



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023



SDMS DocID

294220

BY FAX AND FEDERAL EXPRESS
OVERNIGHT DELIVERY

May 18, 1999

Gregory N. Jonsson, Esq.
683 Main Road
P.O. Box 593
Westport, MA 02790

RE: Parcel #263 owned by Karpa, Inc.

Dear Mr. Jonsson:

I am sorry you have been unable to return my calls in response to your letter dated May 13 which arrived here yesterday. EPA would be happy to meet with you and your client to discuss recent activities around and possibly on Parcel #263. Please contact me to arrange a date to meet next week.

Your letter indicates that Karpa, Inc. has revoked its access agreement; as a result, EPA and its representatives will not enter onto the property. After speaking with our representatives who are physically at the Site, it appears that an air monitoring system was installed on adjacent City-owned property after proper notification to the City. It is possible that a portion of the air monitoring system may have been inadvertently located on Karpa's property. While we did have a valid access agreement with your client at the time the monitoring system was installed, he was not notified in advance because EPA believed the entire station was confined to City-owned property.

To remedy the situation, EPA now asks for immediate access to Parcel #263 to conduct a property survey to determine the exact property boundaries in the area of concern. I have enclosed a limited access agreement for signature by Karpa, Inc. EPA will also be seeking access for activities listed in the revoked agreement; we will be prepared to explain our needs at the meeting next week. For your information, I have enclosed a copy of our Access guidance which explains our authority to obtain access pursuant to CERCLA. I have also enclosed a copy of a recent Ninth Circuit Court decision, Hendler, et. al. v. United States, 1999 U.S. App LEXIS 8805 (May 11, 1999) in which the appellate court upheld the lower court's decision denying a claim that EPA's installation of monitoring wells constituted a regulatory taking.

Toll Free • 1-888-372-7341

Internet Address (URL) • <http://www.epa.gov/region1>

Recycled/Recyclable • Printed with Vegetable Oil Based Inks on Recycled Paper (Minimum 30% Postconsumer)

Gregory N. Jonsson, Esq.
May 19, 1999
Page 2

I look forward to hearing from you within the next day or two. I will not be in the office on Friday, May 21; please call the Project Manager, Dave Dickerson at (617) 918-1329 if you are unable to reach me.

Sincerely,



Cynthia E. Catri
Senior Enforcement Counsel

Enc. (in overnight mail package)

cc: Dave Dickerson, EPA
Robert Hunt, U.S. Army Corps of Engineers
George Willant, Foster Wheeler

CONSENT FOR ACCESS TO PROPERTY

NAME: Karpa, Inc.

**ADDRESS OF PROPERTY: Map #111, Parcel #265, New Bedford Tax Assessment
Records**

I (We) consent to the officers, employees, agents, contractors, subcontractors, consultants, and other authorized representatives of the United States Environmental Protection Agency ("EPA") entering and having continued access to the above-referenced property for the following purpose(s):

- to conduct a property boundary survey for the remediation of New Bedford Harbor

EPA will give reasonable notice before conducting the above activity unless an emergency arises for which immediate access is necessary. EPA does not anticipate that the above activity will interfere with or impede your ability to conduct business at the subject property.

I (We) realize that these actions by EPA are undertaken pursuant to EPA's response and enforcement authorities under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Section 9601 *et. seq.*

I (We) give this written permission voluntarily with knowledge of my (our) right to refuse and without threats or promise of any kind.

Date

Signature of Authorized Representative

Name: _____

Title: _____

Address: _____

Phone: _____

645
1000

FedEx USA Airbill

FedEx Tracking Number

809793946995

Form I.D. No

0210

SPH43

Sender's Copy

1 From (please print and press hard)

Date 5/19/99 Sender's FedEx Account Number 1424-8257-6

Sender's Name Cynthia Catri (SES) Phone (617) 918-1888

Company ENVIRONMENTAL PROTECTION AGENCY

Address 1 CONGRESS ST FL 11 Dept/Floor/Suite/Room

City BOSTON State MA ZIP 02114

2 Your Internal Billing Reference Information
(Optional) (First 24 characters will appear on invoice)

3 To (please print and press hard)
Recipient's Name Gregory N. Jonsson, P.C. Phone (508) 636-6991

Company Law Offices

Address 683 Main ~~XXX~~ Road Dept/Floor/Suite/Room

(To "HOLD" at FedEx location, print FedEx address here) (We Cannot Deliver to P.O. Boxes or P.O. ZIP Codes)

City Westport, State MA ZIP 02790

For HOLD at FedEx Location check here
 Hold Weekday (Not available with FedEx First Overnight)
 Hold Saturday (Not available at all locations and FedEx 2Day only)

For WEEKEND Delivery check here (Extra Charge, Not available to all locations)
 Saturday Delivery (Available for FedEx Priority Overnight and FedEx 2Day only)
 NEW Sunday Delivery (Available for FedEx Priority Overnight only)

Service Conditions, Declared Value, and Limit of Liability - By using this Airbill, you agree to the service conditions in our current Service Guide or U.S. Government Service Guide. Both are available on request. SEE BACK OF SENDER'S COPY OF THIS AIRBILL FOR INFORMATION AND ADDITIONAL TERMS. We will not be responsible for any claim in excess of \$100 per package whether the result of loss, damage, or delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, and document your

actual loss in a timely manner. Your right to recover from us for any loss includes intrinsic value of the package, loss of sales, interest, profit, attorney's fees, costs, and other forms of damage, whether direct, incidental, consequential, or special, and is limited to the greater of \$100 or the declared value but cannot exceed actual documented loss. The maximum declared value for any FedEx Letter and FedEx Pak is \$500. Federal Express may, upon your request, and with some limitations, refund all transportation charges paid. See the FedEx Service Guide for further details.

4a Express Package Service Packages under 150 lbs. Delivery commitment may be later in some areas.
 FedEx Priority Overnight (Next business morning)
 FedEx Standard Overnight (Next business afternoon)
 FedEx First Overnight (Earliest next business morning delivery to select locations; Higher rates apply)
 FedEx 2Day (Second business day)
 FedEx Express Saver (Third business day)
FedEx Letter: Rate not available. Minimum charge: One pound rate.

4b Express Freight Service Packages over 150 lbs. Delivery commitment may be later in some areas.
 FedEx Overnight Freight (Next business day)
 FedEx 2Day Freight (Second business day)
 FedEx Express Saver Freight (Up to 3 business days)
(Call for delivery schedule. See back for detailed descriptions of freight services.)

5 Packaging
 FedEx Letter (Declared value limit \$500)
 FedEx Pak
 FedEx Box
 FedEx Tube
 Other

6 Special Handling (One box must be checked)
Does this shipment contain dangerous goods? No Yes (As per attached Shipper's Declaration) Yes (Shipper's Declaration not required)
 Dry Ice (Dry Ice, 9 UN 1845 x kg) Cargo Aircraft Only
*Dangerous Goods cannot be shipped in FedEx packages.

7 Payment
Bill to: Sender (Account No. in Section 1 will be billed) Recipient (Enter FedEx Account No. or Credit Card No. below) Third Party Credit Card Cash Check

FedEx Account No. _____ Exp. Date _____
Credit Card No. _____

Total Packages _____ Total Weight _____ Total Declared Value \$ _____ Total Charges \$ _____

*When declaring a value higher than \$100 per shipment, you pay an additional charge. See SERVICE CONDITIONS, DECLARED VALUE, AND LIMIT OF LIABILITY section for further information.

8 Release Signature Sign to authorize delivery to recipient.

Your signature authorizes Federal Express to deliver this shipment without obtaining a signature and agrees to indemnify and hold harmless Federal Express from any resulting claims.

321

Questions?
Call 1-800-Go-FedEx® (800)463-3339

The World On Time

0078014574

FACSIMILE COVER SHEET

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
1 CONGRESS STREET (SUITE 1100), BOSTON, MA 02114-2023**

TO: Gregory N. Jonsson

Phone: 508-636-6991

FAX: 508-636-6993

FROM: Cynthia E. Catri, SES

DATE: 5/19/99

Pages (Including cover): 4

RE: Parcel #263 Owned by Karpa, Inc.

