

# Environmental Regulation and the Fourth Amendment

by Traci Waxman

## Introduction

Within the last 40 years, more people and pollution have been added to the planet than existed in the previous 10,000 years.<sup>1</sup> As scientific knowledge about the danger of pollution grows, so does environmental regulation. Enforcement of these environmental regulations presents a difficult task for the government agencies entrusted with implementation of their mandates.<sup>2</sup> The Fourth Amendment's prohibition against unreasonable searches limits the ability of agencies to perform inspections of businesses whose operations pose a threat to the environment.<sup>3</sup>

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For an inspection by government officials to be permissible under the Fourth Amendment,<sup>4</sup> the search must be reasonable.<sup>5</sup> The United States Supreme Court has held that to satisfy Fourth Amendment reasonableness a government official generally must secure a warrant before performing a search.<sup>6</sup> However, securing a warrant takes time.<sup>7</sup> A government official must submit an affidavit requesting a warrant to a magistrate.<sup>8</sup> A magistrate will only issue a warrant if the affidavit indicates sufficient probable cause that a violation is occurring.<sup>9</sup>

The delays in securing warrants often provide businesses with an opportunity to conceal regulatory violations.<sup>10</sup> The warrant requirement, therefore, may allow serious environmental violations to occur without detection.<sup>11</sup> To avoid these enforcement difficulties, many environmental statutes authorize officials to perform inspections of businesses without first obtaining a warrant.<sup>12</sup>

Warrantless searches are subject to the Fourth Amendment reasonableness requirement.<sup>13</sup> The Supreme Court has held that a warrantless search is constitutional only when the search targets a pervasively regulated business.<sup>14</sup> The Court has formulated a three prong test to determine the constitutionality of such warrantless inspections of pervasively regulated businesses.<sup>15</sup>

The Tenth Circuit Court of Appeals applied the three prong test in *V-1 Oil Co. v. Wyoming Department of Water Quality*.<sup>16</sup> In *V-1 Oil Co.*, the Tenth Circuit held unconstitutional a portion of the Wyoming Environmental Quality Act which authorized warrantless searches.<sup>17</sup> This article argues that the Tenth Circuit required more than what Fourth Amendment reasonableness demands and rendered a decision that places too great a burden on government agencies charged with enforcement of environmental regulations.

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Section I of this article discusses the Fourth Amendment and warrantless searches of pervasively regulated businesses. Section II discusses the leading Supreme Court case in which the Court developed the three prong test by which warrantless searches are to be evaluated. Section III summarizes the Tenth Circuit's decision in *V-1 Oil Co.* interpreting the three prong test. Section IV offers an analysis of *V-1 Oil Co.*, and concludes that the Tenth Circuit erred by holding the portion

of the Wyoming Environmental Quality Act authorizing warrantless searches violated the Fourth Amendment.

## I. The Fourth Amendment and Warrantless Searches

Essentially, the Fourth Amendment prohibits unreasonable government invasions of people's privacy<sup>18</sup> by guaranteeing that the government shall not violate the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches.<sup>19</sup> The Fourth Amendment's protection against unreasonable searches extends to businesses as well as individuals.<sup>20</sup> Fourth Amendment reasonableness is gauged by a balancing test, weighing the government's need to perform a search on the one hand, and the individual's privacy interests on the other.<sup>21</sup> In order for the Fourth Amendment's protection to attach, an individual must exhibit an expectation of privacy that society is willing to recognize as reasonable.<sup>22</sup>

According to the Supreme Court, Fourth Amendment reasonableness generally requires warrants for searches of businesses.<sup>23</sup> The Court has held that a search of a business without a warrant is presumptively 'unreasonable.'<sup>24</sup> However, because of a lesser expectation of privacy,<sup>25</sup> the general rule requiring search warrants is subject to exceptions.<sup>26</sup> A business has a lesser expectation of privacy than an individual or a private residence.<sup>27</sup> A business depends on accessibility by customers and employees for its economic survival. By making itself accessible to members of the public, a business necessarily surrenders a certain amount of privacy. Therefore, a business enjoys less Fourth Amendment protection than an individual or a private residence.<sup>28</sup>

One exception to the rule requiring search warrants allows a warrantless search where the subject of the search is a pervasively regulated business.<sup>29</sup> A pervasively regulated business is one in which the pervasiveness and regularity of government oversight affects the owner's expectation of privacy.<sup>30</sup> In *New York v. Burger*,<sup>31</sup> the Supreme Court outlined the constitutional requirements for a warrantless search of a pervasively regulated businesses.

