ct. 1994, 2005, 20 L.Ed.2d 1001 (1968) ("We may not in the absence of compelling evidence that such was not Congress' intention ... prohibit administrative action imperative for achievement of an agency's ultimate purposes."). (citation omitted); *American Trucking Ass'n v. United States*, 344 U.S. 298, 310, 73 S.Ct. 307, 314–15, 97 L.Ed. 337 (1953) (Congress creates regulatory agencies so that they will bring to their work the expert's familiarity with industry conditions that delegating legislatures cannot be expected to possess).

In *Mourning*, the Supreme Court upheld the power of the Federal Reserve Board to promulgate regulation "Z" pursuant to the Board's broad rule-making authority under the Truth and Lending Act. 15 U.S.C. § 1604. The Court emphasized that:

> Where the empowering provision of a statute states simply that the agency may "make ... such rules and regulations as may be necessary to carry out the provisions of this Act," ... a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation."

411 U.S. at 369, 93 S.Ct. at 1660–1661. (citations omitted).

It appears to us that the regulation at issue here is consistent with the objective and directives of the MMPA. Requiring the Captains to consent to the placement of observers on their vessels as a condition of obtaining a fishing permit is reasonably related to the purposes of the enabling legislation. The paramount purpose of the Act is "the protection and conservation of marine mammals." 16 U.S.C. § 1371.[9] As the D.C. Circuit has observed, the MMPA is to be administered "for the benefit of protected species, rather than for the benefit of commercial exploitation." *Committee for Humane Legislation*, 540 F.2d at 1148.

Effective implementation of the MMPA would be impossible without the use of observers for enforcement purposes. Under the MMPA, any incidental taking of marine mammals must be pursuant to a permit issued by the Secretary. 16 U.S.C. § 1371. The permits must specify such factors as the number, kind, age, sex, and location of the mammals to be taken. 16 U.S.C. § 1374(b). Such limitations are necessary to assure that the MMPA's goal of reducing marine mammal mortality to the minimum practical is met.

The affidavit offered by the government on its motion for summary judgment discloses that the use of on-board observers is the only practicable method of enforcing the limitations in MMPA permits. The tuna vessels subject to the Secretary's regulation operate over thousands of square miles of open ocean for months at a time. No independent surveillance program could

9. In its Declaration of Policy, Congress stated:
> [T]hat the protection and conservation of marine mammals is therefore necessary .... Marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the optimum carrying capacity of the habitat.

16 U.S.C. § 1361 (1976–1982).

hope to be able to verify whether or not a particular vessel complied with its trip quota. Even if such a technically feasible surveillance program were available, its costs would be prohibitive. The observer program is thus "necessary and appropriate to insure that such taking will not be to the disadvantage of those species . . . and will be consistent with the purposes and policies set forth in the [MMPA]." 16 U.S.C. § 1373(a). Because the observer program is necessary for the enforcement of the MMPA, it is within the authority granted to the Secretary by Congress. *See Southwestern Cable*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (authority normally presumed for regulations necessary to enforce its statutory mandate); *cf. Mourning*, 411 U.S. at 371–72, 93 S.Ct. at 1662 ("That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority."). In addition, the Secretary could not fulfill his duty under the MMPA to make annual reports to Congress if the observer program were discontinued. *See* 16 U.S.C. § 1373(f); *cf. FCC v. Schreiber*, 381 U.S. at 294, 85 S.Ct. at 1469–1470 (rule promulgated by FCC necessary to execute its duty to make annual reports to Congress).

In upholding the regulation, we are impressed by the fact that Congress, through oversight hearings, was made aware of the continued existence of the observer program. Congress was informed through hearings conducted from 1976 to 1981 that information gathered by observers might be used in penalty proceedings.[10] In 1981, Congress amended the MMPA and did not disturb the Secretary's broad-rule making authority in spite of this regulation.[11] *See Haig v. Agee*, 453 U.S. at 301 & n. 50, 101 S.Ct. at 2779 & n. 50 (quoting *Zemel v. Rusk*, 381 U.S. at 21, 85 S.Ct. at 1283 (fact that Congress left rule-making authority untouched while amending Act gives rise to presumption that Congress has adopted the construction)). Thus, as in *Haig v. Agee*, "the inference of congressional approval 'is supported by more than mere congressional inaction.'" 453 U.S. at 301, 101 S.Ct. at

10. *See, e.g., Hearings on Tuna-Porpoise Amendments Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine Fisheries*, 94th Cong., 2d Sess., Ser. 29 (1976) at 352–53 (government compliance plan to court's order in *Committee for Humane Legislation, Inc. v. Richardson*, 414 F.Supp. 297 (D.D.C.) *aff'd*, 540 F.2d 1141 (D.C.Cir.1976)); *Hearings on Oversight of the Tuna-Porpoise Problem Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 2d Sess., Ser. 45 (1976) at 212 (remarks of Dr. White); *id.* at 223–24, 262 (remarks of Dr. Fox); *Hearings on Reducing Porpoise Mortality Before the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 3 (1977) at 209–10, 213, 216–17 (remarks of Dr. White); *Hearings of Tuna-Porpoise Oversight Before the House Comm. on Merchant Marine and Fisheries*, at 463 (remarks of Mr. Bonker); *id.* at 465–66 (remarks of Mr. McCloskey); *Hearings on Oversight into the Marine Mammal Protection Act Before the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess., Ser. 12 at 17 (1977) (remarks of Dr. White); *Hearings on Marine Mammal Protection Act Authorization Before Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 1st Sess., Ser. 8 at 81–82 (1981) (remarks of Mr. Breaux and Mr. Burney); *id.* at 83–86 (remarks of Mr. Hertel and Mr. Burney).

11. *See* Pub.L. No. 97–58, 95 Stat. 979, *codified at* 16 U.S.C. § 1371(a)(2) (1982).

As one official explained, the observers started gathering compliance data in 1976. *Hearings on Reducing Porpoise Mortality and Tuna-Porpoise Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 465–66 (1977). The government compliance plan submitted in accordance with the order in *Committee for Humane Legislation, Inc. v. Richardson*, 540 F.2d 1141 (D.C.Cir.1976), was also the subject of 1977 oversight hearings, *e.g., Hearings on Marine Mammal Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 20–24 (1977) (use of observers to collect information on compliance is more effective than aircraft surveillance).