If problems with transmission, please call Regina Bixby at (617) 918-1770



104(e)
104(e)-1-D

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN - 5 1987

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Entry and Continued Access Under CERCLA

FROM: Thomas L. Adams, Jr.
Assistant Administrator

Thomas L. Adams, Jr.

TO: Regional Administrators I-X
Regional Counsels I-X

I. INTRODUCTION

This memorandum sets forth EPA's policy on entry and continued access to facilities by EPA officers, employees, and representatives for the purposes of response and civil enforcement activities under CERCLA. 1/ In short, the policy recommends that EPA should, in the first instance, seek to obtain access through consent. Entry on consent is preferable across the full range of onsite activities. If consent is denied, EPA should use judicial process or an administrative order to gain access. The appropriate type of judicial process varies depending on the nature of the onsite activity. When entry is needed for short-term and non-intrusive activities, an ex parte, judicial warrant should be sought. In situations involving long-term or intrusive access, EPA should generally file suit to obtain a court order.

The memorandum's first section addresses the recently amended access provision in CERCLA. The memorandum then sets forth EPA policy on obtaining entry and the procedures which should be used to implement this policy, including separate discussions on consent, warrants, court orders, and administrative orders.

1/ This policy does not address information requests under Section 104(e)(2).

II. STATUTORY AUTHORITY

EPA needs access to private property to conduct investigations, studies, and cleanups. The Superfund Amendments and Reauthorization Act of 1986 (SARA) explicitly grants EPA ^{2/} the authority to enter property for each of these purposes. Section 104(e)(1) provides that entry is permitted for "determining the need for response, or choosing or taking any response action under this title, or otherwise enforcing the provisions of this title."

SARA also establishes a standard for when access may be sought and defines what property may be entered. EPA may exercise its entry authority "if there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant." § 104(e)(1). SARA, however, does not require that there be a release or threatened release on the property to be entered. ^{3/} Places and properties subject to entry under Section 104(e) include any place any hazardous substance may be or has been generated, stored, treated, disposed of, or transported from; any place a hazardous substance has or may have been released; any place which is or may be threatened by the release of a hazardous substance; or any place where entry is needed to determine the need for response or the appropriate response, or to effectuate a response action under CERCLA. § 104(e)(3). EPA is also authorized to enter any place or property adjacent to the places and properties described in the previous sentence. § 104(e)(1).

EPA is granted explicit power to enforce its entry authority in Section 104(e)(5). Under that provision EPA may either issue an administrative order directing compliance with an entry request or proceed immediately to federal district court for injunctive relief. Orders may be issued where consent to entry is denied. Prior to the effective date of the order, EPA must provide such notice and opportunity for consultation as is reasonably appropriate under the circumstances. If EPA issues an order, the order can be enforced in court. Where there is a "reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant," courts are instructed to enforce an EPA request or order unless the EPA

^{2/} Although CERCLA and SARA confer authority upon the President that authority has been delegated to the EPA Administrator. Exec. Order No. 12580, § 2(g) and (i), 52 Fed. Reg. 1923 (1987).

^{3/} The House Energy and Commerce bill at one point contained this limitation. H.R. Rep. No. 99-253 Part 1, 99th Cong., 1st Sess., 158 (1985). This limitation, however, was dropped prior to introduction of the bill for floor debate. See H.R. 2817, 99th Cong., 1st Sess., 131 Cong. Rec. H10857 (December 4, 1985).

"demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." § 104(e)(5). The legislative history makes clear that courts should enforce an EPA demand or order for entry if EPA's finding that there is a reasonable basis to believe there may be a release or threat of release is not arbitrary and capricious. 132 Cong. Rec. S14929 (October 3, 1986) (Statement of Sen. Thurmond); 132 Cong. Rec. H9582 (October 8, 1986) (Statement of Rep. Glickman). See United States v. Standard Equipment, Inc., No. C83-252M (W.D. Wash. November 3, 1986). In addition, a penalty not to exceed ~~\$25,000~~ ^{27,500}/day may be assessed by the court for failure to comply with an EPA order or the provisions of subsection (e).

Finally, Section 104(e)(6) contains a savings provision which preserves EPA's power to secure access in "any lawful manner." This broad savings provision is significant coming in the wake of the Supreme Court's holding that:

When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission.

. . . Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted.

Dow Chemical Co. v. United States, 90 L.Ed. 2d 226, 234 (1986). ^{4/} One lawful means of gaining access covered by this paragraph is use of judicially-issued warrants. See S. Rep. No. 99-11, 99th Cong. 1st Sess. 26 (1985).

In numerous instances prior to the passage of SARA, EPA obtained court rulings affirming its authority to enter property to conduct CERCLA activities. ^{5/} Following enactment of SARA,

^{4/} See also, Mobil Oil Corp. v. EPA, 716 F.2d 1187, 1189 (7th Cir. 1983), cert. denied, 466 U.S. 980 (1984) (EPA authority to sample effluent under Section 308 of the Clean Water Act broadly construed); CEDs, Inc. v. EPA, 745 F.2d 1092 (7th Cir. 1984), cert. denied, 471 U.S. 1015 (1985).

^{5/} United States v. Pepper Steel and Alloy, Inc., No. 83-1717-CIV-EPS (S.D. Fla. October 10, 1986); Bunker Limited Partnership v. United States, No. 85-3133 (D. Idaho October 21, 1985); United States v. Coleman Evans Wood Preserving Co., No. 85-211-CIV-J-16 (M.D. Fla. June 10, 1985); United States v. Baird & McGuire Co. No. 83-3002-Y (D. Mass. May 2, 1985); United States v. United Nuclear Corp., 22 ERC 1791, 15 ELR 20443 (D.N.M. April 18, 1985).

several courts have ordered siteowners to permit EPA access. United States v. Long, No. C-1-87-167 (S.D. Ohio May 13, 1987); United States v. Dickerson, No. 84-76-VAL (M.D. Ga. May 4, 1987); United States v. Standard Equipment, Inc., No. C83-252M (W.D. Wash. Nov. 3, 1986). Further, the one adverse ruling on EPA's right of access has been vacated by the Supreme Court. Outboard Marine Corp. v. Thomas, 773 F.2d 883 (7th Cir. 1985), vacated, 93 L. Ed. 2d 695 (1986).

III. EPA ACCESS POLICY

EPA needs access to sites for several types of activities, including:

- ° preliminary site investigations;
- ° removal actions;
- ° RI/FSs; and
- ° remedial actions.

Within each of these categories, the scope of the work and the time needed to complete that work may vary substantially. This memorandum sets Agency policy on what means should be used to gain access over the range of these various activities.

EPA may seek access through consent, warrant, administrative order, or court order. Consent is the preferred means of gaining access for all activities because it is consistent with EPA policy of seeking voluntary cooperation from responsible parties and the public. In certain circumstances, however, the Region should consider obtaining judicial authorization or issuing an administrative order in addition to obtaining consent. For example, where uncertainty exists whether a siteowner will continue to permit access over an extended period, reliance on consent alone may result in a substantial delay if that consent is withdrawn.

When consent is denied, EPA should seek judicial authorization or should issue an administrative order. If the judicial route is chosen, EPA may seek an ex parte warrant or a court order. Warrants are traditionally granted for short-term entries. Generally, warrants should not be used when the EPA access will involve long-term occupation or highly intrusive activities. Clearly, warrants are appropriate for preliminary site investigations. On the other hand, because of the long, involved nature of remedial actions, access for such projects should be sought through a request for a court order. Neither removals nor RI/FSs, however, can be rigidly matched with a given judicial access procedure. Depending on the activities to be undertaken and the circumstances at the site, either a warrant or a court order may be appropriate.

In deciding whether to use a warrant or a court order when access is needed for a removal or to conduct a RI/FS, the following general principles should be considered. First, if the activity will take longer than 60 days a court order normally is appropriate. Second, even if the activity will take less than 60 days, when the entry involves removal of large quantities of soil or destruction of permanent fixtures, a court order may again be appropriate. Finally, warrants should not be used if EPA action will substantially interfere with the operation of onsite business activities. These issues must be resolved on a case-by-case basis.