## II. *New York v. Burger* and the Reasonableness Test for Warrantless Searches

In *New York v. Burger*, the Court affirmed that an exception to the search warrant requirement applies to pervasively regulated businesses.<sup>32</sup> *Burger* involved a warrantless search of a junkyard by New York City police officers checking for stolen vehicles.<sup>33</sup> The officers conducted the search pursuant to a state statute.<sup>34</sup> In light of the extensive regulations governing junkyards,<sup>35</sup> the Court classified the junkyard as a pervasively regulated business.<sup>36</sup>

The Court developed a three prong test to determine the reasonableness of warrantless searches of pervasively regulated businesses under the Fourth Amendment.<sup>37</sup> If a warrantless search satisfies all three prongs of the test, then the search is reasonable.<sup>38</sup> First, the government must have a substantial interest in performing the warrantless search.<sup>39</sup> Second, the warrantless search must be a necessary part of a regulatory scheme.<sup>40</sup> Third, the warrantless search must be authorized by a statute which provides an adequate substitute for a warrant.<sup>41</sup>

To satisfy the third prong of the test the statute authorizing the warrantless search must perform the basic functions of a warrant.<sup>42</sup> In particular, the third prong of the test requires that the statute notify the owner of a business that the law authorizes warrantless searches.<sup>43</sup> Furthermore, the third prong requires that the statute properly limit the scope of the warrantless search.<sup>44</sup> Finally, the third prong requires that the statute limit the discretion of the officers performing the warrantless search.<sup>45</sup> The Tenth Circuit applied this test in *V-1 Oil Co.*<sup>46</sup>

## III. *V-1 Oil Co. v. Wyoming Department of Environmental Quality*

*V-1 Oil Co.* involved a warrantless search of a V-1 Oil Company oil station by an official of the Wyoming Department of Environmental Quality (WDEQ).<sup>47</sup> The WDEQ knew that earlier searches of the V-1 Oil station had identified it as a source of groundwater pollution.<sup>48</sup> While passing by the station in his car, the official observed V-1 Oil Company removing the concrete over the station's underground storage tanks.<sup>49</sup> The official attempted to discover the reason for the activity.<sup>50</sup> V-1 Oil Company denied two requests to enter the property.<sup>51</sup> Thus, the official conducted a warrantless search pursuant to the Wyoming Environmental Quality Act (ACT).<sup>52</sup> V-1 Oil Company filed suit, alleging that the warrantless search violated its Fourth Amendment rights.<sup>53</sup> The district court ruled for the defendant and held that the Act did provide a constitutionally adequate substitute for a warrant.<sup>54</sup> V-1 Oil Company appealed to the Tenth Circuit.<sup>55</sup>

The Tenth Circuit began its discussion by noting that the Fourth Amendment requirement for a warrant applies to the search of a business.<sup>56</sup> The Court then acknowledged the warrant requirement exception for pervasively regulated businesses.<sup>57</sup> The Tenth Circuit looked to federal and state regulations to determine whether V-1 Oil Company was a pervasively regulated business.<sup>58</sup> Wyoming state law requires gas stations to obtain an operator's license, display

the price of gasoline conspicuously, and pay a gasoline tax.<sup>59</sup> Federal law requires owners of underground gasoline tanks to provide information about the tanks and allow certain inspections and monitoring.<sup>60</sup> The court found the total regulations which govern V-1 Oil Company created sufficient government oversight to conclude that V-1 Oil Company possessed a lessened expectation of privacy.<sup>61</sup> Therefore, the court found that V-1 Oil Company was a pervasively regulated business.<sup>62</sup>