2779. (quoting *Zemel v. Rusk*, 381 U.S. 1, 11–12, 85 S.Ct. 1271, 1283, 14 L.Ed.2d 179 (1965)); *cf. Fredericks v. Kreps*, 578 F.2d 555, 563 (5th Cir.1978) (en banc) (congressional oversight committee's awareness of regulations before they were put into effect reinforces determination that regulation is consistent with Congress' intent). *See also Andrus v. Allard*, 444 U.S. 51, 57, 100 S.Ct. 318, 322, 62 L.Ed.2d 210 (1979) (Court upheld regulation noting that Congress twice reviewed and amended the Act without rejecting the Department's view that it was authorized under the Eagle Protection Act, 16 U.S.C. § 688, to bar sale of preexisting artifacts); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–75, 94 S.Ct. 1757, 1761–62, 40 L.Ed.2d 134 (1974) (great weight may be accorded a long standing interpretation of a statute by an agency charged with its administration especially where Congress has reenacted the statute without pertinent change; failure to repeal or revise the agency's interpretation is persuasive evidence that Congress intended the interpretation).

[2] The Captains advance two arguments against this construction. The first is that since Congress explicitly authorized funds for an observer program for only two years, 16 U.S.C. § 1381, the Secretary's regulation adopting an observer program beyond this two-year period exceeds statutory authority. As noted earlier, the legislative history suggests, and the statute itself reflects, that this program was adopted to enable the Secretary to observe the industry's utilization of advanced gear which purportedly would protect marine mammals.[12] Moreover, the program was a *condition* to the industry's incidental taking of porpoise during the *exemption* from the moratorium. 16 U.S.C. § 1371(a)(2) (1976), *amended by* 16 U.S.C. § 1371 (1982). Thereafter, the *Secretary* was authorized to waive the moratorium pursuant to regulations he deemed necessary and appropriate. *Id.;* 16 U.S.C. § 1373. Certainly, if Congress deemed the observer program a necessary condition to allowing the industry an exemption from the moratorium to ensure the protection of marine mammals, it is not unreasonable for the Secretary, in waiving the moratorium, to so condition the issuance of a permit for commercial fishing. The fact that funding for the statutory program was authorized by Congress only during the industry's two-year exemption does not indicate to us that Congress intended to *ban* the use of observer programs.

Further, the expiration of the statutory observer program and the termination of the industry's exemption from the moratorium on takings imposed by the MMPA coincided with the commencement of the rule-making authority delegated to the Secretary. 16 U.S.C. § 1371(a)(2) (1976), *amended by* 16 U.S.C. § 1371(a)(2) (1982). This suggests that Congress meant what the MMPA clearly states: The *Secretary* would have the broad authority to "determine when, to what extent, *if at all, and by what means,* it is compatable with ... [the MMPA] to allow taking ... of any marine mammal, ... and to adopt suitable regulations, issue permits, and make determinations ... permitting and governing such taking." 16 U.S.C. § 1371(a)(3)(A) (1976–1982) (emphasis added).

We believe that section 1381 of the MMPA, which expressly included an observer program, provided the Secretary with a model of Congress' view as to what was necessary to carry out the purposes of the statute.

[3] The Captains' second argument is that since the House approved a bill in May of 1977[13] that explicitly authorized the use of observer data for enforcement purposes, but the Senate did not act upon it, congressional *disapproval* must be inferred. The House Oversight Committee, however, was well aware of the continued existence of the observer program and the fact that the

12. *See* note 6 *supra*.

13. H.R. 6970 would have amended 16 U.S.C. § 1381 to provide that an observer program for 400 ton capacity vessels should be established and maintained. The observer's responsibilities would have included determining compliance with MMPA regulations.

Senate might not act on the bill.[14] The Committee was informed that existing funds were not adequate to staff all such vessels. Committee members expressed concern that the bill, which would have authorized additional funding for the observer program to staff all vessels with a capacity of four hundred or more tons,[15] might not be acted upon by Congress. This concern stemmed from the discrepancy in numbers of porpoise mortalities reported by observed and unobserved vessels and the belief that the observer program was the only means of obtaining accurate information.[16] We have found nothing in the 1977 or 1978 hearings of the Oversight Committee that suggests that the Committee disapproved of the collection of compliance data. When Congress amended the MMPA in 1981, it did nothing to alter Secretary's power to continue the existence of the observer program. Thus, we conclude that the mere failure of the bill to be enacted does not demonstrate congressional disapproval of the observer program. *Cf. American Trucking Association v. U.S.*, 344 U.S. 298, 309 n. 10, 73 S.Ct. 307, 314 n. 10, 97 L.Ed. 337 (1952) (fact that Act as originally drafted defined commerce to include leasing but lease terminology was stricken was of no consequence to Interstate Commerce Commission's implied power to regulate leasing practices).

The Captains also contend that the observer program exceeds the Secretary's rule-making authority under the MMPA because section 1377 narrowly defines the acceptable enforcement procedures. The observer program is said to be in direct conflict with section 1377, which allows warrantless searches if there exists reasonable cause to believe a vessel is in violation of the MMPA. We disagree.

Section 1377 provides that "the Secretary shall enforce the provisions" of the MMPA, 16 U.S.C. § 1377(a). The statute provides further that its provisions concerning enforcement by arrest, search and seizure, are "in addition to any other authority conferred by law[.]" 16 U.S.C. § 1377(d). Thus, section 1377 does not limit enforcement procedures to those expressly authorized in that section. The regulation prescribing the observer program comes within the meaning of "other authority conferred by law" as used in section 1377.

CONSTITUTIONALITY OF THE REGULATION

The Captains contend that the regulation authorizes a warrantless search in violation of the fourth amendment.