If EPA needs to gain access for a responsible party who has agreed to undertake cleanup activities under an administrative order or judicial decree, EPA may, in appropriate circumstances, designate the responsible party as EPA's authorized representative solely for the purpose of access, and exercise the authorities contained in Section 104(e) on behalf of the responsible party. Such a procedure may only be used where the responsible party demonstrates to EPA's satisfaction that it has made best efforts to obtain access. A further condition on the use of this procedure is that the responsible party agree to indemnify and hold harmless EPA and the United States for all claims related to injuries and damages caused by acts or omissions of the responsible party. The responsible party should also be advised that the expenses incurred by the government in gaining access for the responsible party are response costs for which the responsible party is liable. Before designating any responsible party as an authorized representative, the Region should consult with the Office of Enforcement and Compliance Monitoring.

IV. ACCESS PROCEDURES

A. Entry on Consent

1. General Procedures

The following procedures should be observed in seeking consent:

Initial Contact. Prior to visiting a site, EPA personnel 6/ should consider contacting the siteowner to determine if consent will be forthcoming. EPA personnel should use this opportunity to explain EPA's access authority, the purpose for which entry is needed, and the activities which will be conducted.

6/ As used in this guidance, the term "EPA personnel" includes contractors acting as EPA's authorized representatives.

Arrival. EPA personnel should arrive at the site at a reasonable time of day under the circumstances. In most instances this will mean during normal working hours. When there is a demonstrable need to enter a site at other times, however, arrival need not be limited to this timeframe. Entry must be reasonable given the exigencies of the situation.

Identification. EPA personnel should show proper identification upon arrival.

Request for Entry. In asking for consent, EPA personnel should state the purpose for which entry is sought and describe the activities to be conducted. EPA personnel should also present a date-stamped written request to the owner or person-in-charge. A copy of this request should be retained by EPA. Consent to entry must be sought from the owner 7/ or the person-in-charge at that time.

If practicable under the circumstances, consent to entry should be memorialized in writing. A sample consent form is attached. Although oral consents are routinely approved by the courts, a signed consent form protects the Agency by serving as a permanent record of a transaction which may be raised as a defense or in a claim for damages many years later. If a site-owner is unwilling to sign a consent form but nonetheless orally agrees to allow access, EPA should document this oral consent by a follow-up letter confirming the consent.

Since EPA contractors often are involved in gaining access in the first instance, the Regions should ensure that their contractors are acquainted with these procedures.

2. Denial of Entry

If consent is denied, EPA personnel or contractors, before leaving, should attempt to determine the grounds for the denial. EPA personnel, however, should not threaten the siteowner with penalties or other monetary liability or make any other remarks which could be construed as threatening. EPA personnel may explain EPA's statutory access authority, the grounds upon which this authority may be exercised, and that the authority may be enforced in court.

7/ If EPA's planned site activities will not have a physical effect on the property, EPA generally need not seek consent from the owner of leased property where the lessee is in possession. The proper person in those circumstances is the lessee. But where EPA entry will have a substantial physical effect on the property, both the lessee and the property-owner should be contacted since in this instance interests of both will be involved.

3. Conditions Upon Entry

Persons on whose property EPA wishes to enter often attempt to place conditions upon entry. EPA personnel should not agree to conditions which restrict or impede the manner or extent of an inspection or response action, impose indemnity or compensatory obligations on EPA, or operate as a release of liability. The imposition of conditions of this nature on entry should be treated as denial of consent and a warrant or order should be obtained. See U.S. EPA, General Counsel Opinions, "Visitors' Release and Hold Harmless Agreements as a Condition to Entry of EPA Employees on Industrial Facilities," Gen'l and Admin. at 125 (11/8/72). If persons are concerned about confidentiality, they should be made aware that business secrets are protected by the statute and Agency regulations. 42 U.S.C. § 9604(e); 40 C.F.R. § 2.203(b). EPA personnel should enter into no further agreements regarding confidentiality.

B. Warrants

1. General Procedures

To secure a warrant, the following procedures should be observed:

Contact Regional Counsel. EPA personnel should discuss with Regional Counsel the facts regarding the denial of consent or other factors justifying a warrant and the circumstances which give rise to the need for entry.

Contact Department of Justice. If after consultation with Regional Counsel a decision is made to seek a warrant, the Regional Counsel must contact directly the Environmental Enforcement Section in the Land and Natural Resources Division at the Department of Justice. 8/ The person to call at the Department is the Assistant Chief in the Environmental Enforcement Section assigned to the Region. The Assistant Chief will then arrange, in a timely manner, for the matter to be handled by either an Environmental Enforcement Section attorney or a U.S. Attorney. The Region must send to the Environmental Enforcement Section, by Magnafax or other

8/ This procedure is necessary to comply with internal Department of Justice delegations of authority. Referral to a local U.S. Attorney's office is not sufficient for CERCLA warrants. The Environmental Enforcement Section of the Department of Justice must approve all warrant applications. (See Memorandum from David T. Buente, Jr. to All Environmental Enforcement Attorneys, "Procedures for Authorizing Applications for Civil Search Warrants Under CERCLA" (4/3/87) attached).

expedited means, a draft warrant application and a short memorandum concisely stating why the warrant is needed.

Prepare Warrant Application. The warrant application must contain the following:

- 1) a statement of EPA's authority to inspect;
(see § II, supra)
- 2) a clear identification of the name and location of the site and, if known, the name(s) of the owner and operator of the site;
- 3) a statement explaining the grounds for a finding of a reasonable basis for entry (i.e., a reasonable basis to believe that there may be a release or threatened release of a hazardous substance or pollutant or contaminant) and the purpose for entry (i.e., determining the need for response, or choosing or taking any response action, or otherwise enforcing CERCLA);
- 4) affidavits supporting the asserted reasonable basis for entry and describing any attempts to gain access on consent, if applicable; and
- 5) a specific description of the extent, nature, and timing of the inspection;

Following preparation of the warrant application, the Justice Department attorney will file the application with the local U.S. Magistrate.

EPA may ask the Justice Department attorney to seek the assistance of the United States Marshals Service in executing the warrant where EPA perceives a danger to the personnel executing the warrant or where there is the possibility that evidence will be destroyed.

2. Reasonable Basis for Entry

A warrant for access on a civil matter may be obtained upon a showing of a reasonable basis for entry. This reasonable basis may be established either by presenting specific evidence relating to the facility to be entered or by demonstrating that the entry is part of a neutral administrative inspection plan.

A specific evidence standard is incorporated in SARA as a condition on EPA's exercise of its access authority: EPA must have "a reasonable basis to believe there may be a release or

threat of a release of a hazardous substance or pollutant or contaminant." § 104(e)(1). SARA's express specific evidence standard is consistent with how courts have formulated the specific evidence test in the absence of statutory guidance. E.g., West Point-Pepperell, Inc. v. Donovan, 689 F. 2d 950, 958 (11th Cir. 1982) (there must be a "showing of specific evidence sufficient to support a reasonable suspicion of a violation").

In drafting a warrant application, conclusory allegations regarding the specific evidence standard under subsection 104(e) will not suffice. Courts generally have refused to approve warrants where the application contains mere boilerplate assertions of statutory violations. Warrant applications have been granted, on the other hand, where the application contained detailed attestations by government officials or third-party complaints which have some indicia of reliability. Ideally, EPA warrant applications should contain an affidavit of a person who has personally observed conditions which indicate that there may be a release or threat of a release of a hazardous substance. If they are available, sampling results, although not required, should also be attached. Warrant applications based on citizen, employee, or competitor complaints should include details that establish the complainant's credibility. 9/

C. Court Orders

The provisions in CERCLA authorizing EPA access may be enforced by court order. To obtain a court order for entry, the Region should follow the normal referral process. If only access is required, the referral package can obviously be much abbreviated. If timing is critical, EPA HQ will move expeditiously and will refer the case orally if necessary. The Regions, however, should attempt to anticipate the sites at which access may prove problematic and should allow sufficient lead time for the referral process and the operation of the courts. The Regions should also not enter lengthy negotiations with landowners over access. EPA and DOJ are prepared to litigate aggressively to establish EPA's right of access.