The court then turned to the reasonableness of the warrantless search.<sup>63</sup> The court stated that a warrantless search of a pervasively regulated business is reasonable if the search meets the requirements of the three prong test outlined by the Supreme Court in *Burger*.<sup>64</sup> The court considered whether Wyoming had a substantial interest in performing the warrantless search, which is the first prong of the Burger test.<sup>65</sup> The Tenth Circuit held that protecting the environment and the public from pollution constituted a substantial government interest.<sup>66</sup> Therefore the search satisfied the first prong of the test.<sup>67</sup>

The court could not determine from the record if the search satisfied the second prong of the *Burger* test, which requires that the warrantless search be a necessary part of the regulatory scheme.<sup>68</sup> However, resolution of this question was not necessary because the court found the warrantless search was unconstitutional based on application of the third prong of the *Burger* test.<sup>69</sup> The Tenth Circuit held that the Act did not satisfy the third prong and was therefore unconstitutional.<sup>70</sup> The third prong requires that the statute offer a constitutionally adequate substitute for a warrant by providing notice, limiting the scope of the search, and limiting the discretion of the government official.<sup>71</sup>

The court stated that the Act did not provide adequate notice of searches to businesses.<sup>72</sup> The court found that the Act applied to every business in Wyoming.<sup>73</sup> Therefore, according to the court, the Act did not provide any particular business with adequate notice.<sup>74</sup> Finally, the court stated that the Act did not properly limit the discretion of the inspecting officials.<sup>75</sup> According to the court, the Act offered no assurance of regular inspections and left the timing of inspections to the discretion of the government officials.<sup>76</sup> The court stated that the Fourth Amendment requires a warrant if searches are so random, infrequent, or unpredictable that the owner has no actual expectation that government officials will at times inspect her business.<sup>77</sup> Based on findings of inadequacy regarding the requirements of the *Burger* test, the court found the search of V-1 Oil Company required a warrant.<sup>78</sup> Therefore, the court found unconstitutional the portion of the Act authorizing warrantless searches.<sup>79</sup>

### III. Analysis

#### A. The Tenth Circuit Misapplied the *Burger* Test in *V-1 Oil Co. v. Wyoming Department of Environmental Quality*

The third prong of the *Burger* test requires that a statute authorizing a warrantless search provide an adequate substitute for a warrant.<sup>80</sup> Specifically, the third prong requires that a statute serve the basic functions of a warrant.<sup>81</sup> First, the statute must notify the owner of a

business that the law authorizes the warrantless search and properly limits its scope.<sup>82</sup> Second, the statute must limit the discretion of the inspecting officers.<sup>83</sup> Though the Tenth Circuit held otherwise, the Act does indeed perform these functions.

The Tenth Circuit found that the Act was too general in application to provide adequate notice of potential searches.<sup>84</sup> The court reasoned that because the Act applied to every business in the state, it did not give notice to any particular business.<sup>85</sup> But, the Act does not apply to all businesses in the state, just businesses where a source of pollution exists.<sup>86</sup> Only businesses which threaten the environment, such as V-1 Oil Company, fall under the Act's purview.<sup>87</sup>

Furthermore, the court's finding of pervasiveness suggests that V-1 Oil Company did have notice. As a pervasively regulated business, V-1 Oil Company would have known of the various statutes governing its operation. The Wyoming Environmental Quality Act is not an obscure law. Consequently, V-1 Oil Company was probably familiar with the Act and knew of the authorized warrantless inspections.

The Tenth Circuit also found that the Act failed to limit the discretion of inspecting officers.<sup>88</sup> The court stated that the Fourth Amendment requires a warrant if the statute does not provide an assurance of regular inspections.<sup>89</sup> According to the Court, an assurance of regular inspections informs the owners of businesses that searches will not constitute discretionary acts by inspecting officials.<sup>90</sup> However, an assurance of regular inspections is not a requirement of the *Burger* test.<sup>91</sup> In *Burger* an assurance of regular inspections factored into the Supreme Court's finding that the statute appropriately limited the discretion of inspection officials.<sup>92</sup>

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However, the Court noted in *Burger* that while the regularity of inspections is a factor in the analysis of the constitutionality of a statute, it is not determinative of the outcome.<sup>93</sup> The question is whether the statute as a whole limits the discretion of the inspecting officials.<sup>94</sup>

