No. 99-1805

In the Supreme Court of the United States

CITY OF NEW ORLEANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Environmental Protection Agency's order, which required that the agency be given access to contaminated property owned by the City of New Orleans so that the agency could complete an environmental cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, was arbitrary and capricious.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is unreported. The opinion of the district court (Pet. App. B2-B13) is reported at 86 F. Supp. 2d 580.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2000. The petition for a writ of certiorari was filed on May 9, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The dispute in this case arises from the efforts of the Environmental Protection Agency (EPA) to obtain access to property belonging to petitioner, the City of New Orleans, to complete a cleanup of hazardous substances pursuant to the Comprehensive Environmental

Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*

1. Congress enacted CERCLA in response to widespread concern over the severe environmental and public health effects of the improper disposal of hazardous wastes. See *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). As amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 2, 100 Stat. 1614, CERCLA established a comprehensive statutory scheme to address and accomplish the cleanup of actual or threatened releases of hazardous substances. See *Colorado* v. *Idarado Mining Co.*, 916 F.2d 1486, 1488 (10th Cir. 1990), cert. denied, 499 U.S. 960 (1991); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985).

CERCLA's purpose "is to facilitate the prompt cleanup of hazardous waste sites." *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 894 (5th Cir. 1993). To that end, CERCLA provides EPA with "the authority and the funds necessary to respond expeditiously to serious hazards without being stopped in its tracks by legal entanglement before or during the hazard clean-up." *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011, 1019 (3d Cir. 1991). Among other things, Section 104(e) of CERCLA, 42 U.S.C. 9604(e), accords EPA a statutory right of access to potentially contaminated property, and a right to gather information about such property, subject to certain limits and procedures.

Under Section 104(e), EPA and its representatives may enter property, at reasonable times, if EPA determines that "there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant." 42 U.S.C. 9604(e)(1) and (3)(d). If a party will not consent to access, EPA may issue an administrative order directing

that party to provide access. 42 U.S.C. 9604(e)(5)(A). If the party to whom the order is directed fails to comply, the United States may bring an action in federal district court to compel compliance. 42 U.S.C. 9604(e)(5)(B).

When deciding whether to compel compliance with an EPA access order, a district court first must determine 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." 42 U.S.C. 9604(e)(5)(B). If the answer to that question is "yes," the district court is directed to prohibit any interference with EPA's entry onto or inspection of the property, "unless under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. 9604(e)(5)(B)(i).

2. Between 1909 and the 1960s, petitioner operated a landfill in New Orleans, Louisiana, in the area now designated as the Agriculture Street Landfill Superfund Site (the Site).[1] Pet. App. C16. During the landfill's many years of operation, ash from municipal waste incinerators, hurricane and construction debris, and household trash were deposited there. *Ibid.* Beginning in the 1970s, approximately half of the 95 acres of the Site were developed for private and public uses, including private single-family homes, multiple-family private

[1] Because of its operation of the landfill, petitioner is one of the parties responsible for the cleanup of the Site. See 42 U.S.C. 9607(a). EPA may order potentially responsible parties to perform the cleanup of the Site if certain conditions are satisfied, or seek a court order to compel those parties to do so. 42 U.S.C. 9606(a). Here, EPA has undertaken the cleanup activities itself, subject to its right (under 42 U.S.C. 9607(a)) to seek recovery of its costs from liable parties.

and public housing units, a community center, a recreation center, retail businesses, an elementary school, and an electrical substation. *Ibid.* About half of the site is still undeveloped. *Ibid.* The land owned by petitioner is located in the undeveloped part of the Site. *Ibid.*

EPA's investigations at the Site disclosed heavy metals, such as lead, and organic compounds, such as polynuclear aromatic hydrocarbons (PAHs), in the surface and subsurface soils at the Site. Pet. App. B8. On December 16, 1994, the Site was added to the National Priorities List (NPL), a list of the contaminated sites with the highest priority for investigation and response. See 42 U.S.C. 9605(a); 59 Fed. Reg. 65,206 (1994). In 1995, EPA performed a Human Health Risk Assessment at the Site. Pet. App. C17. As petitioner concedes (Pet. 3), the highest concentrations of hazardous substances (including lead, arsenic and PAHs) were found in the soil of the undeveloped portion of the Site. Pet. App. B11; C.A. R.E. 76-78 (contour maps).

Before the current dispute arose, EPA undertook several response actions to address contamination at the Site. Pet. App. B3. Petitioner did not oppose any of those actions. *Id.* at B3 n.2.[2] Among other things, EPA divided the Site into five operable units (OUs) based on the distinct conditions and problems in the different parts of the Site. OU 1 is the 48-acre section of undeveloped property, including petitioner's property; OU 2 includes all of the residential developments and a small commercial area; OU 3 includes the Community Center; OU 4 is the Moton Elementary School, Magrauer Play-

[2] As petitioner acknowledged in the court of appeals, before 1999, petitioner had "fully cooperated with the EPA * * * by allowing the EPA access for unlimited investigation and testing on its property." Pet. C.A. Br. 3.

ground and recreation center; and OU 5 is the groundwater at the Site. Pet. App. C17.

