Supreme Court, U.S.
FILED

No. 10- 10-388 SEP 16 2010

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

ROBERT AND MICHELLE HUBER,

Petitioners,

v.

NEW JERSEY DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

HOWARD P. DAVIS
Counsel of Record
THE LAW OFFICE OF HOWARD DAVIS, P.C.
180 Sylvan Ave, Second Floor
Englewood Cliffs, N.J. 07632
(201) 541-9737
hdavis@envirolawyer.net

HOWARD P. DAVIS
ANNE M. RONAN
ERIC M. GRILLÉ
THE LAW OFFICE OF HOWARD DAVIS, P.C.
180 Sylvan Ave, Second Floor
Englewood Cliffs, N.J. 07632
(201) 541-9737

Attorneys for Petitioner

232165

Blank Page

QUESTIONS PRESENTED

When the New Jersey Department of Environmental Protection ("NJDEP") acted pursuant to two broadly-worded statutes granting it authority to inspect private property, but without any regulations or guidelines limiting the exercise of that authority to reasonable situations, and pursuant to a policy whereby NJDEP inspectors assert the right to enter private residential property at any time without warrants or consent in order to inspect wetlands, should the evidence, including soil borings, obtained in the course of an unannounced, warrantless inspection of wetlands in the backyard behind Petitioners' home, over their repeated objections, be suppressed because it was obtained in violation of the Fourth Amendment?

Does the Fourth Amendment entitle Petitioners to greater protection from warrantless searches and seizures on their residential property than a closely regulated business, even when their property contains regulated wetlands?

Was the warrantless inspection and seizure of soil samples at Petitioners' property valid under the "special public needs" exception to the warrant requirement?

Do residents lose the right to be free from warrantless inspections of their property due to the presence of regulated wetlands?

To what extent, if any, do environmental laws and regulations of general applicability reduce residents' right to be free from warrantless inspections?

LIST OF PARTIES

Robert and Michelle Huber, Petitioners.

New Jersey Department of Environmental Protection, Respondents.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	x
Opinions Below	1
Statement of Jurisdiction	2
United States Constitutional Provisions Involved	2
New Jersey Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Petition	11
Legal Argument	13
1. Under the Court's decisions, NJDEP Needed a Warrant to Search Petitioners' Property.	13

Contents

Page

2. The decision below reflects and encourages an alarming tolerance of warrantless searches by environmental regulators and other government inspectors threatening the privacy of all American homes. 26

Conclusion 35

TABLE OF CITED AUTHORITIES

Page

Cases

Anobile v. Pelligrino, 303 F.3d 107 (2d Cir. 2002) ... 20

Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) 29

Camara v. Mun. Court of S.F., 387 U.S. 523 (1981) ..... *passim*

Chandler v. Miller, 520 U.S 305 (1997) 21

Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) 17

Donovan v. Dewey, 452 U.S. 594 (1981) 13, 16, 18, 25

Dow Chemical Co. v. United States, 476 U.S. 227 (1986) 14, 18

Griffin v. Wisconsin, 483 U.S. 868 (1987) 21, 24

In re Alameda County Assessor's Parcel Nos. 537-801-2-4 and 537-850-9, et al., 672 F. Supp. 1278 (N.D. Cal. 1987) 14, 15, 25

In re Freshwater Protection Act Rules, 852 A.2d 167 (N.J. 2004) 27

Cited Authorities

Page

Katz v. United States, 389 U.S. 347 (1967) 17, 18

Lewis v. United States, 385 U.S. 206 (1967) 19

Madruga v. County of Riverside, 431 F. Supp. 2d 1049 (C.D. Cal. 2005) 13

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 14, 18, 20

Michigan v. Clifford, 464 U.S. 287 (1984) 25

Minnesota v. Carter, 525 U.S. 83 (1998) 17

New Jersey v. T.L.O, 469 U.S. 325 (1987) 25

New Jersey Dep't of Envtl. Prot. v. Huber, No. A-5874-07T3, 2010 N.J. Super. Unpub. Lexis 121 (N.J. App. Div. Jan. 20, 2010), *certif. denied*, 997 A.2d 232, 202 N.J. 347 (N.J. 2010) 1, 4, 9, 11

New Jersey Dep't of Envtl. Prot. v. Huber, No. 065540, 997 A.2d 232, 202 N.J. 347 (N.J. 2010) 1, 5

New York v. Burger, 482 U.S. 691 (1987) ... 16, 17, 18

Oliver v. United States, 466 U.S. 170 (1984) ... 14

Palmieri v. Lynch, 392 F.3d 73 (2d Cir. 2004), *cert. denied*, 546 U.S. 937 (2005) ..... *passim*

Cited Authorities

	Page
Rapanos v. United States, 547 U.S. 715 (2006) ...	27
Reeves Brothers, Inc. v. EPA, 956 F. Supp. 676 (W.D. Va. 1996)	31
Schmerber v. State of California, 384 U.S. 757 (1966)	24
Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989)	24
Town of Darien v. Estate of D'Addario, 784 A.2d 337 (Conn. 2001)	31-32
United States v. Biswell, 406 U.S. 311 (1972) ..	29
United States v. Grimes, 225 F.3d 254 (2d Cir. 2000)	19
United States v. Hajduk, 396 F. Supp. 2d 1216 (D. Colo. 2005)	20
United States v. Knights, 534 U.S. 112 (2001) ..	19
Wien v. Delaware, 882 A.2d 183 (Del. 2005)	32
Constitution	
United States Constitution Amendment IV	i, 2