The Wyoming Environmental Quality Act did appropriately limit the discretion of inspecting officials. The Act only authorized searches of non-residential property on which air, water, or land pollution sources are located.<sup>95</sup> The Act limited the inspection of records to normal office hours.<sup>96</sup> The Act also limited inspection of monitoring equipment and method of operation to a reasonable time.<sup>97</sup> Further, the official could proceed only after presenting the appropriate credentials, and only to determine compliance with the Act.<sup>98</sup> The sum of these statutory requirements appropriately limited the discretion of inspecting officials.<sup>99</sup> Therefore, although the court found otherwise, the Act actually did serve the two basic functions of a warrant.

## B. Policy Considerations

The decision by the Tenth Circuit in *V-1 Oil Co.* could significantly hinder the ability of governmental agencies to enforce environmental regulations. The decision in *V-1 Oil Co.* sets precedent for Wyoming courts and may be followed by courts in other states, many of which have statutes similar to the Wyoming Environmental Quality Act. Such a stringent interpretation of the requirements for warrantless searches will force agencies to obtain a warrant before performing a search. The warrant process, however, presents delays which will provide businesses with opportunities to conceal violations. Concealed violations adversely affect the health and welfare of the general public.

One argument against the statutory authorization of warrantless searches notes that a pervasively regulated business may escape the repercussions of environmental violations because

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of an unconstitutional warrantless search.<sup>100</sup> If a court finds a warrantless search is unreasonable under the Fourth Amendment, then that court may suppress any evidence seized during the search.<sup>101</sup> Thus, the search could be in vain, as the business that violated environmental protection laws would go unpunished.<sup>102</sup> But this is only true if a

search is unreasonable. However, carefully executed warrantless searches such as the search in *V-1 Oil Co.*<sup>103</sup> are not unreasonable searches.

Moreover, violations undiscovered due to the delay and risk involved in obtaining a warrant threaten environmental enforcement more than the occasional unreasonable search. If the government is to protect the public from environmental harm, then statutes allowing warrantless searches are necessary. Therefore, the argument that statutory authorization of warrantless searches may prove to be a disservice to the public fails.

## Conclusion

The Supreme Court has recognized the necessity for warrantless searches of pervasively regulated businesses.<sup>104</sup> In order for a warrantless search of a pervasively regulated business to be constitutional, it must meet the requirements of the three prong test developed by the Supreme Court.<sup>105</sup> The Tenth Circuit in *V-1 Oil Co.*<sup>106</sup> strictly construed the three prong test and held that the portion of the Wyoming Environmental Quality Act authorizing warrantless searches was unconstitutional.<sup>107</sup> According to the Tenth Circuit, the Act did not provide the same basic protections as a warrant.<sup>108</sup> The Tenth Circuit, however, required more than Fourth Amendment reasonableness demands; *V-1 Oil Co.*'s stringent interpretation misapplied the *Burger* test, and ignored important public policy considerations.<sup>109</sup>