[4] Whether the observer program constitutes a search is a question which is not free from doubt. This circuit has held that not every boarding of a vessel constitutes a search. *United States v. Olander*, 584 F.2d 876, 888 (9th Cir.1978) (boarding to serve process is not a search), *vacated on other grounds sub nom. Harrington v. United States*, 443 U.S. 914, 99 S.Ct. 3104, 61 L.Ed.2d 878 (1979). A search within the meaning of the fourth amendment involves governmental prying into hidden places for that which is concealed by persons exhibiting a "legitimate expectation of privacy." *See Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). The regulation does not authorize an inspection of private papers, nor a search of the person, or the personal effects of the Captains or their crews. Instead, the observers must confine their observations to the fishing operations of the vessel, which occur on the open sea or on deck. Thus, the information they may gather is restricted to evidence which is in plain view. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v.*

14. *Hearings on Reducing Porpoise Mortality and Tuna-Porpoise Oversight Before Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess., 455–56, 463, 465–66 (1977) (remarks of Dr. Fox and Mr. Frank).

15. *Id.* at 4631 (colloquy between Congressman Bonker and Mr. Frank, the NOAA administrator).

16. *Id.*

United States, 389 U.S. 347 at 351, 88 S.Ct. 507 at 511, 19 L.Ed.2d 576 (1967). *See United States v. Whitmire*, 595 F.2d 1303, 1312 (5th Cir.1979), (high levels of privacy might be accorded to crews living quarters on tanker that travels for months, but no crew member has legitimate claim of privacy on open deck of a fishing smack or in the hold of a cargo vessel available for hire), *cert. denied*, 448 U.S. 906, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1980).

It can be argued with equal force, however, that the observer's constant surveillance of the activities of the Captains and their crews, for a prolonged period of time, constitutes an intrusion into liberty and privacy interests, protected by the fourth amendment, by exposing "what [a person] seeks to preserve as private, even in an area accessible to the public." *Katz*, 389 U.S. at 351, 88 S.Ct. at 511.

[5] We need not pause to resolve this nice question. Even if we assume that the regulation authorizes a warrantless *search* of the operations of a fishing vessel, it is our view that the regulation requiring the presence of observers on purse seiners does not violate the fourth amendment.

The fourth amendment prohibits *unreasonable* searches and seizures. Warrantless searches may be reasonable under certain circumstances. *See, e.g., Weeks v. United States*, 232 U.S. 383, 392, 34 S.Ct. 341, 344, 58 L.Ed. 652 (1914) (search incident to a lawful arrest); *Carroll v. United States*, 267 U.S. 132, 146, 45 S.Ct. 280, 282–83, 69 L.Ed. 543 (1925) (search of vehicles based on probable cause that contraband is being carried); *South Dakota v. Opperman*, 428 U.S. 364, 367–76, 96 S.Ct. 3092, 3096–3101, 49 L.Ed.2d 1000 (1976) (inventory search of impounded vehicles without a showing of probable cause); *Illinois v. LaFayette*, —— U.S. ——, ——, 103 S.Ct. 2605, 2611, 77 L.Ed.2d 65 (1983) (booking search of a man's purse-type shoulder bag); *United States v. Villamonte-Marquez*, —— U.S. ——, ——, 103 S.Ct. 2573, 2582, 77 L.Ed.2d 22 (1983) (boarding of vessels without articulable suspicion). In *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1924), the Supreme Court commented: "Under the common law and agreeably to the Constitution [a] search may in many cases be legally made without a warrant. The Constitution does not forbid search, as some parties contend, but it does forbid unreasonable search." 267 U.S. at 146, 45 S.Ct. at 282.

The Supreme Court has recognized that warrantless searches in closely regulated industries can be reasonable. The Court has held that warrantless inspections are reasonable if they are reasonably necessary to further important federal interests and the federal regulatory presence is sufficiently comprehensive and predictable that "the assurance of regularity provided by a warrant is rendered unnecessary." *Donovan v. Dewey*, 452 U.S. 594, 599–602, 101 S.Ct. 2534, 2538–40, 69 L.Ed.2d 262 (1981).[17] The Court has applied the exception where the business premises searched are part of an industry "long subject to close supervision and inspection." *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76–77, 90 S.Ct. 774, 776–77, 25 L.Ed.2d 60 (1970); *see also United States v. Raub*, 637 F.2d 1205, 1208 (9th Cir.1980) ("One of the recognized exceptions to the warrant requirement is for administrative searches of enterprises that traditionally have been closely regulated."). In *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313, 98 S.Ct. 1816, 1820–21, 56 L.Ed.2d 305 (1978), the Court observed that certain industries have had such a history of close governmental supervision that no reasonable proprietor entering into them could have a justifiable expectation of privacy. In *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), the Court extended the pervasively regulated industry

17. As noted earlier, we have concluded that the observer program furthers substantial federal interests in protecting marine mammals. Congress was aware that an important national asset was being depleted by the commercial tuna fishing industry. Congress also determined that the Secretary needed broad rulemaking power to adopt measures consistent with the MMPA to remedy the problem. The Secretary reasonably concluded that the observer program was necessary to further the regulatory scheme presented under the MMPA.

exception to industries without a long tradition of regulation where frequent unannounced inspections are essential to further an important governmental interest.

Where the regulation involves a comprehensive and predictable governmental presence, the owner "is not left to wonder about the purposes of the inspector or the limits of his task." 406 U.S. at 316, 92 S.Ct. at 1596. The Court has also noted that where the industry is closely regulated, the owner cannot help but be aware that the government will conduct periodic inspections for specific purposes. *Donovan v. Dewey,* 452 U.S. 594, 600, 101 S.Ct. 2534, 2538–39, 69 L.Ed.2d 262 (1981). The reasonableness of a search in a closely regulated industry does not depend on the existence of probable cause but rather on the "pervasiveness and regularity of the federal regulations." 452 U.S. at 606, 101 S.Ct. at 2542. When a person chooses to engage in a closely regulated industry and to accept a license which is conditioned upon such warrantless intrusion and inspection, he does so with full knowledge of the restrictions on his privacy. He is also free not to submit to such regulation and warrantless inspection by declining to seek a federal permit. *Biswell,* 406 U.S. at 315–16, 92 S.Ct. at 1596.