9/ If information gathered in a civil investigation suggests that a criminal violation may have occurred, EPA personnel should consult the guidance on parallel proceedings. (Memorandum from Courtney Price to Assistant Administrators et al., "Policy and Procedures on Parallel Proceedings at the Environmental Protection Agency" (1/23/84)). Use of CERCLA's information-gathering authority in criminal investigations is addressed in separate guidance. (Memorandum from Courtney M. Price to Assistant Administrators et al., "The Use of Administrative Discovery Devices in the Development of Cases Assigned to the Office of Criminal Investigations" (2/16/84)).

Prior to seeking a court order, EPA should request access, generally in writing, and assemble the record related to access. The showing necessary to obtain a court order is the same as for obtaining a warrant: EPA must show a reasonable basis to believe that there may be a release or a threat of a release of a hazardous substance or pollutant or contaminant. An EPA finding on whether there is reason to believe a release has occurred or is about to occur must be reviewed on the arbitrary and capricious standard. § 104(e)(5) (B)(i). If the matter is not already in court, EPA must file a complaint seeking injunctive and declaratory relief. Simultaneous to filing the complaint, EPA may, if necessary, file a motion, supported by affidavits documenting the release or threatened release, requesting an immediate order in aid of access. If the matter is already in litigation, EPA may proceed by motion to seek an order granting access. 10/

In a memorandum supporting EPA's request for relief it should be made clear that by invoking judicial process, EPA is not inviting judicial review of its decision to undertake response action or of any administrative determinations with regard to the response action. Section 113(h) of SARA bars judicial review of removal or remedial action except in five enumerated circumstances. A judicial action to compel access is not one of the exceptions. Statements on the floor of the House and the Senate confirm that EPA enforcement of its access authority does not provide an opportunity for judicial review of response decisions. Senator Thurmond, chairman of the Judiciary Committee, remarked that when EPA requests a court to compel access "there is no jurisdiction at that time to review any response action . . .

10/ Parenthetically, it should be noted that the broad equitable power granted to courts in Section 106 can also be relied on to obtain a court order. An additional source of authority for courts in this regard is the All Writs Act, 28 U.S.C. § 1651. The Act authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions" 28 U.S.C. § 1651. This authority "extends under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing are in a position to frustrate the implementation of a court order" United States v. New York Telephone Co., 434 U.S. 159, 174 (1977). Thus, the All Writs Act may prove useful as a means of compelling persons not a party to a consent decree to cooperate with EPA and other settling parties in execution of the decree. The use of the All Writs Act, however, may be limited in light of the Supreme Court's interpretation of the Act in Pennsylvania Bureau of Correction v. United States Marshal Service, 88 L. Ed. 2d 189 (1985).

[T]he court may only review whether the Agency's conclusion that there is a release or threatened release of hazardous substances is arbitrary or capricious." 132 Cong. Rec. S14929 (October 3, 1986) (Statement of Sen. Thurmond); 132 Cong. Rec. 119582 (October 8, 1986) (Statement of Rep. Glickman); see United States v. Standard Equipment, Inc., No. C83-252M (W.D. Wash. Nov. 3, 1986).

D. Administrative Orders

If a siteowner denies an EPA request for access, EPA may issue an administrative order directing compliance with the request. § 104(e)(5)(A). Each administrative order must include a finding by the Regional Administrator that there exists a reasonable belief that there may be a release or threat of release of a hazardous substance and a description of the purpose for the entry and of the activities to be conducted and their probable duration. The order should indicate the nature of the prior request for access. Further, the order should advise the respondent that the administrative record upon which the order was issued is available for review and that an EPA officer or employee will be available to confer with respondent prior to the effective date of the order. The length of the time period during which such a conference may be requested should be reasonable under the circumstances. In deciding what is a reasonable time period, consideration should be given to the interference access will cause with onsite operations, the threat to human health and the environment posed by the site, and the extent of prior contacts with the respondent. The order should advise the respondent that penalties of up to ~~\$25,000~~ ^{\$27,500} per day may be assessed by a court against any party who unreasonably fails to comply with an order. § 104(e)(5). Following the time period for the conference and any conference, the issuing official should send a document to the respondent summarizing any conference, EPA's resolution of any objections, and stating the effective date of the order.

If, following issuance of an administrative order, the siteowner continues to refuse access to EPA, the order may be enforced in federal court. EPA should not use self-help to execute orders. Courts are required to enforce administrative orders where there is a reasonable basis to believe that there may be a release or threat of a release of a hazardous substance. EPA's determination in this regard must be upheld unless it is arbitrary and capricious. § 104(e)(5)(B)(i). EPA will seek penalties from those parties who unreasonably fail to comply with orders.

All administrative orders for access must be concurred on by the Office of Enforcement and Compliance Monitoring prior to issuance.

DISCLAIMER

The policies and procedures established in this document are intended solely for the guidance of government personnel. They are not intended, and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

Attachments

CONSENT FOR ACCESS TO PROPERTY

Name: _____

Address of Property: _____

I consent to officers, employees, and authorized representatives of the United States Environmental Protection Agency (EPA) entering and having continued access to my property for the following purposes:

[the taking of such soil, water, and air samples as may be determined to be necessary;]

[the sampling of any solids or liquids stored or disposed of on site;]

[the drilling of holes and installation of monitoring wells for subsurface investigation;]

[other actions related to the investigation of surface or subsurface contamination;]

[the taking of a response action including]

I realize that these actions by EPA are undertaken pursuant to its response and enforcement responsibilities under the Comprehensive Environmental Response, Compensation and Liability Act (Superfund), 42 U.S.C. § 9601 et seq.

This written permission is given by me voluntarily with knowledge of my right to refuse and without threats or promises of any kind.

Date

Signature

HENRY HENDLER, PAUL GARRETT and TILLIE GOLDRING as Trustees
for Henry Hendler and Irving Gronsky, Plaintiffs-Appellants,
v. UNITED STATES, Defendant-Appellee.

97-5143

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

1999 U.S. App. LEXIS 8805

May 11, 1999, Decided

PRIOR HISTORY: [*1] Appealed from: United States Court of Federal Claims. Senior Judge Wilkes C. Robinson.-

DISPOSITION: AFFIRMED.

COUNSEL: John D. Hoffman, Ellman, Burke, Hoffman & Johnson, A.P.C., of San Francisco, California, argued for plaintiffs-appellants. With him on the brief were Howard N. Ellman and David H. Blackwell. Of counsel on the brief was Paul Hamilton, Jeffer, Mangels, Butler & Marmaro, LLP, of Los Angeles, California. Of counsel was Kenneth N. Burns, Ellman, Burke, Hoffman & Johnson, A.P.C., of San Francisco, California.

David C. Shilton, Environmental and Natural Resources Division, U.S. Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Lois J. Schiffer, Assistant Attorney General, Robert L. Klarquist, David F. Shuey, and Eric S. Gould, Attorneys, General Litigation Section. Of counsel on the brief were David Coursen, Attorney, Office of General Counsel, U.S. Environmental Protection Agency, of Washington, DC and Laurie Williams, Attorney, U.S. Environmental Protection Agency, of San Francisco, California.

JUDGES: Before PLAGER, Circuit Judge, ARCHER, Senior Circuit Judge, and CLEVINGER, Circuit Judge.

OPINIONBY: PLAGER

OPINION:

PLAGER, Circuit [*2] Judge.

In this takings case, we approach the final chapter in a decade-long dispute between the landowners and the Government. The dispute was initiated when the Government entered upon the land of the plaintiffs, without their consent and over their objection, for the purpose of sinking wells for monitoring of ground water migration from adjacent properties. Over time the Government continued to establish additional wells and to service them, all

without payment to the landowners for the use of their property. The landowners sued, claiming inverse condemnation.