Cited Authorities

Page

Statutes

28 U.S.C. § 1257(a) 2

33 U.S.C. § 1344(g), (h) 15

Ala. Code § 22-28-19 33

Conn. Gen. Stat. § 48-13 32

Del. Code Ann. tit. 7, § 6616 32

Idaho Code Ann. § 39-108 34

Ind. Code § 13-14-2-2 33

Kan. Stat. Ann. § 65-3009 33

La. Rev. Stat. Ann. § 30:2012 33

Miss. Code Ann. § 49-27-63 33

Mont. Code Ann. § 75-2-403 34

N.J. Stat. Ann. § 13:1D-9(d) 3, 7, 25

N.J. Stat. Ann. § 13:9B-1 to -30 15

N.J. Stat. Ann. § 13:9B-21(m) 3, 7, 25

N.J. Stat. Ann. § 58:10B-16(b) 34

N.J. Stat. Ann. § 58:10C-1 to -29 34

Page

S.C. Code Ann. § 48-1-50(24) 34

Regulations

40 C.F.R. § 233.70 (2010) 15, 27

40 C.F.R. § 233.71(a), (b) (2010) 15, 27

40 C.F.R. § 233.71(d) (2010) 15

Senate Report

S. Rep. No. 95-181, 27 (1977)
as reprinted in 1977 U.S.C.C.A.N. 3401, 3427 ... 25

Rules

U.S. Sup. Ct. R. 10(c) 11

N.J. Ct. R. 1:36-3 26

Treatises and Law Reviews

Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242 (1995) 15

Nicholas A. Robinson, *Environmental Regulation of Real Property* § 3.06A, 3-78 (2006) 12,31

TABLE OF APPENDICES

Page

Appendix A — Decision of the Superior Court of New Jersey, Appellate Division Dated January 20, 2010 ..... 1a

Appendix B — Decision of the New Jersey Department of Environmental Protection Dated July 30, 2008 ..... 38a

Appendix C — Decision of the State of New Jersey Office of Administrative Law Dated April 30, 2008 ..... 49a

Appendix D — Order of the Supreme Court of New Jersey Denying Petition for Certification Dated June 18, 2010 ..... 87a

Appendix E — Constitutional And Statutory Provisions Involved 88a

OPINIONS BELOW

The Initial Decision of Administrative Law Judge Jeff S. Masin is reported at *New Jersey Department of Environmental Protection v. Robert and Michelle Huber*, OAL Dkt. No. ESA 00505-04S, Agency Dkt. No. PEA020002-1006-01-1001.1, 2008 N.J. AGEN LEXIS 331 (2008), 2008 WL 2026050 (N.J. Adm. Apr. 30, 2008), and is reprinted as Appendix C.

The Final Decision of the Commissioner of the New Jersey Department of Environmental Protection is reported at *New Jersey Department of Environmental Protection v. Robert and Michelle Huber*, OAL Dkt. No. ESA 0505-04, Agency Dkt. No. PEA020002-1006-01-1001.1, 2008 N.J. AGEN LEXIS 1245 (2008), 2008 WL 2971348 (July 30, 2008), and is reprinted as Appendix B.

The unpublished opinion of the Superior Court of New Jersey, Appellate Division is reported at *New Jersey Department of Environmental Protection v. Robert and Michelle Huber*, No. A-5874-07T3, 2010 N.J. Super. Unpub. LEXIS 121 (N.J. App. Div. Jan. 20, 2010), 2010 WL 173533 (N.J. App. Div. Jan. 20, 2010), and is reprinted as Appendix A.

The Supreme Court of New Jersey's decision denying Petitioners' Petition for Certification is reported at *New Jersey Department of Environmental Protection v. Robert and Michelle Huber*, No. 065540, 997 A.2d 232, 202 N.J. 347 (2010), and is reprinted as Appendix D.

STATEMENT OF JURISDICTION

The Superior Court of New Jersey, Appellate Division, entered judgment in this matter on January 20, 2010 (Pet. App. 1a-37a), and the Supreme Court of New Jersey denied a petition for certification on June 21, 2010 (Pet. App. 87a). Petitioners filed a motion for leave to file a motion for reconsideration as within time and an underlying motion for reconsideration on July 22, 2010 with the Supreme Court of New Jersey. The Supreme Court of New Jersey has not entered a decision on either motion.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. IV.

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

NEW JERSEY STATUTES INVOLVED

N.J. Stat. Ann. § 13:9B-21(m). Remedies for Violations.

The department shall have the authority to enter any property, facility, premises or site for the purpose of conducting inspections, sampling of soil or water, copying or photocopying documents or records, and for otherwise determining compliance with the provisions of P.L.1987, c.156.

N.J. Stat. Ann. § 13:1D-9. Powers of the Department.

The department shall formulate comprehensive policies for the conservation of the natural resources of the State, the promotion of environmental protection and the prevention of pollution of the environment of the State. The department shall in addition to the powers and duties vested in it by this act or by any other law have the power to:

. . .

(d) Enter and inspect any property, facility, building, premises, site or place for the purpose of investigating an actual or suspected source of pollution of the environment and conducting inspections, collecting samples, copying or photocopying documents or records, and for otherwise ascertaining compliance or noncompliance with any laws, permits, orders, codes, rules and regulations of the department. Any information relating to secret processes concerning methods of manufacture or production, obtained in the

course of such inspection, investigation or determination, shall be kept confidential, except this information shall be available to the department for use, when relevant, in any administrative or judicial proceedings undertaken to administer, implement, and enforce State environmental law, but shall remain subject only to those confidentiality protections otherwise afforded by federal law and by the specific State environmental laws and regulations that the department is administering, implementing and enforcing in that particular case or instance. In addition, this information shall be available upon request to the United States Government for use in administering, implementing, and enforcing federal environmental law, but shall remain subject to the confidentiality protection afforded by federal law. If samples are taken for analysis, a duplicate of the analytical report shall be furnished promptly to the person suspected of causing pollution of the environment;

. . .

STATEMENT OF THE CASE

This petition seeks review of the federal constitutional questions presented by a decision of the Superior Court of New Jersey, Appellate Division, *New Jersey Dep't of Envtl. Prot. v. Huber*, No. A-5874-07T3, 2010 N.J. Super. Unpub. LEXIS 121 (N.J. App. Div. Jan. 20, 2010), 2010 WL 173533 (N.J. App. Div. Jan. 20, 2010) (Pet. App. 1a-37a), which affirmed a Final Decision of the Commissioner of the New Jersey Department of Environmental Protection ("NJDEP"), *New Jersey Dep't of Envtl. Prot. v. Huber*, OAL Dkt. No. ESA 0505-

04, Agency Dkt. No. PEA020002-1006-01-1001.1, 2008 N.J. AGEN LEXIS 1245 (2008), 2008 WL 2971348 (July 30, 2008) (Pet. App. 38a-48a), and, *inter alia*, affirmed the constitutional validity of a warrantless search and seizure conducted in the backyard of Petitioners' home. (Pet. App. 36a-37a).