In September 1997, after investigating the extent of the contamination in each OU, EPA issued an Action Memorandum for OUs 1-3 and a no-action Record of Decision for OUs 4 and 5. Pet. App. C18-C19. EPA's Action Memorandum authorized a "removal action" for OUs 1-3. *Id.* at C18. The removal action for OU 1 consisted of a sequence of actions—including clearing the property of vegetation, placing a geotextile filter fabric on the subgrade, and covering the surface with fresh soil and new vegetation—to address the continuing risk posed by the contamination in the area. *Id.* at C19.

Beginning in November 1997 and continuing for approximately one year after that date, EPA asked property owners in the undeveloped area (OU 1), including petitioner, to consent to EPA access to their property. Pet. App. B3-B4. EPA's efforts to obtain voluntary agreements regarding access reflected the agency's normal policy of seeking such agreements before exercising the agency's authority to compel access. *Id.* at C20. On December 23, 1998, after more than one year of unsuccessful efforts to obtain petitioner's voluntary consent, EPA again wrote petitioner, explaining that access to petitioner's properties in the undeveloped portion of the Site was needed in order to complete the cleanup of the undeveloped area, and that the agency had statutory authority to compel access. *Id.* at B4. By letter dated January 7, 1999, petitioner unequivocally declined to give EPA access to its property. *Ibid.*

Petitioner is the sole landowner from the undeveloped area (OU 1) that refused to grant EPA access

voluntarily.[3] The primary reason petitioner gave for its refusal, however, had nothing to do with what EPA proposed to do on petitioner's land. Instead, petitioner's refusal stemmed from petitioner's desire that EPA provide new housing to any resident of the residential area who wished to be relocated; petitioner called that proposed government-financed relocation plan a "community buy-out." C.A. R.E. 44-45. EPA, in response to petitioner's demands, explained that it "does not have authority to conduct a permanent relocation at this site, and EPA is now conducting the environmental response action which will be fully protective of human health and the environment." *Id.* at 42. Petitioner, however, altered neither its demands nor its refusal to grant EPA access to its property. Having failed to obtain petitioner's voluntary consent, on February 24, 1999, EPA exercised its statutory authority to issue a unilateral administrative order requiring petitioner to provide access. Pet. App. C14-C27. Petitioner, however, declined to comply with the order. *Id.* at B4.

3. Following petitioner's refusal to comply, the United States filed this action, on March 19, 1999, in the United States District Court for the Eastern District of Louisiana, seeking enforcement of EPA's order. C.A. R.E. 1. On April 1, 1999, the district court granted the United States' Motion for Order in Aid of Immediate Access and ordered petitioner to provide EPA access to its property. Pet. App. B2-B13.

The district court first explained that, in general, district courts will enforce EPA unilateral administra-

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[3] EPA's access order stated that petitioner and one other owner in the undeveloped area had refused access. Pet. App. C17. However, the other landowner subsequently gave consent.

tive orders requiring access to property under CERCLA where "five statutory elements" have been met. Pet. App. B6. Those "elements," the court explained, are as follows:

> 1) the entry must be sought under paragraphs (2), (3) or (4) of § 9604(e); 2) the EPA must seek the property owner's consent before seeking court-ordered compliance; 3) the EPA must demonstrate that there is "a reasonable basis to believe" that there may be a release of a hazardous substance, pollutant, or contaminant from the site; 4) there must be some interference with the entry request before the court may order compliance; and 5) the demand for entry must not be arbitrary and capricious, an abuse of discretion, or otherwise in violation of law.

Ibid. (citations omitted).

In this case, petitioner claimed only that the latter-most three elements had not been met, *i.e.*, petitioner disputed whether there was a reasonable basis to believe that there may be a release of a hazardous substance, whether petitioner had interfered with EPA's entry onto the property, and whether the demand for entry was arbitrary, capricious, or an abuse of discretion. Pet. App. B6. With respect to the first disputed "element," the court found that EPA had a reasonable basis to believe that there may be a release of a hazardous substance from the Site "based upon the clear existence of hazardous substances located at the site and the Site's inclusion in the National Priorities List." *Id.* at B8. With respect to the second issue, the court found that petitioner had engaged in conduct that had interfered with EPA's response action. Petitioner had "unequivocally denied access to the EPA via letter"

and had "filed a complaint for a preliminary and permanent injunction to enjoin [EPA] from implementing continuing response efforts on [petitioner's] property." *Id.* at B10.