After several false starts at the trial level, see *Hendler v. United States*, 11 Cl. Ct. 91 (1986) ("Hendler I"); *Hendler v. United States*, 19 Cl. Ct. 27 (1989) ("Hendler II"), this court determined that plaintiffs had a good cause of action. We held that the Government, however well motivated and however important its cause, must adhere to fundamental Constitutional principles: if private property is taken for public use, just compensation must be paid. See *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) ("Hendler III"). The cause was remanded to the trial court for further proceedings. [*3]

Subsequently, the Court of Federal Claims undertook to determine, on the facts of the case, what was the just compensation mandated by the Constitution. After trials on liability theories and damages issues, the Court of Federal Claims determined that plaintiffs ultimately were due no compensation. See *Hendler v. United States*, 36 Fed. Cl. 574 (1996) ("Hendler IV"); *Hendler v. United States*, 38 Fed. Cl. 611 (1997) ("Hendler V"). Plaintiffs appeal that judgment, and the findings that underlay it.

BACKGROUND

The detailed background of the case is described in the prior opinions, Hendler I-V. We provide here a brief overview. The subject property is an approximately 100-acre tract of land in southern California, near the city of Riverside. Plaintiffs first acquired the property for investment purposes in 1960, at which time the area was largely agricultural. They planned to hold the property until economic conditions favored commercial development, at which time they expected to sell the land to a developer. See *Hendler IV*, 36 Fed. Cl. at 576-77.

The property is located near and 'downstream' of a seventeen-acre former rock quarry that, under the auspices of [*4] the State of California, was converted in 1952 to a toxic-waste disposal site serving many manufacturing companies associated with the aerospace industry. This site became known, infamously, as the Stringfellow Acid Pits ("Stringfellow"). See *id.* at 577. In 1969, Stringfellow became a source of public concern when heavy rains caused the acid pits to overflow, releasing toxic chemicals to lower-lying areas, including plaintiffs' property. See *id.* In 1972 waste disposal at Stringfellow was stopped; not long afterward it was discovered that toxic chemicals had seeped into the groundwater aquifer below Stringfellow. The site was declared a public nuisance in 1975, but large-scale cleanup efforts did not begin until 1980. See *id.*

The State of California and the United States, acting through the U.S. Environmental Protection Agency ("Government"), undertook cleanup efforts pursuant to federal authority under CERCLA, n1 commonly known as Superfund. As part of its efforts, the Government decided to locate wells and associated equipment on plaintiffs' property to monitor the movement of the contaminated groundwater from Stringfellow. When the Government approached plaintiffs with [*5] this proposal, plaintiffs resisted. See *id.* at 577-78. Shortly thereafter, in 1983, the Government issued an order (herein "access order") mandating that government officials, including both state and federal officials and their agents, were to have access to plaintiffs' land for purposes of installing wells and related

equipment, and conducting tests and other related activities. The access order further ordered that plaintiffs were not to interfere in any manner. See *id.* at 578-79.

-----Footnotes-----

n1 The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq.

-----End Footnotes-----

Well-drilling then began on plaintiffs' property. Over the course of the following three years, twenty wells were installed on the property. During this period and well beyond, Government officials and agents periodically entered the property to monitor the groundwater, using the installed wells. See *id.* at 579. Based on information derived from the wells, a plume of contaminated water from Stringfellow was located [*6] flowing directly under portions of plaintiffs' land, and on down to lower-lying communities. See *id.*

The Government undertook extensive cleanup and remediation activities at Stringfellow. Groundwater samples since taken from the wells on plaintiffs' property have shown these efforts to have been successful. The groundwater contamination under plaintiffs' property has been greatly reduced, to the extent that, it is reported, the groundwater as of May 1995 has been restored almost to its pre-polluted condition, nearly meeting drinking water standards. See *id.* at 579-80.

In 1994 the Government formally terminated the 1983 access order. See *id.* at 580. As noted, the litigation triggered by the order had started some ten years earlier when plaintiffs filed suit against the Government in the Claims Court (now the Court of Federal Claims). This was shortly after the Government began installing the wells on their property. In their suit, plaintiffs claimed that their property suffered a regulatory and physical taking by way of the access order and the associated activities taken thereunder on their land; they sought just compensation for the alleged takings.

In *Hendler II* [*7] , 19 Cl. Ct. 27, the trial court dismissed plaintiffs' suit on procedural grounds, and entered a final judgment. In *Hendler III*, 952 F.2d 1364, we reviewed the dismissal, as well as prior rulings on the merits by the trial court in *Hendler I*, 11 Cl. Ct. 91, which we determined to be properly before us. We reversed the dismissal and concluded that the trial court should have entered summary judgment for plaintiffs on their physical taking claim, opining that "the Government behaved as if it had acquired an easement . . ." *Hendler III*, 952 F.2d at 1378. We also noted with respect to the physical taking that plaintiffs would have "the opportunity to establish their severance damages, the damages accruing to their retained land as a result of the taking." *Id.* at 1383-84. With respect to plaintiffs' regulatory taking claim, we indicated concurrence in the trial court's view that the access order did not, alone, effect a regulatory taking. See *id.* at 1375. However, we noted that "subsequent events . . . might have had sufficient economic impact on the plaintiffs to constitute a regulatory taking." *Id.*

On remand, the trial court bifurcated the trial between the liability [*8] issues and damages. The liability issues

were reviewed and resolved in *Hendler IV*, 36 Fed. Cl. 574, and damages in *Hendler V*, 38 Fed. Cl. 611, though evidence relevant to damages was heard in both trial phases. In *Hendler IV*, the trial court determined that the physical taking was in the form of well-site and access-corridor easements. 36 Fed. Cl. at 584. Specifically, the court found that each well-site easement "comprises a 50 by 50 foot square area for activities related to the well(s) contained therein," and that each access-corridor easement comprises a "16 foot wide access corridor [from a well-site] to a public right of way." *Id.* With regard to the regulatory taking issue, the court determined that there had been no regulatory taking because, among other reasons, in its view the nuisance doctrine defeated the claim and there was insufficient adverse economic impact on plaintiffs. See *id.* at 586-88.

In the damages trial, the court heard evidence on the valuation of the well-site and access-corridor easements, as well as evidence as to whether and to what extent plaintiffs' remaining property was harmed or benefited from the Government's activity on their [*9] land. The court found that neither the easements nor the access order damaged the remaining part of plaintiffs' property, and hence determined that the remaining part suffered no compensable severance damage. See *Hendler V*, 38 Fed. Cl. at 622. The court further determined that plaintiffs' remaining property received substantial "special benefits" and that those benefits outweighed the value of the easements taken. As a consequence, the court concluded that plaintiffs are due no compensation for the value of the easements, and plaintiffs were awarded no compensation for the access order and the Government's activities thereunder. See *id.* at 626-27.

Plaintiffs appeal, asserting that the trial court erred in denying them compensation for the partial physical taking of their land, both for the value of the part taken and severance damages to the remainder. Plaintiffs also assert that the trial court erred in determining that there has not been a regulatory taking of their land. We consider these issues in turn.

DISCUSSION

I.

We review the judgment of the Court of Federal Claims to determine whether it is premised on errors of law or clearly erroneous factual findings. See [*10] *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1171 (Fed. Cir. 1991). The trial court's findings regarding the property's value, nature, and alternative uses, as well as the extent to which the property's use is limited by the Government's actions, are all reviewed for clear error. See *id.* at 1172-73, 1177-78. Also reviewed for clear error are the court's findings on causation. See *Loesch v. United States*, 227 Ct. Cl. 34, 645 F.2d 905, 913 (Ct. Cl. 1981).

Under the clear error standard of review, a finding is clearly erroneous, even though there is some supporting evidence in the record, when the reviewing court, based on the entire record, "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525 (1948). This standard gives considerable deference to the trial court's factual findings. Conclusions of law, however, are "subject to full and independent review," without deference to the trial court.

Gardner v. TEC Sys., Inc., 725 F.2d 1338, 1344, 220 USPQ 777, 782 (Fed. Cir. 1984) (en banc).

II.