On February 17, 2010, Petitioners sought review of the decision below by way of a petition for certification from the Supreme Court of New Jersey, which was denied on June 18, 2010. (Pet. App. 87a). *See New Jersey Dep't of Envtl. Prot. v. Huber*, 997 A.2d 232 (N.J. 2010). On July 22, 2010, Petitioners filed a motion for leave to file a motion for reconsideration as within time and an underlying motion for reconsideration with the Supreme Court of New Jersey. The Supreme Court of New Jersey has yet to issue a decision on Petitioners' motions.

Petitioners Michelle and Robert Huber were dedicated suburban homeowners and the parents of young children (Huber Hr'g Tr. 172-76, Feb. 20, 2008) when a NJDEP inspector arrived at their Property on July 3, 2002 to inspect their backyard in response to a complaint from a neighbor that they had disturbed the wetlands in their backyard (*see* Huber Hr'g Tr. 60, 55, Feb. 20, 2008). The Hubers had no notice of the inspection (*see* Huber Hr'g Tr. 16, 17, 55-56, Feb. 20, 2008), and had objected to an earlier attempt by an NJDEP inspector to enter the property (*see* Huber Hr'g Tr. 60-61, Feb. 20, 2008).

Petitioners first raised the federal question of whether the NJDEP violated their Fourth Amendment rights by conducting a warrantless search of their residential property without consent or exigent circumstances during the cross examination of Michael Nystrom in a plenary hearing before an Administrative Law Judge ("ALJ") on February 19, 20 and 21, 2008, where Petitioners appeared *pro se*. (*See, e.g.*, Huber Hr'g Tr. 60-64, Feb. 20, 2008.) According to NJDEP inspector Michael Nystrom, one of the reasons that he was sent to the Hubers' property was that "the person that preceded [him] was intimidated by [Mr. Huber] and was told – apparently had the door slammed in her face, and I was told to go." (Huber Hr'g Tr. 60, Feb. 20, 2008.) Inspector Nystrom testified that he was aware that the Hubers objected to NJDEP's entry onto their property, but that he intended to inspect it, and ultimately did so, anyway:

> One of the reasons that this is very clear with me is because in our job when we are given information where we may be entering a hostile site, it does not bode well — one goes through a period of stress before one gets there. It's a lot of what-if'ing that happens in one's mind, at least mine. So one of the things when I got there — I remember this because I was relieved that you were very nice to me and you were polite. I said, Oh this is not that bad. And then I went on with my business.

(Huber Hr'g Tr. 62-63, Feb. 20, 2008.)

Inspector Nystrom did not have a warrant, and he expressed no interest in obtaining Petitioners' consent to his entry onto their property. Instead, he testified

that he did not need their consent as follows: "I can enter[] your property regardless of whether you were there or not. . . ." (Huber Hr'g Tr. 61, Feb. 20, 2008.)

Inspector Nystrom's statement expresses NJDEP's policy to conduct warrantless searches pursuant to New Jersey's Freshwater Wetlands Protection Act (the FWPA), which by its broadly-worded terms grants NJDEP regulatory authority "to enter any property, facility, premises or site for the purpose of conducting inspections, sampling of soil or water . . ., and for otherwise determining compliance with the provisions" of the FWPA. *See* N.J. Stat. Ann. § 13:9B-21(m) (2010). NJDEP also has relied on a provision of the New Jersey Conservation and Development Act, N.J. Stat. Ann. § 13:1D-9(d) (2010), which generally grants NJDEP authority to "enter and inspect any property, facility, building, premises, site or place for the purpose of investigating an actual or suspected source of pollution of the environment and conducting inspections, collecting samples, copying . . . documents or records, and for otherwise ascertaining compliance or noncompliance with any law, permits, orders, codes, rules and regulations."

Interpreting those statutes as though they give DEP unfettered authority to enter private residential property at any time to inspect wetlands, Inspector Nystrom disregarded Petitioners' objections and walked from the front of their property, around the house, and into the backyard where he took photographs, notes and soil borings. (Huber Hr'g Tr. 61-63, 21-100, Feb. 20, 2008); (Appellants' App. 126-137a) (*see also* Appellants' App. 181a).

As a result of this search and seizure, NJDEP issued a Notice of Violation ("NOV") of the FWPA to Petitioners on September 5, 2002. (Appellants' App. 120-125a). The NOV described Petitioners' noncompliance as follows: "the performance of unauthorized regulated activities within a freshwater wetland. More specifically, the regulated activities involve removal of native vegetation and placement of fill in the form of soil and sod." (Appellants' App. 123a). Thereafter, on October 3, 2003, NJDEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment (the "Administrative Order") requiring "restoration" of various areas of Petitioners' property and payment of a penalty. (Appellants' App. 2a).

Petitioners filed a request for a hearing to dispute the Administrative Order. (*See* Appellants' App. 317a). NJDEP used the evidence that Inspector Nystrom gathered on July 3, 2002 in support of a motion for Summary Decision (Appellants' App. 126-137) and at a plenary hearing before the ALJ. (*See, e.g.*, Huber Hr'g Tr. 21-100, Feb. 20, 2008) (Appellants' App. 200a). Thereafter, in reliance on, among other things, this evidence, the ALJ issued an Initial Decision on April 30, 2008 (Pet. App. 49a-85a). The Initial Decision was adopted in the Final Decision of the DEP Commissioner on June 23, 2008 (Pet. App. 47a), which determined that Petitioners had, inter alia, placed fill into protected wetlands in their backyard in violation of the FWPA. (Pet. App. 47a-48a, 76a). The Final Decision ordered Petitioners, among other things, to "restore" large portions of their backyard and to pay the penalty assessed by NJDEP. (Pet. App. 47a-48a).

Petitioners appealed the Final Decision of the NJDEP Commissioner to the Superior Court of New Jersey, Appellate Division raising again, *inter alia*, the federal question of whether NJDEP violated Petitioners' Fourth Amendment rights by conducting a warrantless search of Petitioners' private residential property without consent or exigent circumstances. *See New Jersey Dep't of Envtl. Prot. v. Huber*, No. A-5874-07T3, 2010 N.J. Super. Unpub. LEXIS 121, *13 (N.J. App. Div. Jan. 20, 2010), (Pet. App. 12a). In an unpublished opinion determining a great number of legal arguments under New Jersey law, as well as the consent issue, the Appellate Division held that it did not need to "determine if Nystrom had consent to conduct an inspection and testing on the Hubers' property." *Id.* at *25, (Pet. App. 23a). Instead the court was "persuaded that consent was not essential and that Nystrom had statutory authority to enter the property and perform his inspection." *Id.* Accordingly, it rejected Petitioners' argument that the evidence obtained from Inspector Nystrom's search should have been suppressed.