The Captains argue that the closely regulated industry exception does not apply to a warrantless administrative search unless it is expressly authorized by Congress. This argument was presented and rejected by the court in *United States v. Rucinski,* 658 F.2d 741 (10th Cir.1981), *cert. denied,* 455 U.S. 939, 102 S.Ct. 1430, 71 L.Ed.2d 649 (1982). It is quite true that in each of the cases cited above where the Supreme Court determined that a warrantless search of a closely regulated industry was reasonable under the fourth amendment, the entry was expressly authorized by statute. The Captains assume that since the Supreme Court has held that a warrantless search of a closely regulated industry is reasonable when expressly authorized by Congress, the search of such a business violates the fourth amendment if it is conducted pursuant to a regulation *impliedly* authorized by Congress. No authority is cited for this novel constitutional proposition. The law is to the contrary. Congress cannot authorize conduct which violates the fourth amendment. The proper inquiry when a warrantless search is challenged is whether it is authorized by the fourth amendment—not by an act of Congress.

In *Raub,* this court noted that "[c]ommercial fishing has a long history of being a closely regulated industry." 637 F.2d at 1208 (footnote omitted). Regulation of the fishing industry began in 1793. *Id.* at 1209 n. 5. Since 1972, the tuna industry has been closely regulated by Congress because its fishing operations threatened the extinction of the porpoise. Congress' interest in the protection of marine mammals was made known to all commercial fishermen in 1972 when Congress expressly authorized the placing of observers on purse seiners to protect the porpoise under the MMPA. As discussed above, in the MMPA, Congress authorized the Secretary to prescribe regulations and to issue a permit restricting the taking of marine mammals. Congress also authorized the Secretary to limit the issuance of permits to those persons who can demonstrate that any taking of marine mammals will be consistent with the MMPA, 16 U.S.C. § 1373. Thus, commercial fishermen have been made aware since 1972 that to take porpoise they must have a permit which is subject to conditions that will insure that marine mammals are given the protection required by Congress. The statutory observer program had been one such condition. Since 1974 commercial fishermen have also been aware of the regulation which prescribes the observer program. Any tuna boat Captain who does not wish to expose himself to the observation of his open deck activities is free not to submit to such an intrusion by refraining from seeking a permit. *See Biswell,* 406 U.S. at 315–16, 92 S.Ct. at 1596. *See also Wyman v. James,* 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971) (a welfare recipient may avoid an entry into his home by refusing to accept public assistance).

In determining whether warrantless searches in a closely regulated industry are

reasonable we must decide whether the regulatory scheme "in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant." *Dewey*, 456 U.S. at 603, 101 S.Ct. at 2540. It is evident to us that the observer program regulation provides an adequate substitute for a warrant for several reasons.

First, the MMPA, the regulation, and the National Marine Fisheries Services' (NMFS) Manual establish a predictable and guided federal presence and limit the scope of the data collection. The MMPA delegates to the Secretary the authority to waive the moratorium on porpoise takings only when he can determine that such takings will not disadvantage protected species. The MMPA specifically sets forth permissible restrictions on the takings of porpoises and authorizes the Secretary to impose additional ones. The Act also requires publication of proposed regulations, and clearly defines its objectives and purposes.

Under the observer program, vessel owners are sent advance calendars of scheduled observer trips. This notification includes a statement of the significant regulations promulgated by the Secretary. The regulation, 50 C.F.R. § 216.24(f), limits the scope of observer activities to data collection. The National Marine Fishery Service Field Manual further defines the data collection activities of individual observers. The 1979 Manual informs observers that they are not enforcement agents and they are not "to record extraneous comments, editorials, or personal opinions . . . or evaluate or interpret data." Observers are instructed simply to record the data called for in the form. The Manual, which is available to the industry, contains sections on the observer's responsibilities, instructions to the observers, and standardized forms to record information. The 1981 Manual additionally establishes a predeparture conference between the owner, master, observer, and an agency official to ensure a common understanding of the scope of observers' activities.

Second, the regulation requires that tuna vessel owners be given advance notice of the stationing of an observer on their vessel. Thus, the surprise element of many warrantless inspections is lacking here. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 657, 99 S.Ct. 1391, 1398, 59 L.Ed.2d 660 (1979). This advance notice also provides the Captains with an opportunity to seek judicial review of a particular scheduled observer trip. *Cf. Dewey*, 452 U.S. at 604–05, 101 S.Ct. at 2541 (opportunity for judicial review is factor important in reasonableness determination). They are also free to request a court order accommodating any privacy interests that may need protection. We conclude that the regulation as limited by the field manual provides a constitutionally adequate substitute for a warrant.

Use of observers advances the legitimate government interest of meaningful protection of the porpoise population, while the safeguards built into the observer program insure that there will be no significant intrusion on the Captains' fourth amendment interests. *Cf. Delaware v. Prouse*, 440 U.S. at 654, 99 S.Ct. at 1396 (constitutionality of a law enforcement procedure is basically tested by balancing its intrusion on fourth amendment interests against its promotion of legitimate government interests).

The Captains ask us to invalidate the observer program on the ground that a less restrictive alternative for obtaining the information exists. The government's affidavit, however, demonstrates that the suggested techniques—aerial surveillance and the like—are prohibitive in terms of cost and are ineffective in terms of data collection necessary for the Secretary to waive the moratorium on takings of porpoise and to issue permits. *Cf. Wyman*, 400 U.S. at 322, 91 S.Ct. at 388 (although secondary sources might be helpful, they would not always assure identification of information required for receipt of benefits).

In *Villamonte-Marquez*, the Court noted that the nature of water borne commerce in waters providing ready access to the open sea is sufficiently different from the nature of vehicular traffic on highways so as to make possible alternatives to the boarding of a vessel less likely to accomplish essential

governmental procedures. —— U.S. at ——, 103 S.Ct. at 2581.

CONCLUSION

We hold that the requirement that observers be permitted to board purse seiners on a scheduled basis as a condition of obtaining a permit to take porpoise is reasonable under the fourth amendment. The regulation and the field manual do not authorize the observers to conduct searches of the persons, personal effects, or living quarters of the Captains and their crews. Such a search would have to be justified independently under the fourth amendment.