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## NOTES

1. Robert V. Percival, et al., *Environmental Regulation* 2 (1992). Warnings of scientists stress that pollution poses an "unprecedented threat to the health of the planet." *Id.* Pollution also poses a threat to people, for it is the health of the planet on which the quality of our lives depend. *Id.* at 3. Evidence of the harm we are inflicting on our environment surrounds us. *Id.* at 2. Whether it is smog, or oil spills, or contamination of our drinking water, the damaging effect of environmental pollution is becoming all too clear. *Id.*
2. Percival, *supra* note 1 at 984-987.
3. *Id.* The Supreme Court has acknowledged that for an inspection to be effective, and serve as a deterrent, unannounced inspections are necessary. *United States v. Biswell*, 406 U.S. 311, 316 (1972). The Court also noted that inspections may be frustrated by a warrant requirement. *Id.*
4. The Fourth Amendment's protection is not limited to criminal investigations, but may be applicable to any government activity which may be characterized as a "search." Frank W. Miller, et al., *The Police Function* 275 (5th ed. 1991).
5. See *New York v. Burger*, 482 U.S. 691 (1987) (holding that warrantless search must meet certain criteria to be considered reasonable under Fourth Amendment).
6. See *Camera v. Municipal Court*, 387 U.S. 523 (1967) (holding that administrative searches of private residences are generally subject to Fourth Amendment warrant requirement).
7. Miller, *Supra* note 4 at 125.
8. *Id.*
9. *Id.*
10. Percival, *supra* note 1 at 985.
11. *Id.*
12. *Id.* at 986. Due to a lack in resources, many environmental enforcement agencies require self-monitoring and self-reporting by businesses as a means of detecting violations. *Id.* Because reliance on self-monitoring and self-reporting has obvious shortcomings, many statutes authorize inspections by enforcement officials. *Id.*
13. See *New York v. Burger*, 482 U.S. 691 (1987) (holding that warrantless search must meet certain criteria to be considered reasonable under Fourth Amendment).
14. *Burger* 482 U.S. at 691. See also *United States v. Biswell*, 406 U.S. 311 (1972) (holding that an exception to warrant requirement exists for pervasively regulated businesses).
15. *Burger* 482 U.S. at 691.
16. *V-1 Oil Co. v. Wyoming Dep't of Env't. Quality*, 902 F.2d 1482 (10th Cir. 1990).
17. *Id.*
18. See *Katz v. United States*, 389 U.S. 347 (1967) (finding that secret recording of telephone conversation by police was violation of constitutionally protected privacy interest).
19. U.S. Const. amend. IV. The Fourth Amendment reads in its entirety:  
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. *Id.*
20. See *v. City of Seattle*, 387 U.S. 541, 543 (1967).
21. *New York v. Burger*, 482 U.S. 691, 702 (1987).
22. *Katz*, 389 U.S. at 361 (Harlan J., concurring). See also *Oliver v. United States*, 466 U.S. 170, (1984) (holding Fourth Amendment protects those privacy expectations society recognizes as reasonable).
23. See *Camera v. Municipal Court*, 387 U.S. 523 (holding that warrant requirement is "basic component of a reasonable search under Fourth Amendment").
24. *Id.*
25. *Burger*, 482 U.S. at 700.
26. See *United States v. Biswell*, 406 U.S. 311 (1972) (holding that an exception to warrant requirement exists for pervasively regulated businesses).

27. *Burger*, 482 U.S. at 700. The Tenth Circuit's decision is inconsistent with the Supreme Court's recognition that a business has a lesser expectation of privacy than an individual. *Id.* When the operation of a business releases harmful pollutants into the environment, that business affects more than its customers and employees, it affects the public at large. A public threat lessens a business' privacy expectation even further. The lower the expectation of privacy, the less the Fourth Amendment requires. *Id.*

28. *Id.*

29. *Biswell*, 406 U.S. at 317. In *United States v. Biswell*, the Supreme Court acknowledged that regulatory warrantless inspections are necessary for proper enforcement of the laws. *Id.* at 316. Therefore, when a person makes the choice to engage in a pervasively regulated business, he does so with the knowledge that he will be subject to government inspections. *Id.* The Court held that when regulatory inspections further an urgent government interest, and the possible threat to privacy is not significantly high, an inspection may proceed without a warrant where authorized by statute. *Id.* at 317. The Court reasoned that a search under these conditions is not unreasonable under the Fourth Amendment. *Id.*

In *Biswell*, the Court upheld the constitutionality of a warrantless search authorized by the Gun Control Act of 1968. *Id.* The search involved a pawn shop federally licensed to sell weapons. *Id.* at 312. As the Court noted, the first requirement of reasonableness was met because important federal interests were at stake. *Id.* at 315. The Court came to this finding based on the close regulation of firearms, and the indisputable importance of federal efforts to prevent violent crime. *Id.* According to the Court, the second requirement was also met because inspections performed to insure compliance with the Gun Control Act did not pose a significant threat to the owner's justifiable expectations of privacy. *Id.* at 316. These requirements were later altered in *New York v. Burger*, 482 U.S. 691, 701 (1987). See *infra* notes and accompanying text (discussing *Burger*).