The decision below also contains the following decisive paragraphs:

> State statutory schemes have permitted administrative agencies to conduct warrantless inspections. Such warrantless inspections have generally involved a pervasively or closely regulated industry and an administrative inspection scheme. . . . Three criteria must be met in order for a warrantless search of a regulated industry or activity to be deemed constitutionally

reasonable. First there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made. Second, the warrantless inspection must be necessary to further the regulatory scheme. Third, the regulatory inspection in terms of the certainty and regularity of its application must provide a constitutionally adequate substitute for a warrant.

This analysis is satisfied by the comprehensive regulatory scheme under FWPA. This court has recognized that activity integrally related to the issue of water pollution and conservation of resources is extensively regulated in this State. The Wetlands Permit applicable to this property brought it directly under the regulatory arm of the DEP just as much as if it was regulated industry. Further, such an inspection is authorized by the FWPA to ascertain compliance with the Act. N.J.S.A. 13:9B-21(m). *See also* N.J.S.A. 13:1D-9(d) (authorizing the DEP to "enter and inspect any . . . property, . . . premise[], site or place for the purpose of . . . ascertaining compliance or noncompliance with any laws, permits, and regulations of the department.") Nystrom had the authority to enter the Hubers' property, conduct his inspection, and perform his testing to determine if the Hubers were in violation of the FWPA. He did not have to secure an administrative search warrant to fulfill his regulatory duties.

Id. at *25-*28 (internal quotations and citations omitted in part), (Pet. App. 23a-25a).[1]

Thus the court applied the test for "pervasively regulated businesses" to determine whether NJDEP's search was valid, even though petitioners' property is residential.

REASONS FOR GRANTING THE PETITION

Under Rule 10 (c) of the Rules of this Court, certiorari may be appropriate "when a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Here, an appellate court in New Jersey, like the United States Court of Appeals for the Second Circuit in an earlier decision,[2] has deemed the warrantless intrusion of a State environmental inspector into the backyard of homeowners justified by the State's need to inspect and protect wetlands.

However, under numerous decisions of the Court, before NJDEP entered Petitioners' property to inspect

---

1. The Wetlands Permit that the decision refers to had been granted to the developer of the property several owners back, as part of a negotiated deal that determined the buildable portion of Petitioners' lot. It expired by its own terms in 1997 before the Petitioners purchased the property. (*See* Appellants' App. 94-99a).

2. *See Palmieri v. Lynch*, 392 F.3d 73 (2d Cir. 2004), *cert. denied*, 546 U.S. 937 (2005).

their wetlands, it was required to obtain a warrant, based on a showing of "reasonable legislative or administrative standards for conducting an . . . inspection." *See, e.g., Camara v. Mun. Court of S.F.*, 387 U.S. 523, 538 (1981).

A similarly flawed decision has been issued by the Second Circuit in *Palmieri v. Lynch*, 392 F.3d 73 (2d Cir. 2004), *cert. denied*, 546 U.S. 937 (2005). Taken together, this case and *Palmieri* stand as leading, albeit misguided, authority on the degree of privacy that should be afforded by environmental investigators to homeowners with wetlands on their property. *See, e.g.*, Nicholas A. Robinson, *Environmental Regulation of Real Property* § 3.06A, 3-78 (2006) (discussing *Palmieri*). Accordingly, unless the federal constitutional error at the heart of these decisions is corrected, they are likely to encourage federal and State inspectors throughout the country to conduct searches of residential wetlands without warrants. Beyond that, they are likely to encourage a national trend of tolerance toward unwarranted invasions onto private and even residential property by environmental inspectors and other government agents.

In order to check that trend; safeguard the sanctity of the home from unwarranted governmental intrusions; provide necessary guidance on the questions presented; and correct an egregious infringement on the constitutional rights of the Petitioners herein, the Court should grant this petition for *certiorari*.

LEGAL ARGUMENT

1. Under the Court's decisions, NJDEP Needed a Warrant to Search Petitioners' Property.

The Court repeatedly has stated that "[a]bsent consent or exigent circumstances, a private home may not be entered to conduct a search or effect an arrest without a warrant." *See, e.g., Donovan v. Dewey*, 452 U.S. 594, 599 n.6 (1981). This rule applies to administrative as well as criminal searches, *see Camara*, 387 U.S. at 528-29, 539-40 (1981); and extends to protect the "curtilage,"[3] which includes the close backyard, of a

---

3. In *Madruga v. County of Riverside*, 431 F. Supp. 2d 1049, 1055 (C.D. Cal. 2005), the court provided the following helpful background:

> The curtilage was a concept devised under the common law to distinguish between the petty and the menacing trespass to a person's property. "In the common law of England the curtilage was the part of a person's property that a criminal had to break into in order to be guilty of burglary. Since burglary was a capital offense, there was a felt need to confine it to the most alarming forms of breaking and entering." *U.S. v. Redmon*, 138 F.3d 1109, 1130 (7th Cir. 1998) (Posner, C.J., dissenting). The curtilage, as distinguished from "open fields," thus understood has since been invoked to describe the "area intimately linked to the home, both physically and psychologically," *California v. Ciraolo*, 476 U.S. 207, 212-13, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986), and against which intrusion from governmental agents, much like the burglars of old, is sought to curb.

family home. *See Oliver v. United States*, 466 U.S. 170, 180 (1984) ("The curtilage ... warrants the Fourth Amendment protections that attach to the home."); *id.* at 182 n.12 ("And, for most homes, the ... conception defining the curtilage – as the area around the home to which the activity of home life extends – is a familiar one easily understood from our daily experience.") (cited with approval in *Dow Chemical Co. v. United States*, 476 U.S. 227, 237 n.3 (1986)).[4]

Thus, under these long-established principles, when the Environmental Protection Agency ("EPA") was faced with similar circumstances, and needed to ascertain the location of wetlands on a farm upon evidence that they had been improperly filled, although the owners did not consent to a search, EPA obtained an administrative search warrant. *See In re Alameda County Assessor's Parcel Nos. 537-801-2-4 and 537-850-9, et al.*, 672 F. Supp. 1278, 1282 (N.D. Cal. 1987). The court in *Alameda* denied the landowners' motion to quash the warrant, noting that EPA was entitled to seek a warrant when ""reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]," as well as if "probable cause . . .[is] based . . . on specific evidence of an existing violation."" *See id.* at 1287 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978)) (alterations in original).