The judgment in *Balelo* is reversed and remanded for further proceedings consistent with this opinion. The judgment in *Gladiator* is affirmed.

PREGERSON, Circuit Judge, concurring:

I concur in the majority's opinion but write separately to say that the observer program does not constitute a "search" within the meaning of the fourth amendment.

Fourth amendment protection operates when two conditions are met. First, a person must have exhibited an expectation of privacy in the place where the Government has allegedly intruded. Second, this expectation must be one that a free society is prepared to recognize as reasonable. *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516–17, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring).

The tuna boat captains have failed to meet either condition. They conduct fishing operations at sea on decks covered only by the sky and open to view by other crew members, nearby vessels, and overflying aircraft.

Moreover, our society is not prepared to recognize an expectation of privacy on open tuna boat decks, which are really no different from work areas in any industry the Government regulates to safeguard the public health and welfare. Federal inspectors, without impinging on any reasonable expectation of privacy, routinely monitor work areas in the coal mining, *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (Federal Mine Safety and Health Act of 1977), firearms, *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (Gun Control Act of 1968), and salmon fishing, *United States v. Raub*, 637 F.2d 1205 (9th Cir.1980) (Sockeye Salmon Fishing Act of 1947), industries, to name just a few.

In the final analysis, I think the question whether a governmental intrusion into a private area constitutes a reasonable search under the fourth amendment depends on the kind and degree of intrusion that a free society is willing to tolerate. *United States v. Solis*, 393 F.Supp. 325, 328 (C.D.Cal.1975) (Pregerson, J.), *aff'd in relevant part*, 536 F.2d 880 (9th Cir.1976). With few exceptions, our society does not tolerate warrantless intrusions into private dwellings and offices. *E.g., Camara v. Municipal Court*, 387 U.S. 523, 528–29, 87 S.Ct. 1727, 1730–31, 18 L.Ed.2d 930 (1967). But the presence on open decks of government scientists monitoring commercial fishing operations to save the porpoise from extinction is the kind and degree of intrusion that our society should tolerate.

NELSON, Circuit Judge, concurring:

If hard cases make bad law, I fear the result of cases such as this. I write specially to reveal the extraordinary difficulties I find in this case, and to explain its limited applicability.

First, I would make explicit that the search involved here is overwhelmingly intrusive. Stationing an observer on a small boat for months at a time is both a search and a massive invasion of privacy. Thus, when I balance the need for government regulation with the degree of intrusion in this case, I find both sides of the scale weighted heavily. I would not simply "assume *arguendo*" that this is a search, but would call it by its name and treat it accordingly.

Warrantless searches are presumptively unreasonable. *See, e.g., Camara v. Municipal Court*, 387 U.S. 523, 528–29, 87 S.Ct.

1727, 1730-31, 18 L.Ed.2d 930 (1967). The pervasively regulated industry exception is narrowly crafted, and should be limited as much as possible. *See See v. City of Seattle*, 387 U.S. 541, 543, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967). It is only because I view a commercial fishing vessel to be a workplace (unlike, say, a house boat or a recreational boat) that I am willing to apply the exception here. Even then, however, I am wary of permitting warrantless searches of residences that double as workplaces. But for the unique inaccessibility of ships at sea, I would not permit a warrantless search. *See United States v. Villamonte-Marquez*, — U.S. —, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983).

Second, I write to emphasize the magnitude of the governmental interest involved in this case. If the world loses genetic diversity, it has truly suffered irreparable harm. Marine mammals have long been threatened by the onslaught of technology; if we must take drastic steps to avoid further encroachment, so be it.

Last, I am struck by the precautions the government has taken to limit the intrusiveness of the observer program. The regulatory scheme is detailed; the inspectors can report about porpoises and nothing more; absolutely no alternative method of enforcement exists. Under these circumstances, I hesitantly concur. Were the situation less compelling in any respect, I would not.

TANG, Circuit Judge, with whom FERGUSON, Circuit Judge, joins, and with whom CANBY, Circuit Judge, joins in Part II, dissenting:

I respectfully dissent. In my view the challenged regulation is not authorized by Congress and the provision for warrantless searches offends the Constitution.

I

The regulation, 50 C.F.R. § 216.24(f), establishes an indefinite policy of stationing federal observers aboard tuna boats for enforcement as well as research purposes. Because Congress expressly restricted the use of observers to the two-year period following passage of the Act and limited the function of such officials to research and scientific observation, this regulation goes far beyond the design of the statute it purports to implement.

Regulations promulgated pursuant to an enabling statute will be upheld if they are reasonably related to the purposes of the enabling legislation, *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318 (1973), but such regulations will not be sustained when they are contrary to congressional design. "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213–14, 96 S.Ct. 1375, 1391, 47 L.Ed.2d 668 (1976) (quoting *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936)). Thus, "our primary task when testing the statutory authority of a challenged regulation must always be to determine the intent of Congress." *State of California v. Block*, 663 F.2d 855, 860 (9th Cir.1981).

In this case, the language of the statute and its legislative history both indicate that Congress intended to restrict the use of on-board observers to the two-year period following passage of the Act.

16 U.S.C. § 1381 provided:

> [a]fter timely notice and *during the period of research provided in this section*, duly authorized agents of the Secretary are hereby empowered to board and to accompany any commercial fishing vessel ... on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section. 16 U.S.C. § 1381(d) (1976). (emphasis added)

The period of research referred to in § 1381(d) covered "the full twenty-four calendar month period following October 21, 1972," after which the results of such research were to be reported to Congress. 16 U.S.C. § 1381(a). Funding for the observer program was also limited to the two-year period provided in the statute. The statutory objective was to use the observers as part of "a program of research and development for the purpose of devising improved fishing methods and gear so as to reduce to the maximum extent practicable the incidental taking of marine mammals in connection with commercial fishing." 16 U.S.C. § 1381(a). Congress clearly expressed its intent to use the observers only as part of a short term research program. The majority, however, sanctions the agency's administrative decision to transform one part of a limited research program into an ongoing regulatory policy of indefinite duration.