30. *V-1 Oil Co. v. Wyoming Dep't of Env'tl. Quality*, 902 F.2d 1482, 1486 (10th Cir. 1990) (quoting *Burger*, 482 U.S. at 701). For examples of other decisions finding pervasive government oversight, see *Burger*, 482 U.S. 691 (finding automobile junkyards pervasively regulated); *Donovan v. Dewey*, 452 U.S. 594 (1981) (finding stone quarries pervasively regulated); *United States v. Biswell*, 406 U.S. 311 (1972) (finding weapons pervasively regulated); *Colonnade Corporation v. United States*, 397 U.S. 72 (1970) (finding alcoholic beverages pervasively regulated).

31. *Burger*, 482 U.S. at 691.

32. *Burger*, 482 U.S. 691. *But see* dissent. Justice Brennan wrote, "The implications of the Court's Opinion, if realized, will virtually eliminate Fourth Amendment protection of commercial entities in the context of administrative searches. No State may require, as a condition of doing business, a blanket submission to warrantless searches for any purpose." *Id.* at 729.

33. *Id.* at 693-95.

34. *Id.*

35. *Id.* at 705-07.

36. *Id.* The Court stated that the exception applies because the pervasiveness of the regulation diminishes the privacy expectations of the junkyard owner. *Id.*

37. *Id.* at 708-12.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *V-1 Oil Co. v. Wyoming Dep't of Env'tl. Quality*, 902 F.2d 1482 (10th Cir. 1990).

47. *Id.* at 1484.

48. *Id.* The official's duties included investigation of pollution discharges from products such as petroleum into groundwater. *V-1 Oil Co. v. Wyoming Dep't of Env'tl. Quality*, 696 F. Supp. 578, 579 (D. Wyo. 1988).

49. *V-1 Oil Co.*, 902 F.2d at 1484.

50. *Id.*

51. *Id.* Upon noticing the activity at the V-1 Oil station, the official stopped and inquired as to what was being done. *V-1 Oil Co.*, 696 F. Supp. at 579. The manager of the V-1 Oil station refused to answer any questions and asked the official to leave. *Id.* The official returned later the same day and asked the same question of the area supervisor. *Id.* The official was again told his questions would not be answered and informed he was not welcome on the property. *Id.*

52. *V-1 Oil Co.*, 902 F.2d at 1484. A judge was not available to issue a warrant. *Id.* Therefore, following the advice of an assistant Attorney General, the official conducted a warrantless search. *Id.* The official, accompanied by a policeman and the local City Attorney, visually inspected the tanks and removed a soil sample. *Id.* The assistant Attorney General had informed the official that the Wyoming Environmental Quality Act authorized such searches. *Id.*

The specific portion of the Act reads:

[Certain officials may] enter and inspect any property, premise or place, except private residences, on or at which an air, water or land pollution source is located or is being constructed or installed....Persons so designated may inspect and copy any records during normal office hours, and inspect any monitoring equipment or method of operation required to be maintained pursuant to this act at any reasonable time upon presentation of appropriate credentials, and without delay, for the purpose of investigating actual or potential sources of air, water, or land pollution and for determining compliance or noncompliance with this act.

Wyo. Stat. § 35-11-109(a)(vi) (1988).

53. *V-1 Oil Co.*, 902 F.2d at 1484. V-1 filed suit pursuant to 42 U.S.C. § 1983. *Id.*

The statute reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983 (1979).

Although V-1's challenge to the constitutionality of the statute was successful, the party named as defendant was found to have qualified immunity so V-1 could not recover. *V-1 Oil Co.*, 902 F.2d at 1484.

54. *V-1 Oil Co.*, 902 F.2d at 1486.

55. *Id.* at 1487.

56. *Id.* at 1485.

57. *Id.* at 1487.

58. *Id.* at 1486.