---

4. The NJDEP has never argued that that the search and seizure herein was conducted outside the "curtilage" of the Hubers' residence.

In New Jersey, pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344(g), (h), the NJDEP regulates wetlands throughout the State according to agreements with the EPA, Army Corps of Engineers, and Fish and Wildlife Service, *see* 40 C.F.R. § 233.71(d) (2010) (incorporating the memoranda of these agreements into the federal regulations governing wetlands), and the FWPA, N.J. Stat. Ann. § 13:9B-1 to -30 (2010). *See* 40 C.F.R. § 233.71(a), (b) (2010) (incorporating the FWPA into the federal regulations insofar as they apply to New Jersey). New Jersey and Michigan are the only states with such delegated authority. *See* 40 C.F.R. §§ 233.70, 233.71 (2010); *see generally* Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242 (1995).

Thus it was NJDEP's decision how to proceed when Petitioners objected to its attempt to enter and search their residential property to determine the extent of the wetlands thereon, and whether they had been impermissibly filled. But rather than get an administrative warrant, as the EPA did in *Alameda*, NJDEP merely authorized one of its more brazen inspectors to conduct the search, which he did, at his discretion and convenience, with no consideration of any constitutional limitations that might have been applicable. NJDEP has defended that search by arguing that Petitioners are entitled to only the reduced protection from warrantless searches afforded to pervasively regulated businesses; and that under the

test applicable in the case of such entities,[5] no warrant was needed. Petitioners do not agree that this search passes that test.

But much more important, clear and decisive herein is the principle established and acknowledged in many of the Court's decisions that a home is entitled to greater protection from warrantless searches than any commercial establishment. In *Donovan v. Dewey*, the Court explained the reason for this difference:

> The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections.

452 U.S. at 598-99 (1981) (upholding warrantless inspections pursuant to Federal Mine Safety and Health

---

5. As the Court has stated, a warrantless inspection of a pervasively regulated business is considered reasonable for Fourth Amendment purposes if "there is a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made. . ."; the warrantless search is "necessary to further [the] regulatory scheme. . ."; and the search is part of an inspection program that advises the owner that the search is conducted pursuant to "the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *See New York v. Burger*, 482 U.S. 691, 702 (1987).

Act); *see also, e.g.*, *Minnesota v. Carter*, 525 U.S. 83, 90 (1998) ("Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property.") (citing *New York v. Burger*, 482 U.S. 691, 700 (1987) (determining that junk shops are so pervasively regulated that their owners cannot expect them to be free from inspection) ("An expectation of privacy in commercial premises. . . is different from and indeed less than, a similar expectation in an individual's home.")).

In this connection, the Court has specified that "pervasively regulated businesses" have even further reduced privacy protection than other commercial premises because their owners expect and implicitly consent to warrantless inspections as part of the overall regulatory schemes affecting their particular industries. As explained in *Marshall v. Barlow's, Inc.*:

> [A]n exception from the search warrant requirement has been recognized for "pervasively regulated business[es]," *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 1596, 32 L.Ed.2d 87 (1972), and for "closely regulated" industries "long subject to close supervision and inspection." *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74, 77, 90 S.Ct. 774, 777, 25 L.Ed.2d 60 (1970). These cases are indeed exceptions, but they represent responses 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 U.S. 347, 351-352, 88 S.Ct.

> 507, 511, 19 L.Ed.2d 576 (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.

436 U.S. 307, 313.

In *New York v. Burger*, 482 U.S. 691 (1987), the Court explained that the pervasively regulated "doctrine is essentially defined by 'the pervasiveness and regularity of the federal regulation' and the effect of such regulation upon an owner's expectation of privacy." *See* 482 U.S. at 701. On this point, the Court specifically has stated that "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home", *see Dow Chemical Co.*, 476 U.S. at 237-38 (quoting *Donovan*, 452 U.S. at 599); and that "a homeowner's interest in his dwelling" *does* include "being free from any inspections." *See id.*

Thus, insofar as constitutional freedom from warrantless entry and inspections is concerned, "pervasively regulated businesses" are at least two significant degrees of separation away from a home. Accordingly, before the decision below was issued, there were no state or federal cases, except *Palmieri v. Lynch*, 392 F.3d 73, that justified the warrantless search of a residence with reference to the standards for "pervasively regulated businesses". In this regard, the

Second Circuit made the following observations shortly before another panel of the court decided *Palmieri*:

> Neither the Supreme Court nor this Court has ever permitted warrantless administrative searches of a person's residence unless: exigent circumstances exist, business was conducted in the home, or the search was directed at convicted felons still serving sentences of probation or parole. *Cf. United States v. Knights,* 534 U.S. 112, 122 S.Ct. 587, 591, 151 L.Ed.2d 497 (2001) (upholding search of home of felon then subject to condition of probation that permitted warrantless search; "a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens"); *Griffin v. Wisconsin,* 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987) (same); *United States v. Grimes,* 225 F.3d 254 (2000) (search of parolee's home pursuant to violation-of-parole warrant); *Lewis v. United States,* 385 U.S. 206, 211, 87 S.Ct. 424, 17 L.Ed.2d 312 (1967) (where home is "converted into a commercial center . . . that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street"). Indeed, the Supreme Court has held administrative searches of homes to be unconstitutional, even in the face of compelling circumstances. *See Michigan v. Clifford,* 464 U.S. 287, 291-92, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984) (concluding that strong expectations of privacy, even in fire-damaged

> residences, prevent a warrantless search to determine the cause and origin of the fire absent consent or exigent circumstances); *Camara*, 387 U.S. at 534-39, 87 S.Ct. 1727 (concluding that a warrant is required to conduct an administrative search of a residence located in the commercial area of an apartment building). Given the Supreme Court precedent emphasizing the strong privacy interest in homes, we decline to take a step to erode this strong interest, as appellees have invited us to do in this case.