The legislative history of the observer program underscores the two-year limitation as part of the Act's congressional design. Section 1381 of the Act originated as a Senate amendment. The Senate report indicates that Congress intended the observer research and development program to terminate two years after passage of the Act. The majority is simply incorrect when it suggests that the observer program was merely a model after which a regulatory observer policy could be patterned. "The committee has authorized a $2 million, 2-year program to devise new methods of netting and tuna boat operating procedures which will reduce the killing of marine mammals. The committee has provided a 2-year period because it is believed that science can come up with new systems within that time." S.Rep. No. 863, 92nd Cong., 2d Sess. 9–10 (1972). At the end of the two-year period, the best available fishing methods, if feasible, were to be mandated on commercial fishing vessels, S.Rep., *supra* at 21. The research program, including its $2 million appropriation and federal observer component, was restricted to a two-year period in clear and explicit terms. Neither the statutory language nor the legislative history of the observer program hint that the agency retained any discretion to extend the use of on-board observers beyond the explicit two-year period.

In addition to its unauthorized extension of the operative period for the observer program, the regulation also expands the function of the government observers beyond the research component contemplated by Congress by enlisting them as inspection and enforcement officials. When Congress created the two-year observer program, it expressly stated that the observer presence was a research tool aimed at "the development of improved fishing methods and gear as authorized by this section." 16 U.S.C. § 1381(d). The regulation, however, extends the duration of the observer presence indefinitely and transforms the observers from mere researchers into enforcement officers who collect information for use against the fishermen in civil and criminal actions. To label them now merely "observers" is an understatement. They are now federal inspectors who maintain constant surveillance to ensure that fishermen comply with federal law. The majority is correct to say this is probably the most efficient way to guarantee that the fishermen fish by the rules, but it is not what Congress provided. The observer program was not developed in a spirit of expediency. If Congress contemplated the use of live-in observers for enforcement purposes, it could have expressly provided for such a function in the observer statute or at least granted the Secretary the discretion to create additional functions for the observers.

Instead, Congress specifically addressed the methods of enforcing the statutory scheme in § 1377 of the Act, which allows warrantless searches of vessels only if there is "reasonable cause to believe" that a vessel or crew member is violating the Act or its regulations. 16 U.S.C. § 1377(d).[1]

1. Execution of process; arrest; search; seizure

(d) Any person authorized by the Secretary to enforce this subchapter may execute any

Hence, the very structure of the Act itself—indeed its own language—indicates that Congress did not envision warrantless searches by on-board observers as an enforcement mechanism. The majority, however, seizes on that part of the language of § 1377 which suggests that the enforcement measures it authorizes are "in addition to any other authority conferred by law." 16 U.S.C. § 1377(d). The majority asserts that this language indicates that Congress vested the Secretary with the power to create additional enforcement measures even in contravention of the express statutory limitations of § 1377. Under the majority's reading of the statute, the Secretary, apparently without limitation, may abrogate the explicit search and seizure restrictions of § 1377 and effectively render most of that section a nullity. Beyond the fact that neither the plain language of the statute nor its legislative history substantiates such an interpretation, the majority's reading defies basic principles of statutory construction because "acceptance of that meaning would lead to absurd results ... or would thwart the obvious purpose of the statute." *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643, 98 S.Ct. 2053, 2061, 56 L.Ed.2d 591 (1978) (*quoting Commissioner v. Brown*, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965)). This self-emasculating interpretation of § 1377 is contrary to the presumption against reading a statute in a manner which renders it ineffective. *F.T.C. v. Manager, Retail Credit Co.*, 515 F.2d 988, 995 (D.C.Cir.1975). The majority's reading of § 1377 exaggerates the language of a single phrase to eviscerate the statute's internal enforcement scheme, a scheme that was designed to enforce the Act without disregarding the privacy concerns of those who would be subject to it.

The majority suggests that subsequent congressional inaction infers approval of the way observers are used under the regulation. Such inaction is not a helpful indicator of congressional intent when the statutory language itself suggests a contrary interpretation. *S.E.C. v. Sloan*, 436 U.S. 103, 117, 98 S.Ct. 1702, 1711, 56 L.Ed.2d 148 (1978). When Congress has squarely faced the propriety of a regulatory measure, congressional non-action may be evidence of congressional approval. *Bob Jones University v. United States*, — U.S. —, 103 S.Ct. 2017, 2033, 76 L.Ed.2d 157 (1983). Absent such direct consideration, however, "[n]on-action by Congress is not often a useful guide..." *Bob Jones University*, *supra*, at 2033.

The majority attempts to bolster its finding of congressional approval by noting that Congress has amended the Act without disturbing the Secretary's use of on-board observers. This argument is unpersuasive because the on-board observer program was not specifically addressed in subsequent legislative action. Indeed, the Supreme Court recently rejected such an argument in *Aaron v. S.E.C.*, 446 U.S. 680, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980). There, the Court refused to adopt an agency's statutory interpretation which was premised on congressional

warrant or process issued by any officer or court of competent jurisdiction for the enforcement of this subchapter. Such person so authorized may, in addition to any other authority conferred by law—

(1) with or without warrant or other process, arrest any person committing in his presence or view a violation of this subchapter or the regulations issued thereunder;

(2) with a warrant or other process, or without a warrant if he has reasonable cause to believe that a vessel or other conveyance subject to the jurisdiction of the United States or any person on board is in violation of any provision of this subchapter or the regulations issued thereunder, search such vessel or conveyance and arrest such person;

(3) seize the cargo of any vessel or other conveyance subject to the jurisdiction of the United States used or employed contrary to the provision of this subchapter or the regulations issued hereunder or which reasonably appears to have been so used or employed; and

(4) seize, whenever and wherever found, all marine mammals and marine mammal products taken or retained in violation of this subchapter or the regulations issued thereunder and shall dispose of them in accordance with regulations prescribed by the Secretary.

16 U.S.C. 1377(d).

failure to disturb that interpretation in subsequent legislative amendments to the authorizing act. "[S]ince the legislative consideration of those statutes was addressed principally to matters other than that at issue here, it is our view that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction of § 10(b) so clearly at odds with its plain meaning and legislative history." *Id.* at 694, n. 11, 100 S.Ct. at 1954, n. 11.