59. *Id.*

60. *Id.* An example of the pervasiveness of the federal regulation is 42 U.S.C. § 6991d(a) which provides: For the purpose of developing or assisting in the development of any regulation, conducting any study, or enforcing the provisions of this subtitle, any owner or operator of an underground storage tank shall, upon request of any officer, employee or representative of a State acting pursuant to subsection (h)(7) of section 9003 [42 U.S.C. § 6991c(h)(7)] or with an approved program, furnish information relating to such tanks, their associated equipment, their contents, conduct monitoring or testing, permit such officer at all reasonable times to have access to, and to copy all records relating to such tanks and permit such officer to have access for corrective action. For the purpose of developing or assisting in the development of any regulation, conducting any study, taking corrective action, or enforcing the provisions of this subtitle, such officers, employees, or representatives are authorized (1) to enter at reasonable times any establishment or other place where an underground storage tank is located; (2) to inspect and obtain samples from any person of any regulated substances contained in such tank; (3) to conduct monitoring or testing of the tanks, associated equipment, contents, or surrounding soils, air, surface water or ground water; and (4) to take corrective action. 42 U.S.C. § 6991d(a) (1979).

61. *V-1 Oil Co.*, 902 F.2d at 1485. The district court noted that it found the attitude of V-1 Oil Company, as expressed by the V-1 Oil station's manager, puzzling. *V-1 Oil Co. v. Wyoming Dep't of Env'tl. Quality*, 696 F. Supp. 578, 582 (D. Wyo. 1988). The manager stated in his deposition that "We just allow no inspections, no nothing, without permission. [I]t really shouldn't matter to them. It's our business what we're doing out there." *Id.* The court found these views did not conform to the regulatory scheme. *Id.*

62. *V-1 Oil Co.*, 902 F.2d at 1485. State regulations not only require gasoline dealers to obtain a license and pay a fee, but also subject the companies to criminal sanctions for violations of these requirements. *Id.* The court found the aggregation of these requirements intrusive enough to affirm trial court's holding that V-1 Oil Company was pervasively regulated. *Id.* Cf. *Marshall v. Barlow's Inc.*, 436 U.S. 307 (holding a warrantless search of a business pursuant to a federal statute was unconstitutional when the business was not pervasively regulated).

63. *V-1 Oil Co.*, 902 F.2d at 1485.

64. *Id.* The court addressed all three parts of the test, first asking if there was a substantial government interest served by the search. *Id.* at 1486-87. Second, the court asked if the search was necessary to further the regulatory scheme. *Id.* Third, the court asked if the statute authorizing the warrantless search served the same basic functions as a warrant. *Id.* In other words, did the statute notify the owner of the business that the search is being made pursuant to the law and had a properly defined scope? *Id.* Also, did the statute limit the discretion of the inspecting officers? *Id.*

65. *Id.* at 1486. Before reaching the question of whether or not the requirements of the *Burger* test were met, the court needed to determine if the Wyoming Environmental Quality Act authorized the warrantless search of V-1 Oil Company. *Id.* at 1484-85. First, according to the Tenth Circuit, courts will not infer a warrant requirement from statutes, such as the Wyoming Environmental Quality Act, which authorize inspections without mentioning warrants. *Id.* Instead, any authorization of inspections in a statute is interpreted as an authorization for warrantless inspections. *Id.*

Second, the Tenth Circuit held that the Wyoming Environmental Quality Act applied to underground gasoline storage tanks. *Id.* The Act covers "method[s] of operation required to be maintained pursuant to th[e] act." Wyo. Stat. § 35-11-109(a)(vi) (1988). The court construed this language as authorizing inspection of "any mechanism which is necessary to avoid committing a violation." *V-1 Oil Co.*, 902 F.2d at 1485. As the court mentioned, faulty storage could allow gasoline to escape into the surrounding environment and pollute the land and groundwater. *Id.* Because this is what the Act prohibits, the search of V-1 Oil Company was authorized by the Act. *Id.*

66. *Id.* at 1486-87.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1485.

72. *Id.* at 1487.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* (quoting *Donovan v. Dewey*, 452 U.S. 594,599 (1981)).

78. *V-1 Oil Co.*, 902 F.2d at 1487.

79. *Id.*

80. *New York v. Burger*, 482 U.S. 691, 711 (1987).

81. *Id.*

82. *Id.*

83. *Id.*

84. *V-1 Oil Co.*, 902 F.2d at 1487.

85. *Id.*

86. Wyo. Stat. § 35-11-109(a)(vi) (1988). The Act applies to "any property....except private residences, on or at which an air, water or land pollution source is located or being installed." *Id.*

87. The V-1 Oil station is a known source of water pollution. *V-1 Oil Co.*, 902 F.2d at 1484.

88. *Id.* at 1487.