Anobile v. Pelligrino, 303 F.3d 107, 120-21 (2d Cir. 2002) (upholding certain warrantless administrative searches but not those of dormatories at a racetrack).

Indeed, even in the case of commercial property, there is no "precedent for declaring that a business is subject to warrantless administrative searches as 'closely regulated' solely because it is subject to general purpose environmental laws." *See United States v. Hajduk*, 396 F. Supp. 2d 1216, 1233 (D. Colo. 2005) (regarding searches conducted to ensure compliance with the Clean Water Act and Resource Conservation and Recovery Act); *see also Marshall v. Barlow's, Inc.*, 436 U.S. 307 (determining that a section of the Occupational Safety and Health Act allowing warrantless inspections violated the Fourth Amendment, and that the statute and its regulations, which applied across numerous industries, did not transform any of them into "pervasively regulated businesses").

In light of the foregoing, the determination by the court below that the NJDEP inspector's intrusion into Petitioners' backyard was justified under the "pervasively regulated business" exception is plainly wrong. In this regard, the New Jersey court failed to appreciate the difference between searches conducted as part of the close, pervasive regulation of a particular industry, and searches conducted pursuant to generally applicable governmental regulations affecting residential property.

In cases like this one, involving a search conducted pursuant to a generally applicable statute and not in a pervasively regulated industry, the "special public needs" test allows warrantless searches only when the government shows that (1) urgent "special public needs" make such a search necessary, and (2) the special needs outweigh the infringement upon private rights caused by the search. *See, e.g., Griffin v. Wisconsin,* 483 U.S. 868, 873 (1987) (allowing a warrantless search of probationer's apartment upon information that it contained at least one gun) ("Although we usually require that a search be undertaken only pursuant to a warrant . . ., we have permitted exceptions when 'special needs' . . . make the warrant . . . requirement impracticable"); *see also Chandler v. Miller*, 520 U.S 305, 318 (1997) (invalidating a statute requiring election candidates to pass a drug test when "Georgia . . . failed to show. . . a special need. . ." for the requirement).

The controlling case here is *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967), which held that the San Francisco Department of Public Health could not penalize a resident for refusing to comply with

a section of the City Housing Code that would have authorized a warrantless search of his apartment. That section provided as follows:

> Sec. 503. RIGHT TO ENTER BUILDING. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.

Camara, 387 U.S. at 526. The inspector in *Camara* first went to the resident's apartment building "to make a routine inspection for possible violations of the city's Housing Code." Upon learning that the lessee of the first floor was using the rear area as his personal residence, the inspector demanded that he be let in to search those premises. *See id.* The building manager refused because the inspector had no warrant. *Id.* As in this case, a few days later, the inspector came back, again without a warrant, and the resident again turned him away. *See id.*

In *Camara*, after being refused the second time, the inspector caused the resident to be prosecuted for refusing to permit an inspection under the Housing Code, pursuant to which inspections could be conducted "at reasonable hours" upon presentation of "proper credentials;" as long as entry was not obtained "by force". *See id.* at 531 n.10. Despite these statutory "safeguards", the Court held that the resident could not

be prosecuted for refusing to allow a warrantless search. *See id.* at 540. In language that should apply with equal relevance in this matter, the Court explained the constitutional problem as follows:

> Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area. . . . The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.

Id. at 532-33. The Court acknowledged that San Francisco had a legitimate public need to inspect apartments for housing code violations, but distinguished that from the need to avoid a warrant, viz:

> The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant. For example, to say that gambling raids may not be made at the discretion of the police

> without a warrant is not necessarily to say that gambling raids may never be made. In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. *See Schmerber v. State of California*, 384 U.S. 757, 770-771, 86 S.Ct. 1826, 1835-1836, 16 L.Ed2d 908. It has nowhere been urged that fire, health and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement.

Id. at 533. Thus, because getting the warrant would not frustrate the purposes of the government inspection, the Court did "not find the public need argument dispositive". *See id.*

As in *Camara*, there was no need here for the NJDEP's inspection to be conducted without a warrant. In fact, this case bears no resemblance to any of the various cases where warrantless searches have been justified by a special public need to proceed immediately, or to act with some degree of surprise or unpredictability. *See, e.g., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (alcohol and drug testing of railroad employees); *Griffin v. Wisconsin*, 483 U.S. at 873 (search for a gun in probationer's

apartment); *New Jersey v. T.L.O*, 469 U.S. 325, 342 (1987) (search of student's purse for marijuana); *Michigan v. Clifford*, 464 U.S. 287, 291-92 (1984) (firefighters investigating fire); *Donovan v. Dewey*, 452 U.S. at 600 (inspection of stone quarry operator) (quoting S. Rep. No. 95-181, at 27 (1977) *as reprinted in* 1977 U.S.C.C.A.N. 3401, 3427 ("[I]n [light] of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives.")).

Indeed, NJDEP has not attempted to show that it would have been frustrated in its enforcement of the FWPA by the process of obtaining a warrant for the inspection at issue here. And there is certainly no reason to presume that. Indeed, it is hard to imagine a more permanent target of inspection than Petitioners' wetlands or any fill alleged to have been placed therein. In fact, NJDEP has never contended that the inspection herein had to be conducted right away, nor offered any other justification for its failure to get a warrant, other than its recitation of the broadly-worded terms of the New Jersey Statutes sections 13:9B-21(m) and 13:1D-9(d). Under these circumstances, it is reasonably impossible to conclude that there was any "special need" to proceed without a warrant. Accordingly, as in *Camara*, a warrant was constitutionally required.

In light of all of the foregoing, it is clear that obtaining an administrative warrant to search residential property should be standard procedure. *See e.g., In re Alameda County Assessor's Parcel*, 672 F. Supp. 1278. Thus, the decision below is based on a plain

error of fundamental constitutional law that deprived Petitioners of their right to be free from warrantless searches and seizures at their home.

2. The decision below reflects and encourages an alarming tolerance of warrantless searches by environmental regulators and other government inspectors threatening the privacy of all American homes.