COMPENSATION FOR THE PART TAKEN

With regard to [*11] the partial physical taking of plaintiffs' land in the form of the well-site and access-corridor easements, plaintiffs argue that the trial court erred in rejecting their expert's valuation of the easements as of 1983 at \$67,364 (which with interest to 1996 totaled \$185,000). Plaintiffs' valuation was based on the scope of use permitted under the access order, rather than on the Government's actual use. See *Hendler V*, 38 Fed. Cl. at 619. They additionally assert that the trial court erroneously determined that their retained land (the part not taken) received special benefits as a result of the taking.

The trial court's conclusion that plaintiffs are not entitled to compensation for the value of the part of their property taken hinged on this latter determination, that the retained property received special benefits. In particular, the court determined that the special benefits conferred on the property as a result of the taking more than offset the value of the easements--even under plaintiffs' valuation--and hence no compensation therefor is due. See *id.* at 626-27. Accordingly, we first consider plaintiffs' arguments that the trial court erred in its special benefits determination. [*12]

An initial question is whether special benefits to retained land can offset the value of the part actually taken (here, the well-site and access-corridor easements). Such a setoff against the value of the part taken is prohibited under the law of most states. See 3 Julius L. Sackman et al., *Nichols on Eminent Domain* § 8A.03 (rev. 3d ed. 1998) (hereinafter "Nichols"). Rather, most states permit a setoff of special benefits only against the losses, caused by the partial taking, to the property remaining in the owner's hands, i.e., against so-called "severance damages." *Id.* The rationale is that, with regard to the property actually taken, the landowner is entitled to its full value; but with regard to severance damages, the damages to the property remaining in the owner's hands, these are measured by the net of the damages, i.e., losses less benefits. In this way the land owner is fully compensated for what is taken, and is left no better or worse off as a result of the taking.

Before the trial court, plaintiffs contended that under California law special benefits cannot offset the value of the easements taken, but rather can only offset severance damages. [*13] See *Hendler V*, 38 Fed. Cl. at 617. The trial court rejected this argument, concluding as a matter of law that federal law governs, and implicitly concluding that federal law permits such an offset. See *id.* As the authority for these conclusions, the court cited *Bartz v. United States*, 224 Ct. Cl. 583, 633 F.2d 571 (Ct. Cl. 1980), a decision of this court's predecessor. See *Hendler V*, 38 Fed. Cl. at 617.

The trial court's conclusions find support in the law. In *Bartz*, the Court of Claims observed that the issue of what constitutes a taking by the federal government is a federal question. The court held that federal law rather than state law governed whether benefits conferred by the construction and operation of a dam could be considered in

deciding what compensation is due for an alleged taking of farmland by recurring flooding allegedly caused by the dam. See *Bartz*, 633 F.2d at 576-77. In concluding that the landowners were due no compensation, the Bartz court reasoned that the damages caused by the flooding "were heavily countervailed by the benefits to the farmlands as a whole" Id. at 577-78.

In *Bauman v. Ross*, 167 U.S. 548, 42 L. Ed. [*14] 270, 17 S. Ct. 966 (1897), the Supreme Court held constitutional a federal statute that called for considering special benefits when deciding what compensation is due for the taking of part of a tract of land for a highway. The Court observed that the statute was in accord with prior views of the matter as stated in *Kennedy v. Indianapolis*, 103 U.S. 599, 605, 26 L. Ed. 550 (1881), and further stated:

When part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. . . . If, for example, by widening of a street the part which lies next to the street, being the most valuable part of the land, is taken for the public use, and what was before in the rear becomes the front part, and upon a wider street, and thereby of greater value than the whole was before, it is neither just in itself, nor required by the constitution, that the owner should be entitled both to receive the full value of the part taken, considered as front land, and to retain the increase in value of the back land, which has been [*15] made front land by the same taking.

Bauman, 167 U.S. at 574-75.

The *Bauman* decision has led at least one commentator to conclude that "the federal rule regarding setoff of benefits allows benefits to set off . . . the value of the property taken." Nichols, *supra*, § 8A.07[1]. Other circuits have reached the same conclusion. See, e.g., *United States v. Trout*, 386 F.2d 216, 221 (5th Cir. 1967); *Aaronson v. United States*, 65 App. D.C. 14, 79 F.2d 139, 139-40 (D.C. Cir. 1935). Plaintiffs have not asserted that the law is to the contrary. At oral argument plaintiffs agreed that the matter is controlled by federal law and that federal law permits offsetting the value of the part taken by any special benefits conferred.

Plaintiffs point out, however, that it is further the law that only "special" benefits can be deducted from any compensation due; "general" benefits cannot be deducted. See *City of Van Buren v. United States*, 697 F.2d 1058, 1062 (Fed. Cir. 1983); *Trout*, 386 F.2d at 221-22; Nichols, *supra*, § 8A.07[1]. It is the distinction between special and general benefits that plaintiffs offer as the difference between their position [*16] and that of the trial court. They assert that any benefit received as a result of the taking is general rather than special, and that therefore setoff is not permitted.

Distinguishing between special and general benefits is not always an easy task. See Nichols, *supra*, § 8A.04[2]. This court has suggested that, as a general matter, special benefits are those which inure specifically to the landowner who suffered the partial taking and are associated with the ownership of the remaining land. See *Van Buren*, 697 F.2d at 1062. In contrast, benefits that inure to the community at large are considered general. See *id.*

A similar distinction can be derived from other cases and commentary: special benefits are those which arise directly and proximately to the remaining land as a result of the public work on the part taken, due to the peculiar relation of the land in question to the public work. In contrast, resulting benefits that are more or less common to all lands in the vicinity of the land taken are general. See *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 415-16, 70 L. Ed. 339, 46 S. Ct. 144 (1926); *United States v. 2,477.79 Acres of Land*, 259 [*17] F.2d 23, 28 (5th Cir. 1958); *United States v. 901.89 Acres of Land*, 436 F.2d 395, 398-99 (6th Cir. 1970); Nichols, *supra*, § 8A.04[2].

The Supreme Court's analysis in *River Rouge* of benefits arising by way of a river improvement, which required partial taking of numerous parcels of riparian land, is instructive:

We are of opinion that an increase in the value of the remaining portion of any parcel of land caused by its frontage on the widened river, carrying a right of immediate access to and use of the improved stream, would constitute a special and direct benefit within the meaning of the statute, as distinguished from a benefit common to all the lands in the vicinity, although the remaining portions of other riparian parcels would be similarly benefited.

River Rouge, 269 U.S. at 415-16.

In the case before us, the trial court, based on the testimony of the Government's experts, found three types of special benefits arising from the taking of the easements: (1) the investigation, (2) the characterization, and (3) the remediation of the contaminated groundwater. See *Hendler V*, 38 Fed. Cl. at 617, 626-27. The trial court found that, with regard [*18] to the "investigation" benefit, it would have been necessary for the plaintiffs to investigate, by way of testing and sampling, the contamination underneath the subject property prior to its commercial development. The trial court noted that both parties' experts explained that property suspected of containing contamination is investigated in two phases when a property owner is preparing a plan of development. Phase One is an assessment of the likelihood of contamination based on available public records and historical data. Phase Two is scientific analysis involving actual testing and sampling. See *Hendler IV*, 36 Fed. Cl. at 587 n. 15. The court further noted that governmental permitting agencies as well as lending institutions would routinely require Phase One/Phase Two investigations for property that might be contaminated. See *Hendler V*, 38 Fed. Cl. at 622.

The court considered that the installation of the wells and attendant testing by the Government provided the necessary information and is the equivalent of a completed Phase Two investigation. The court found that a private undertaking of the investigation would have cost at least \$100,000 (with interest, \$195,000). [*19] See *id.*; *Hendler IV*, 36 Fed. Cl. at 587 & n. 15.