Because the plain language of § 1381 and its legislative history demonstrate that the on-board observer program was limited to research duties during the two-year period following passage of the Act, the Secretary's regulation adopting an indefinite policy of on-board observers for enforcement purposes as well as research is unauthorized.

II

The absence of statutory authorization, however, is only one basis for finding this regulation invalid. The regulation also offends the Constitution because it empowers federal inspectors to conduct searches in violation of the fourth amendment.

The majority, in its discussion of the regulation's fourth amendment impact, sidesteps and fails to confront the threshold question of whether the intrusiveness of stationing government observers on private fishing vessels for extended periods constitutes a search. The majority suggests that the observer policy may not constitute a search within the meaning of the fourth amendment because the government officials confine their observations to the open deck or open sea. This understates the actual operation of the observers. They are more than mere passive onlookers; they are uninvited government inspectors who live with the crew for weeks at sea, watching all aspects of fishing operations, conducting research and collecting data and information that may be used against the tuna fishermen in civil and criminal proceedings. This is not "a brief detention where officials come on board, visit public areas of the vessel, and inspect documents." *United States v. Villamonte-Marquez*, — U.S. —, 103 S.Ct. 2573, 2581, 77 L.Ed.2d 22 (1983). This regulation places live-in government inspectors on private vessels for surveillance purposes over a period of months and results in the type of governmental invasion that is well within the protection of the fourth amendment. Despite the majority's ambivalence on this issue, the use of government inspectors under the regulation is a search within the meaning of the fourth amendment. As such, it is presumptively unconstitutional in the absence of a warrant, and "[t]he burden is on the government to prove that the departure from the warrant requirement was justified." *United States v. Martin*, 693 F.2d 77, 78 (9th Cir.1982) (per curiam); *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971).

The majority decides, however, that even if this use of observers constitutes a search, it is reasonable because it falls within the pervasively regulated industry exception to the warrant requirement. The majority suggests that because the tuna fishing industry has been subject to government regulation, the acceptance of federal observers must be part of the regulatory burden that goes with the benefit of tuna fishing. The majority ventures into uncharted territory, however, because the Supreme Court has admonished that the regulated industry exception is a narrow one, one that neither the Supreme Court nor this court has ever embraced in the absence of explicit statutory authorization for the warrantless search scheme it purports to justify. Moreover, the regulated industry exception has never been used to justify warrantless surveillance schemes such as the one in this case. Until now, the exception has only applied to warrantless inspections of particular businesses on a periodic basis. The majority breaks new ground by applying the exception to warrantless surveillance schemes conducted for days and months at a time.

In regulated industry cases, warrantless searches are still presumptively unreasonable and the government retains the burden

of justifying its disregard for the warrant requirement. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312–13, 98 S.Ct. 1816, 1820–21, 56 L.Ed.2d 305 (1978). "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Id.*, at 312, 98 S.Ct. at 1820 (quoting *See v. Seattle*, 387 U.S. 541, 543, 87 S.Ct. 1737, 1739, 18 L.Ed.2d 943 (1967)). In this case, the government has failed to meet its burden of justifying the warrantless intrusions which the challenged regulation authorizes.

Under the pervasively regulated industry exception, a warrant may not be 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." *Donovan v. Dewey*, 452 U.S. 594, 600, 101 S.Ct. 2534, 2539, 69 L.Ed.2d 262 (1981). While planting government observers on fishing vessels for the duration of the expeditions may offer the most efficient method of policing the Act, enthusiasm for this enforcement technique should not obscure the essential constitutional requirement that the warrantless quality of such a procedure must be vital to the regulatory scheme. The government has not proffered any convincing explanation why waiver of the warrant requirement is essential to the enforcement of the Act or to the effective implementation of the observer program.

In *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981), the Supreme Court upheld a warrantless search scheme under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a) (1976). The statute allowed federal mine inspectors to make unannounced inspections of underground mines four times a year and surface mines twice a year. The Court noted that a warrant requirement could frustrate such an inspection scheme because unannounced inspections were needed to effectuate the scheme's objective of deterring hazardous mine conditions. *Id.* at 603, 101 S.Ct. at 2540. In *United States v. Kaiyo Maru No. 53*, 699 F.2d 939 (9th Cir.1983), this court upheld a warrantless search scheme designed to enforce the Fishery Conservation and Management Act. 16 U.S.C. § 1861(b). The court concluded that dispensing with the warrant requirement for Coast Guard inspections of fishing boats in the Fishery Conservation Zone was necessary due to the logistical barriers of obtaining a warrant for ships at sea. *Id.* at 995.

A comparable element of necessity is missing in this case. The regulation authorizes boarding by federal observers at the time of departure and provides for notification of the observer presence several days before the expedition begins. After they are aboard, the observers make their observations and inspections throughout the duration of the fishing trip. Nothing in this procedure indicates that a warrant requirement would frustrate the objectives of the regulatory search scheme. Research and observation activities under the regulatory procedure can be conducted in the same manner whether or not a warrant is obtained. Although a warrant requirement in this case might be an administrative annoyance, the inconvenience it poses is an insufficient basis to "vitiate the general constitutional requirement that for a search to be reasonable a warrant must be obtained." *Marshall*, 436 U.S. at 324, 98 S.Ct. at 1827. Moreover, a warrant requirement pursuant to a regulatory search scheme need not be based on evidence of specific violations or actions on particular boats. A warrant requirement in this context would be designed to ensure governmental compliance with reasonable legislative and regulatory standards for the frequency and scope of the search operation. *Id.* at 320, 98 S.Ct. at 1824; *Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S.Ct. 1727, 1735–36, 18 L.Ed.2d 930 (1967). Such a requirement preserves the historic function of checking the potential for arbitrary government conduct without frustrating the legitimate objectives of the Marine Mammal Protection Act. This

balance is especially important as virtually all guidelines regarding the conduct of the observer operation emanate from internal agency policies instead of statutory or regulatory guidelines with force of law.

As the reasonableness of a regulatory search scheme "depends on the specific enforcement needs and privacy guarantees of each statute," *Kaiyo Maru No. 55*, 699 F.2d at 995, and as the burden of demonstrating the need to by-pass the warrant requirement rests with the government, the absence of any persuasive proof that warrantless searches are necessary calls for adherence to the general rule instead of the exception. A warrant is required for this regulatory search scheme.