The decision below threatens the privacy rights of people in their homes everywhere, and not just those with wetlands on their property. Regulations and ordinances governing trees, septic systems, setback lines, buffer zones, and many other health, safety, environmental and land use issues all could be more efficiently administered without adherence to the federal constitution's warrant requirement, and this case is likely to inspire numerous agencies to take advantage of the court's tolerance. Indeed, under the reasoning of the decision below, inasmuch as some regulatory schemes affect all residential property, all people in their homes would be entitled to only the reduced level of privacy and freedom from warrantless inspections generally given to "pervasively regulated businesses." [6]

---

6. It is worth noting that the New Jersey Supreme Court has recently amended the Court rule relating to unpublished opinions to make it easier to cite them as persuasive authority. *See* New Jersey Court Rule 1:36-3, *as amended by* New Jersey Court Order 2010-31, July 23, 2010 effective September 1, 2010 (removing a previous condition for citation of an unpublished opinion that required the citing party to provide the court and all other parties with copies of all other relevant and contrary unpublished opinions) (now only contrary opinions are required).

The threat of such constitutional mayhem is not limited to New Jersey. Courts in other states are likely to follow the lead of the court below, particularly considering the sophisticated wetland regulation system in New Jersey, which, as mentioned above, is one of the only two States authorized to regulate wetlands under the Clean Water Act. *See* 40 C.F.R. §§ 233.70, 233.71.

Reverberations outside New Jersey are also especially likely because of the strong call in the Clean Water Act and its regulatory scheme for nationally uniform standards in the enforcement of regulations governing wetlands, which are ubiquitous throughout much of the United States. *See generally Rapanos v. United States*, 547 U.S. 715, 722-25 (2006) (noting the "immense . . . regulation of land use that has occurred under the Clean Water Act"). The CWA, as interpreted by the EPA, expresses a specific federal interest "about national consistency in administration and effectiveness of State programs." *See Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations,* 53 Fed. Reg. 20764, 20771-72 (June 6, 1988); *see also In re Freshwater Protection Act Rules*, 852 A.2d 167, 172-73 (N.J. 2004). Thus, an appellate ruling relating to wetlands in one jurisdiction may be expected to guide courts in other jurisdictions pursuing harmonious statutory construction.

Beyond this, the errors in this ruling are even more likely to be disseminated because the Second Circuit already has issued a decision based on similar errors, implicitly approving the warrantless trespass into the backyard of residential property by State environmental

inspectors to inspect regulated tidal wetlands over a homeowner's objections. In *Palmieri*, 392 F.3d 73, the court dismissed a homeowner's claim under 42 U.S.C. § 1983, that employees of the New York Department of Environmental Conservation ("NYDEC") violated his Fourth Amendment rights when they trespassed on his residential property in order to inspect the wetlands in his backyard. *See* 392 F.3d at 87. The Plaintiff had applied for and obtained a tidal-wetland permit to expand his dock and build an additional boatlift. *Id.* at 76. The permit stated that it was conditioned on the property being "subject to inspection at reasonable hours and intervals by an authorized representative of the DEC to determine whether the permittee [wa]s complying with th[e] permit" and with applicable law. *Id.* The Plaintiff refused to grant physical access to his property for such inspections, so NYDEC at first inspected it by boat. *Id.* But after he applied for an additional permit, NYDEC officials visited his property. They knocked at the front door and got no answer; so, despite their awareness of his express refusal to allow their entry, they walked around the side of the house to get to the dock and wetlands in the back. *Id.* at 76. Faced with a system of gates and fences intended to exclude trespassers from entering the property, and signs announcing "PRIVATE PROPERTY – NO TRESPASSING" and "BEWARE OF DOG", the inspectors nevertheless proceeded into the backyard, where plaintiff encountered them, and immediately ordered and escorted them off his property. *Id.* at 76-77.

The court in *Palmieri* acknowledged how limited the "special needs" exception is intended to be. *See* 392 F. 3d at 79-81 (noting that the test of whether special

government concerns override privacy interests balances "the nature of the privacy interest allegedly compromised"; "the character of the intrusion"; and "the nature and immediacy of the government's concerns. . . . ") (quoting *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 832, 834 (2002)). Nevertheless, the decision cavalierly discounted the homeowner's expectation of privacy, relying in part on the existence of the permits relating to his wetlands, and finding "his privacy interest in these areas somewhat analogous to the diminished level of privacy interest typically recognized to reside in other zones of activity in the public sphere." *See Palmieri*, 392 F.3d at 82 (citing *United States v. Biswell*, 406 U.S. 311, 315-17 (1972) (involving the pervasively regulated business of firearms)).

Having minimized the homeowners' right to privacy as essentially equivalent to that of a pervasively regulated business, the court concluded that protecting wetlands is an important governmental interest, as follows:

> Indeed, while there is no case law directly on point with respect to an environmental inspection of residential property, there can be no principled distinction made between the need to inspect commercial property and the need to inspect residential property where the residential property consists of protected tidal wetlands. Such wetlands are a well-regulated zone in the public sphere of concerns. It is axiomatic in this day and age that the state's interest in performing regulatory inspections . . . is unquestionably of the highest order.

Palmieri, 392 F.3d at 85. The court in *Palmieri* substituted this observation (which disregards the principle that homes enjoy more protection from warrantless searches than regulated businesses) for any analysis of whether the inspection at issue needed to be done without a warrant, just as the New Jersey court did in the decision below. But, as noted above, under the "special public needs" test, the government must show an urgent public need to search residential property without a warrant, not just a valid public purpose for a statute which purports to authorize the search. As the Court explained in *Camara*, "The question is not . . . whether these inspections may be made, but whether they may be made without a warrant." *Camara*, 387 U.S. at 533.

Dissenting on this issue, Judge Straub identified the *Palmieri* court's "extraordinary" and "aggressive" break from fundamental Fourth Amendment jurisprudence, as follows:

> Today the majority expands the narrow "special needs" exception to cover non-exigent searches of private messuages belonging to citizens who neither have nor are suspected to have committed any crime at all. This is an extraordinary step and it represents an aggressive shift in our Fourth Amendment jurisprudence away from the rights of individuals to maintain control of their homes toward the privilege of government agents to invade without either receiving consent or casting their claims of need into the crucible of judicial review. Nothing in the facts of this case or in our Fourth Amendment

> jurisprudence demands or permits that this step be taken.