Finally, the court rejected petitioner's claim that EPA's demand for access was arbitrary and capricious. Petitioner's primary claim was one of unequal treatment. EPA, petitioner argued, had made the removal action voluntary for property owners in the developed area, but had issued an access order to petitioner, a property owner in the undeveloped area. Pet. App. B10. The district court first rejected petitioner's factual argument that EPA had designated the removal action as entirely voluntary. *Id.* at B10 n.8. Although EPA had indicated to property owners that their decision to sign a consent to access agreement was voluntary, the district court recognized that, by so doing, EPA had not renounced all use of its enforcement authority. To the contrary, even after seeking consent from landowners, "EPA would still have the option of filing an enforcement action under 42 U.S.C. 9604(e)(5) against a party who [did] not consent." *Ibid.*

The district court also noted that there was a significant difference between petitioner's property, which was undeveloped, and the developed property. "EPA has demonstrated," the district court explained, "that the contamination is significantly higher in the undeveloped portions (which is where [petitioner's] property is located) of the Site than the developed areas." Pet. App. B11. Furthermore, the court continued, "examination of the affidavits provided by the EPA, the Action Memorandum and [EPA's access order] evidences that the EPA decision is reasonable." *Ibid.* Having concluded that EPA had met all of the requirements of 42 U.S.C. 9604(e)(5), the court ordered

petitioner to provide EPA with immediate access to the property, and it enjoined petitioner from interfering with EPA's remediation efforts. Pet. App. B12-B13.

The court of appeals affirmed in a one-page, unpublished opinion, adopting the reasoning of the district court. Pet. App. A1.

ARGUMENT

Petitioner contends (Pet. 6) that the district court did not properly evaluate one of the relevant statutory factors under CERCLA—whether EPA's demand for access to petitioner's property was arbitrary and capricious—before ordering petitioner to grant EPA access to its property. That contention is factbound and without merit. Accordingly, no further review is warranted.

1. Petitioner does not claim that the district court articulated an incorrect legal standard. To the contrary, quoting the district court's decision, petitioner agrees that an order compelling compliance with an EPA access order under CERCLA is appropriate where the "five prerequisites" listed by the district court are met. Pet. 5 (quoting Pet. App. B6). See also p. 7, *supra*. Petitioner instead contends that the courts below misapplied one of the five "prerequisites," namely the requirement that EPA's demand for entry not be arbitrary and capricious, an abuse of discretion, or otherwise in violation of law. Pet. 5-6. The misapplication of settled law to particular facts, however, rarely warrants this Court's review. In any event, the courts below properly evaluated and rejected petitioner's claim.

Petitioner's primary claim of arbitrariness before the district court stemmed from its contention that EPA had made the removal action voluntary for property

owners in the developed part of the Site, but had issued an access order to petitioner. Pet. App. B10. As the district court pointed out (*ibid.*), the factual premise of that argument—that EPA had designated the removal action as voluntary—is simply incorrect. The fact that EPA told property owners that their decision to sign a consent to access agreement was voluntary, the court explained, in no way precluded EPA from using its enforcement authority with respect to any property owners who did not consent. *Id.* at B10-B11 & n.8. To the contrary, even after seeking consent from landowners, "EPA would still have the option of filing an enforcement action under 42 U.S.C. 9604(e)(5) against a party who [did] not consent." *Id.* at B10 n.8.

2. Petitioner also appears to argue (Pet. 5-6) that the district court erroneously merged two distinct inquiries. In particular, petitioner characterizes the district court's opinion as holding that whenever there is a reasonable basis to believe a release of hazardous materials is threatened, EPA's demand for access to the property cannot be arbitrary or capricious. Petitioner misinterprets the district court's opinion. To be sure, the court sensibly noted that the threatened release of hazardous substances from petitioner's property supported EPA's desire for access. Pet. App. B10-B11. But the court did not end its analysis there. EPA's decision to obtain access, the court also explained, was supported by the fact that the highest concentrations of the primary contaminants were found in the undeveloped area (OU 1), where petitioner's property is located. *Id.* at B11. Moreover, while petitioner claims to have been singled out for differential treatment, every owner of undeveloped property in the Site *except* petitioner voluntarily agreed to provide EPA access for remediation purposes. See pp. 5-6 & note 3, *supra*. The fact that peti-

tioner was the only owner of undeveloped property—the most contaminated property—that declined to provide voluntary access explains why petitioner was also the only owner subjected to an EPA order requiring it to provide access.

In any event, the district court also specifically examined EPA's rationale for demanding access to petitioner's property—including "the affidavits provided by the EPA, the Action Memorandum and [EPA's access order]"—and concluded that EPA's decision was "reasonable." Pet. App. B11. Petitioner offers no reason to question that conclusion, which is amply supported by the record. In its Action Memorandum, EPA determined that grading the undeveloped area, including petitioner's land, was necessary to control run-off and to minimize storm water impacts to the developed area. C.A. R.E. 69. Indeed, EPA found that the topography of petitioner's property affected EPA's ability to grade a substantial portion of the lower section of the undeveloped area. Supp. C.A. R.E. 15. As a result, optimal measures to alleviate future flooding in the community could not have been implemented absent access to petitioner's property. *Ibid.*[4] Thus, as the courts below properly concluded, EPA's decision to require access to petitioner's property was wholly reasonable, and not arbitrary or capricious.

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[4] Although the removal action could in theory be conducted on properties adjacent to those owned by petitioner without remediating petitioner's property, EPA concluded that doing so would substantially increase the time and cost of the response action. Additionally, remediation of alternating parcels of land would create differences in elevation, which could create drainage problems. C.A. R.E. 47.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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