With regard to the "characterization" benefit, the trial court found that the Government, by way of its activities on plaintiffs' land, characterized the nature and extent of the contamination, thereby eliminating uncertainty as to the land and as a result restoring its otherwise depressed value due to uncertainty. See *Hendler V*, 38 Fed. Cl. at 617, 626-27. Similarly, the court found that the Government's remediation of the contamination in conjunction

with the activities on plaintiffs' land conferred a "remediation" benefit to plaintiffs. See *id.*

The Government's expert valued the characterization benefit at \$280,000 and the remediation benefit at \$244,000. See *id. at 626*. The trial court appears to have credited the Government's characterization and remediation valuations, but it did not expressly find them to be correct. See *id. at 626-27*. Rather, the court stated that even if it "limits the special benefits to the \$100,000 cost avoided for a required Phase Two study, the special benefits would outweigh any damage from the physical taking. Therefore, no compensation is due to plaintiffs for the physical [*20] taking." *Id. at 627*. In particular, the court noted that even if plaintiffs' valuation of the easements is adopted (with interest, \$185,000), the investigation benefit (with interest, \$195,000) outweighs the value of the easements. See *id. at 622, 626-27*.

Plaintiffs do not challenge the valuation of this benefit. To the contrary, the trial court noted that plaintiffs concurred that privately-undertaken equivalent tests and analyses, as part of a proposed commercial development, would have cost at least \$100,000, totaling with interest \$195,000. See *Hendler IV, 36 Fed. Cl. at 587*; *Hendler V, 38 Fed. Cl. at 622*. We have no basis for concluding that this finding is clearly erroneous.

Rather, plaintiffs assert that any benefit provided by the investigation is "general," not "special," and is therefore immaterial. They argue that the only properties specially benefited by the Government's actions are the "intended beneficiaries"--those downstream properties whose owners either used, or intended to use, the groundwater. Plaintiffs claimed no use for the groundwater, given the contemplated commercial development of their property. They argue that therefore their property [*21] received only general benefits, benefits common to all lands in the vicinity. In this vein, they assert that the Government's investigation merely provided public information available to "every other property in the vicinity[,] . . . for that matter, [to] every citizen of this country." Finally, they assert that if anyone is specially benefited, "it is the State of California and the other parties liable for characterizing and remediating the Stringfellow contamination."

Though the distinction between "special" and "general" benefits is clearer in the abstract than in the application, on the facts of the case the Government has the better argument, and the trial court was not wrong in viewing these particular benefits as "special" with regard to the particular land. As the above discussion bears out, the fact that others benefited from the Government's activities does not make the benefits to plaintiffs' land general. And, that other landowners may have been the "intended beneficiaries" of the Government's actions is similarly inapposite.

What is relevant is the trial court's finding that the Government's investigation on plaintiffs' land avoided an otherwise required Phase [*22] Two study for development of the property. See *Hendler V, 38 Fed. Cl. at 627*. Plaintiffs have not shown this finding to be clearly erroneous. In view of the finding, the "investigation" benefit to plaintiffs--i.e., avoidance of a Phase Two study--inured specifically to them and is associated with their ownership of their remaining property. See *Van Buren, 697 F.2d at 1062*. It inures to plaintiffs because of its peculiar relation to their land. While others may have benefited generally from the information provided by the investigation, the benefit to others was not the same. The benefit to others was not in the form of an equivalent of a Phase Two study of plaintiffs' property. That benefit is unique to plaintiffs' land, obviating an otherwise necessary requirement for

developing the land. In sum, we conclude that the trial court did not err in determining that the plaintiffs' remaining property received an "investigation" special benefit.

Furthermore, given the record in this case, we conclude that the trial court did not err in offsetting this special benefit against the value of the easements taken. However harsh by modern day standards the federal offset rule may seem, [*23] which allows the Government to escape any payment for private property actually taken for public use, we accept it as the governing rule for purposes of this case. If the rule is to be changed, and to make it more consistent with the rule followed in the states, it is for Congress to make that change.

This court's predecessor, in the Bartz case, applied the rule to deny a group of farm owners along the Iowa River compensation for lands repeatedly flooded by a Government dam, on the ground that their remaining land was greatly benefited by the flood and drought control project, such that the benefits far exceeded the value of the land taken. 633 F.2d at 577-78. The court stated that, "if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty." Id. at 578 (quoting *United States v. Sponenbarger*, 308 U.S. 256, 266-67, 84 L. Ed. 230, 60 S. Ct. 225 (1939)).

As the quote indicates, the rule takes its force from the underlying equitable principle that the Government's obligation is, to the extent possible following the Government's [*24] intrusion, to restore the landowner to the position he was in absent any government action. In a case in which the problem was not created by the Government, and the Government's intrusion was necessary to correct the problem for the benefit of the general public, it can be argued that it is not inequitable to balance against the harm caused the landowner by the Government's remedial action any special benefits that happen as a result to accrue to the land. Thus, in the flooding cases such as Bartz, in which dams are built to control natural flooding, the result, even though it denies recovery for property actually taken, is seen as not being ultimately inequitable.

Applying that principle to the case at hand, if this were a case in which the Government's remedial efforts were shown to be related to Government causes, the setoff rule would be inapplicable. Here, however, there is no indication that the United States Government contributed in a direct way to the creation of the problems at Stringfellow. See *United States v. Stringfellow*, No. CV-83-2501, 1995 WL 450856, at * 5-6 (C.D. Cal. Jan. 24, 1995) (unreported order) (holding the owners of the Stringfellow site, the State [*25] of California, and users of the site liable for costs associated with the site). Plaintiffs seem to concede that, asserting that "it is the State of California and [] other parties [that are] liable for . . . the Stringfellow contamination."

Accordingly, the only indication we have in this case is that the Government's role as remediator is free of Government responsibility as a causal agent. If that were not the case, the rule of setoff would have no application, because the Government would merely be remediating its own mistakes. Just as the person who causes injury to his neighbor's land cannot be heard to say that the required restoration is a gift, the Government cannot claim that restoring a landowner's land to its natural state by cleaning up a Government-created pollution problem is a "special benefit" for which the landowner can be charged.

Given that that is not the case here, and given the established precedents that govern compensation for a federal taking, the trial court did not err in setting off the value of the easements taken by the found "investigation" special benefit. Because the unchallenged trial court's valuation of that benefit completely offsets even [*26] plaintiffs' valuation of the easements taken, we need not address the correctness of the other special benefits found by the trial court. Simply put, because the court did not err in determining that the value, however measured, of the easements taken is outweighed by the special benefits conferred to the remainder, we affirm the denial of compensation for the value of those easements.

III.

SEVERANCE DAMAGES

Next we consider plaintiffs' contention that the trial court erred in finding that their retained property suffered no severance damage. In cases of a partial physical taking as that here, just compensation under the takings clause of the Constitution includes "not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing . . . injury due to the use to which the part appropriated is to be devoted." *United States v. Grizzard*, 219 U.S. 180, 183, 55 L. Ed. 165, 31 S. Ct. 162 (1911); see also *Hendler III*, 952 F.2d at 1383-84. However, plaintiffs bear the burden of proving severance damages. See *Miller v. United States*, 223 Ct. Cl. 352, 620 F.2d 812, 828 (Ct. Cl. 1980).

Plaintiffs' severance damage [*27] theory begins with the proposition that the scope of the taking, and thus the extent of the damage to the retained land, is defined by the broad scope of the access order, and not by the actual activities undertaken by the Government. This theory, if accepted, would have opened up a large measure of potential damages to the retained land, since the access order could be read to authorize virtually unlimited governmental activity. The trial court rejected that theory, as do we. As we explain below, the trial court correctly concluded that the economic consequences flowing from the access order itself did not rise to the level of a regulatory taking. Though plaintiffs devoted considerable effort in their brief to bolstering the theory, and the damages that would flow from it, the conclusion that there was no regulatory taking cuts the ground out from under it. If there is no regulatory taking, what remains is a physical taking of the easements, and the severance damages, if any, caused by the taking of those easements.

Building on their theory, plaintiffs presented through their expert the proposition in essence that the access order and the Government's activities thereunder made their [*28] retained property unmarketable, or at least greatly depreciated. This damage, they contend, was caused by the access order and attendant activities significantly interfering with development of their property and creating the false impression that the property was a source of contamination. Plaintiffs' expert valued the alleged severance damage at over one million dollars (with interest, \$3.1 million).