392 F.3d at 88 (Straub, J., concurring and dissenting in part).[7]

These two cases now muddy the waters of "special needs" jurisprudence justifying warrantless searches and approving intrusions into private residential property at the unfettered discretion of State environmental inspectors. *See, e.g.,* Robinson, *supra*, at § 3.06A, 3-78 (citing *Palmieri* as a leading case and noting without question the Second Circuit's determination therein that the inspectors' trespass into a fenced-off residential backyard was "de minimus" and "only minimally intrusive"); *see also Palmieri*, 392 F.3d at 84. They both reflect and exacerbate a trend of tolerance toward increasingly frequent warrantless searches of private property. *See generally Reeves Brothers, Inc. v. EPA*, 956 F. Supp. 676, 679 (W.D. Va. 1996) ("There are those within EPA, and within Region III specifically, who believe the Fourth Amendment to be inapplicable to the realm of environmental investigation."). Thus without corrective guidance from the Court, broadly drafted statutes and regulations have been and will continue to be written and interpreted to avoid the Fourth Amendment's warrant requirement.[8] *See, e.g., Town of Darien v. Estate of D'Addario*, 784

---

7. The remainder of Circuit Judge Straub's opinion explains well the fundamental flaws in *Palmieri,* which substantially overlap those in the decision below. *See* 392 F.3d at 87 (Straub, J., concurring and dissenting in part).

8. Broad, generally applicable statutes interpreted to grant warrantless access to private property can accomplish the same (cont'd)

A.2d 337 n.1 (Conn. 2001) (noting issue over constitutionality of Conn. Gen. Stat. § 48-13 which provides that ". . . either before or after the institution of a condemnation proceeding and after reasonable notice to the property owner or owners affected, the Superior Court or any judge thereof may authorize such condemning authority to enter upon and into land and buildings sought or proposed for public uses for the purpose of inspection, survey, borings and other tests."); *Wien v. Delaware,* 882 A.2d 183, 189 (Del. 2005) (citing with apparent approval Del. Code Ann. tit. 7, § 6616, which authorizes environmental investigators "to conduct administrative 'spot checks' without requiring that the official have any reason to suspect that a violation of the Wetlands Act has occurred" by providing that they "may enter, at reasonable times, upon any private or public property for the purpose of determining whether a violation [of the Wetlands Act] exists . . . upon giving written notice. . . ."); *see also,*

(cont'd)
purposes as, and thus resemble, the "general warrants" that the Fourth Amendment was specifically intended to protect against. *See generally Marshall v. Barlow's Inc.*, 327 U.S. at 327-28, n.4 (Stevens, J., dissenting) ("Our 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 looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches. . . ."); *id.* at 327 ("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.").

e.g., Ala. Code § 22-28-19 ("No person shall refuse entry of access to any authorized representative of the [Alabama] department [of environmental management] who requests entry for purposes of inspection [for compliance with the Clean Air Act], and who presents appropriate credentials, nor shall any person obstruct, hamper or interfere with any such inspection. . . ."); Ind. Code § 13-14-2-2 (allowing Indiana Department of Environmental Management to "have a designated agent, upon presentation of proper credentials, enter upon private or public property to inspect for and investigate possible violations" of any air pollution, water pollution or environmental management laws); Kan. Stat. Ann. § 65-3009 (providing that the State Secretary of Health and the Environment may "designate competent representatives who may enter and inspect any property, premise or place at any reasonable time for the purpose of investigating either an actual or possible source of air pollution or of ascertaining the state of compliance with [the Kansas Air Quality Act] and regulations in force pursuant thereto" and that "no person shall refuse entry or access to any authorized representative of the secretary who requests entry for purposes of inspection, and who presents appropriate credentials"); La. Rev. Stat. Ann. § 30:2012 (authorizing warrantless inspections of all facilities subject to environmental regulations); Miss. Code Ann. §49-27-63 (stating that the Mississippi Commission on Marine Resources "or any authorized employee of the Department of Marine Resources may enter at reasonable times upon any private or public property

in the performance of duty [*sic*] to enforce the Coastal Wetlands Protection Act.").[9]

In New Jersey, one statutory scheme even allows NJDEP to outsource the responsibility to determine whether to conduct a search. *See* N.J. Stat. Ann. § 58:10B-16(b) (allowing for court orders granting access to private property upon a determination of necessity made by any individual licensed by NJDEP to oversee the remediation of a potentially related site); N.J. Stat. Ann. § 58:10C-1 to -29 (New Jersey Site Remediation Reform Act) (empowering individuals licensed by

---

9. Other State statutes do recognize constitutional limitations on the inspection of private and residential property. *See, e.g.,* Idaho Code Ann. § 39-108 ("All inspections and investigations conducted under the authority of this chapter shall be performed in conformity with the prohibitions against unreasonable searches and seizures contained in the fourth amendment to the constitution of the United States and section 17, article I, of the constitution of the state of Idaho."); Mont. Code Ann. § 75-2-403 ("The department [of environmental quality] or an authorized representative, for the purpose of ascertaining the state of compliance with this chapter or a rule, order, or permit in force under this chapter, may enter and inspect, at any reasonable time, any property, premises, or place, *except a private residence . . .*") (emphasis added); S.C. Code Ann. § 48-1-50(24) ("The Department [of Health and Environmental Control] may . . . [e]nter at all times in or upon any property, public or private, for the purpose of inspecting and investigating conditions relating to pollution or the possible pollution of the environment of the State. . . *provided, however, that if such entry or inspection is denied or not consented to, and no emergency exists, the Department is empowered to and shall obtain from the magistrate . . . a warrant* to enter and inspect any such property, premise or place prior to entry and inspection.") (emphasis added).

NJDEP to determine whether remediation is necessary and to oversee and control environmental remediation without NJDEP oversight).

In light of all of the foregoing, and the obviously slippery slope threatening to undermine Fourth Amendment protection for all people in their homes, this case presents, on a simple and humble set of facts, questions of fundamental constitutional significance and extensive nationwide scope that cry out for the Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD P. DAVIS
Counsel of Record
THE LAW OFFICE
OF HOWARD DAVIS, P.C.
180 Sylvan Ave, Second Floor
Englewood Cliffs, N.J. 07632
(201) 541-9737
hdavis@envirolawyer.net

HOWARD P. DAVIS
ANNE M. RONAN
ERIC M. GRILLÉ
THE LAW OFFICE
OF HOWARD DAVIS, P.C.
180 Sylvan Ave, Second Floor
Englewood Cliffs, N.J. 07632
(201) 541-9737

Attorneys for Petitioner

Blank Page