III

Because 50 C.F.R. § 216.24(f) exceeds congressional authorization and establishes a search scheme in violation of the fourth amendment of the Constitution, I dissent.

FERGUSON, Circuit Judge, dissenting:

Today the majority installs a federal agent in the temporary home of 14 to 18 fishermen for a two- to three-month period without requiring a warrant or a showing of probable cause to believe that the law has been broken. The fourth amendment, assuring that the people are to be secure in their homes, mandates that warrantless government intrusion into even a temporary home is *per se* unreasonable. This protection is not lost because the place called home is also used for commercial purposes, i.e. as a fishing vessel, for both commercial premises and seafaring vessels are covered by the fourth amendment.

The National Oceanic and Atmospheric Administration (NOAA), an agency of the federal government, has by regulation placed federal agents on board tuna fishing vessels for two- to three-month fishing trips by conditioning the license to fish for tuna upon the vessel owner's consent to the presence of federal observers. 50 C.F.R. § 216.24(f) (1982). The federal "observers" are authorized to conduct research and collect information "which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions," *id.* § 216.24(f)(1), while they live for the extended fishing trip on a 150- to 250-foot boat with the crew of 14–18 men. M.K. Orbach, *Hunters, Seamen, and Entrepreneurs* (1977) (hereinafter "Orbach"). It has been stipulated by the parties that the observers take their meals with the fishermen, are not confined to any particular areas of the vessel, and are expected to "maintain open communication" with and question vessel operators and other personnel while recording data pertaining to the enforcement of the Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1407.

Any possibility of separating the business aspects of a fishing vessel from the home aspects is belied by the realities of life on such a vessel:

> [I]t is impossible to get more than about 50 feet from any of the other 15 men with whom you are going to spend the next two months. You can draw curtains or close doors and remain out of sight a good part of the time, but you can never get *away* from them, and the fishing process forces you into regular interaction with them.

Orbach at 25 (emphasis in original). Both Congress and the Supreme Court have acted to specially protect the rights and comforts of seamen due to this unusual characteristic of their work. *See Aguilar v. Standard Oil Co.*, 318 U.S. 724, 732, 63 S.Ct. 930, 934–35, 87 L.Ed. 1107 (1943) ("Of necessity, during the voyage [the seaman] must eat, drink, lodge and divert himself within the confines of the ship. In short, during the period of his tenure the vessel is not merely his place of employment; it is the framework of his existence."); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952); *Warner v. Goltra*, 293 U.S. 155, 162, 55 S.Ct. 46, 49, 79 L.Ed. 254 (1934), ("[T]he maritime law by inveterate tradition has made the ordinary seaman a member of a favored class.").

The NOAA's effort to install a federal agent on board a fishing vessel without securing a warrant based on probable cause

is reminiscent of the "indiscriminate searches and seizures conducted under the authority of 'general warrants' [which] were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 583, 100 S.Ct. 1371, 1378, 63 L.Ed.2d 639 (1980); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311, 98 S.Ct. 1816, 1819–20, 56 L.Ed.2d 305 (1978). The fourth amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects...." The Supreme Court has defined the scope of the fourth amendment to include a person's "reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Such a definition extends fourth amendment protections beyond the literal meaning of "houses" to temporary residences, such as a hotel, *Stoner v. California*, 376 U.S. 483, 490, 84 S.Ct. 889, 893, 11 L.Ed.2d 856 (1964), a rooming house, *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948), and even a mobile home, *People v. Carney*, 34 Cal.3d 597, 194 Cal.Rptr. 500, 668 P.2d 807 (1983) and to commercial premises, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329, 99 S.Ct. 2319, 2326, 60 L.Ed.2d 920 (1979) (adult bookstore); *Mancusi v. DeForte*, 392 U.S. 364, 367, 88 S.Ct. 2120, 2123, 20 L.Ed.2d 1154 (1968) (office); *See v. City of Seattle*, 387 U.S. 541, 543, 87 S.Ct. 1737, 1739, 18 L.Ed.2d 943 (1967) (warehouse), as well as to seafaring vessels, *United States v. Villamonte-Marquez*, —— U.S. ——, 103 S.Ct. 2573, 2581, 77 L.Ed.2d 22 (1983), and automobiles, *Delaware v. Prouse*, 440 U.S. 648, 662–63, 99 S.Ct. 1391, 1400–01, 59 L.Ed.2d 660 (1979). More important, the "Fourth Amendment protects people, not places," *Katz v. United States*, 389 U.S. at 351, 88 S.Ct. at 511, and thus prohibits warrantless surveillance of a person's ordinarily private actions and words. *Id; United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134–35, 32 L.Ed.2d 752 (1972). As the Court stated over twenty years ago:

> At the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard.

Silverman v. United States, 365 U.S. 505, 511–12, 81 S.Ct. 679, 683, 5 L.Ed.2d 734 (1961) (citations omitted). It is precisely this "right to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting), that is trampled when tuna fishermen are required to live, eat, sleep, lodge and relax in the presence of a federal agent within the confines of a 150- to 250-foot boat in the middle of the ocean for two to three months at a time.

The fourth amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause ... particularly describing the place to be searched, and the persons or things to be seized." A warrantless search is presumptively unreasonable. *Payton v. New York*, 445 U.S. at 586 n. 25, 100 S.Ct. at 1380 n. 25; *Marshall v. Barlow's, Inc.*, 436 U.S. at 312, 98 S.Ct. at 1820; *United States v. United States District Court, supra.* If the reasonableness of a search could be based "on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests ... Fourth Amendment protection in this area would approach the evaporation point." *Chimel v. California*, 395 U.S. 752, 764–65, 89 S.Ct. 2034, 2041, 23 L.Ed.2d 685 (1969). Rather, "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant" or falls within one of carefully defined exceptions to the warrant requirement. *Camara v. Municipal Court*, 387 U.S. 523, 528–29, 87 S.Ct. 1727, 1730–31, 18 L.Ed.2d 930 (1967).