The trial court rejected this aspect of plaintiffs' theory. The court found unconvincing their assertion that the access order and associated activities created the false impression that their property was contaminated, thereby

decreasing its value. See *Hendler V*, 38 Fed. Cl. at 621. Instead, the court "found that the 'evidence shows that the value of plaintiffs' property was reduced by the contamination [from Stringfellow], rather than by the actions pursuant to the access order.'" *Id.* (quoting *Hendler IV*, 36 Fed. Cl. at 588). The court went on to state that "it defies logic that the monitoring wells, rather than the actual existence of groundwater contamination, would devalue plaintiffs' property." *Id.* at 622. Thus, the trial court's rejection of plaintiffs' "false [*29] impression" theory turned on causation, a question of fact. See *Loesch*, 645 F.2d at 913.

With regard to plaintiffs' assertion that the access order and attendant activities inhibited development of their property, the court found that "the easements could be incorporated into any planned development as parking lots or landscaped areas, without any significant loss of building area." *Hendler V*, 38 Fed. Cl. at 622. This finding is not inconsistent with plaintiffs' contemplated use of the property: they maintained that "their property would have been an ideal location for . . . commercial development . . . [such as] suburban strip-malls and retail centers . . ." *Hendler IV*, 36 Fed. Cl. at 586-87. In the end, the court found that "the easements and the [access] order did not materially interfere with the subject property's daily use and did not result in severance damages." *Hendler V*, 38 Fed. Cl. at 622.

In challenging these findings, plaintiffs assert that the trial court erred by rejecting the opinion of their expert, and by basing its analysis on the Government's actual activities on their land rather than the scope of activities permitted under the access order. [*30] The difficulty with plaintiffs' position on appeal is that they have to overcome the express findings of the trial court. The trial court's findings are supported by the record; though we might as an initial matter have found otherwise, we cannot say that these findings are clearly erroneous. The Government's experts explained that the consequence of the discovery of actual groundwater contamination on plaintiffs' property was to stigmatize the property for any type of development, and thereby reduced its value by eighty percent. n2 See *id.* at 624. They further testified that the well-site and access-corridor easements were not in themselves an impediment to development of the property. See *id.* at 626. On this point, the trial court noted that "plaintiffs' expert conceded that the monitoring wells could have been incorporated into a commercial development without significant difficulty." *Hendler IV*, 36 Fed. Cl. at 588. The Government's experts additionally opined that the Government's activities pursuant to the access order actually restored value to plaintiffs' property by characterizing and remediating the contamination. See *Hendler V* 38 Fed. Cl. at 626. In view of [*31] this evidence, we cannot say that the trial court clearly erred in rejecting the contrary opinion of plaintiffs' expert.

-----Footnotes-----

n2 Generally, fines imposed pursuant to a civil-contempt order are remedial, designed primarily to coerce an offending party into prompt compliance with a judicial mandate. Once the contemnor comes into compliance, the contempt is purged and no further fines are incurred. See *United States v. Marquardo*, 149 F.3d 36, 39 (1st Cir. 1998). By contrast, a monetary fine imposed in connection with a criminal contempt adjudication is essentially punitive and deterrent in purpose, rather than remedial. That is, it vindicates judicial authority by assessing a one-time penalty for past disobedience of a court order. See *id.* at 39-40. Since criminal contempt proceedings address a completed crime, and the fine imposed is a criminal "sentence," see *In re Kave*, 760 F.2d 343, 351 (1st Cir. 1985),

the contemnor lacks the unilateral option to avoid the fine by future compliance with the court order. Further, since the fine is punitive rather than compensatory, its amount need not be exclusively commensurate with victim loss. See *Marquardo*, 149 F.3d at 40.

-----End Footnotes----- [*32]

With regard to the access order itself, the court noted that the "order was never invoked to bar any sale or development of plaintiffs' property." *Hendler IV*, 36 Fed. Cl. at 588. In fact, "plaintiffs failed to disclose the existence of the [access] order to any of the prospective purchasers, and none of the proposals for purchase of the subject property were made with knowledge of it." *Id.* Furthermore, the court noted that "plaintiffs' expert . . . admitted that someone interested in developing the property would attempt to find out the nature of the monitoring activities and what accommodations could be made." *Hendler V*, 38 Fed. Cl. at 619. Accordingly, we cannot say that the trial court clearly erred in finding that the access order did not itself result in measurable severance damages.

Again, while we might have reached contrary findings had we sat as the trier of fact, that does not entitle us to reverse the trial court's findings. See *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985). We are limited to the clearly erroneous standard of review, and plaintiffs' have failed to convince us that the findings fail that [*33] standard. In view of these findings, we must affirm the judgment with respect to severance damages.

IV.

REGULATORY TAKING

Lastly, we consider plaintiffs' assertion that the trial court erred in determining that there has been no regulatory taking of their property. In *Hendler I*, the trial court held that the access order, standing alone, did not work a regulatory taking. 11 Cl. Ct. at 96. In *Hendler III*, we concurred, stating that: "On the facts then before the court . . . we do not disagree with that ruling." 952 F.2d at 1375. We went on to note that "subsequent events, in light of the character of the Government's action and plaintiffs' distinct investment-backed expectations, might have had sufficient economic impact on the plaintiffs to constitute a regulatory taking." *Id.* We remanded for "the fact-specific findings required for determining" whether a regulatory taking has occurred. *Id.* at 1375, 1384. That is what the trial court set out to do, see *Hendler IV*, 36 Fed. Cl. at 585-89, but plaintiffs claim that it erred.

A pivotal criterion governing whether a regulatory taking has occurred is the impact the regulatory imposition has had on the economic use, [*34] and hence value, of the property. See *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1564-65 (Fed. Cir. 1994); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994). If a regulation categorically prohibits all economically beneficial use of land there is, without more, a compensable taking. See *Florida Rock*, 18 F.3d at 1564-65. On the other hand, though it is not necessary to have a total wipeout before the Constitution compels compensation, if the regulatory action is not shown to have

had a negative economic impact on the property, there is no regulatory taking. See generally *id. at 1569-71; Loveladies, 28 F.3d at 1180*. The question of the economic impact of a particular regulatory action is of course fact-specific to the case. See *Florida Rock, 18 F.3d at 1570*.

Plaintiffs' economic impact theory for their regulatory taking claim is quite similar to their severance damage theory. They contend that the access order and attendant activities falsely stigmatized their property as a source of contamination, and significantly interfered with its development. As a result, they contend, the property was unmarketable for a period [*35] of up to twelve years, yielding a loss in the range of \$16-18 million.

The trial court's rejection of this claimed economic impact parallels its analysis and findings with respect to plaintiffs' severance damage claim. The court found that their property was stigmatized by the actual contamination from Stringfellow, rather than the Government's actions pursuant to the access order. See *Hendler IV, 36 Fed. Cl. at 588*. Furthermore, the court found that the access order and Government actions thereunder did not interfere with the development or marketing of the property. See *id.*

We have already concluded (with respect to the question of severance damages) that these factual findings by the trial court are not clearly erroneous, and thus cannot be disturbed. In light of these findings, we cannot say that the court erred in determining that plaintiffs have not suffered a regulatory taking. In sum, as found by the trial court, plaintiffs failed to prove that their "use" was sufficiently interfered with to constitute a regulatory taking. See *Florida Rock, 18 F.3d at 1568-71*.

The trial court alternatively based its rejection of plaintiffs' regulatory taking claim on the theory [*36] that "the nuisance exception described in *Loveladies, Lucas, and other cases*" is applicable and defeats the claim. *Hendler IV, 36 Fed. Cl. at 585-86*. However, having concluded that the trial court did not err in determining that there was insufficient economic impact to give rise to a regulatory taking, it is unnecessary for us to consider this further theory; under the circumstances, we choose not to. Thus, while in appropriate cases the nuisance doctrine is an available defense (see *Florida Rock, 18 F.3d at 1565 n.10; Loveladies, 28 F.3d at 1182-83*), we do not decide whether it has any applicability to this case.

CONCLUSION

The judgment of the Court of Federal Claims is

AFFIRMED.

COSTS

The parties shall bear their own costs.