89. *Id.* (quoting *Donovan v. Dewey*, 452 U.S. 594, 599 (1981)).

90. *Burger*, 482 U.S. at 711-12.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* In *United States v. Biswell*, the Supreme Court in fact approved a statute authorizing warrantless searches which did not provide any assurance of regular inspections. *United States v. Biswell*, 406 U.S. at 317.

95. Wyo. Stat. § 35-11-109(a)(vi) (1988).

96. *Id.*

97. *Id.*

98. *Id.*

99. The Wyoming Department of Environmental Quality official performed the search of the V-1 Oil station in compliance with the requirements of the Wyoming Environmental Quality Act. *V-1 Oil Co. v. Wyoming Dep't of Envtl. Quality*, 696 F.Supp. 578, 581 (D. Wyo. 1988). The inspection took place while the station was open for business. *Id.* The official presented the appropriate credentials and performed the search without delay. *Id.* He also searched only what the Act authorized him to. *Id.*

100. Richard F. Cauley, *Constitutionality of Warrantless Environmental Inspections*, 15 Colum. J. Envtl. L. 83, (1990). Cauley argues that Congress may have done the regulatory agencies, and the public, a disservice by authorizing warrantless searches in various statutes. *Id.* Cauley explains that in an attempt to give environmental inspectors the greatest amount of leeway, Congress has ignored significant constitutional issues. *Id.* However, the Supreme Court has stayed true to the reasonableness requirements of the Fourth Amendment by restricting the performance of warrantless regulatory searches to circumstances which meet the requirements of the three prong *Burger* test. *New York v. Burger*, 482 U.S. 691 (1987).

101. *Mapp v. Ohio*, 367 U.S. 643 (1961). The Fourth Amendment "exclusionary rule" results in the suppression of evidence in criminal trials due to the illegal manner in which it was obtained, regardless of the reliability of the evidence. *Id.* Although the Fourth Amendment nowhere explicitly dictates an exclusionary rule, the Supreme Court has found the rule to be an "essential ingredient of the Fourth Amendment." *Mapp v. Ohio*, 367 U.S. 643, \_\_\_ (1961). According to the Court, the purpose of the exclusionary rule is to deter unconstitutional conduct by eliminating the incentive to disregard it. *Id.* at \_\_\_.

102. Cauley, *supra* note 118.

103. *V-1 Oil Co. v. Wyoming Dep't of Envtl. Quality*, 902 F.2d 1482 (1990).

104. *See New York v. Burger*, 482 U.S. 691 (1987) (holding that warrantless searches which meet certain criteria are constitutional).

105. *Id.*

106. *V-1 Oil Co. v. Wyoming Dep't of Envtl. Quality*, 902 F.2d 1482 (10th Cir. 1990).

107. *V-1 Oil Co.*, 902 F.2d at 1487.

108. *Id.*

109. *See supra* notes 88-111 and accompanying text (analyzing Tenth Circuit's decision). The Tenth Circuit in *V-1 Oil Co.* focused too heavily on the warrant requirement. "The warrant requirement leads judges to artificially constrain the scope of the [Fourth] Amendment itself by narrowly defining 'search' and 'seizure.'" Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 769 (1994).

The principal requirement of the Fourth Amendment is reasonableness. *Id.* at 758. Akhil Reed Amar wrote, in a recent law review article, "There is a better way to think about the Fourth Amendment - by returning to its first principles. We need to read the Amendment's words and take them seriously: they do not require warrants...but they do require that all searches and seizures be reasonable." *Id.* at 759. The test for the reasonableness of a warrantless search can be applied less strictly than the Tenth Circuit applied it, and still ensure a reasonable substitute for a warrant. Ultimately, however, the test should not focus on a reasonable substitute for a warrant, but instead on the reasonableness under the Fourth Amendment.

The three prong test developed by the Supreme Court in *New York v. Burger*, if interpreted correctly, is a good test for reasonableness. However, the *Burger* test should not be applied too strictly to warrantless searches of businesses whose operations pose a significant threat to human health and the environment.