

As Engrossed: 3/5/91, 3/6/91

1 **State of Arkansas**
2 **78th General Assembly**
3 **Regular Session, 1991**
4 **By: Senator Pagan**

A Bill

SENATE BILL 517

For An Act To Be Entitled

8 "AN ACT TO AMEND TITLE EIGHT, CHAPTER ONE OF THE ARKANSAS
9 CODE ANNOTATED OF 1987 TO PROVIDE PROCEDURES FOR
10 ADMINISTRATIVE SEARCHES BY DEPARTMENT OF POLLUTION CONTROL
11 AND ECOLOGY PERSONNEL, FOR THE ISSUANCE OF ADMINISTRATIVE
12 SEARCHES WARRANTS TO THE ARKANSAS DEPARTMENT OF POLLUTION
13 CONTROL AND ECOLOGY; AND FOR OTHER PURPOSES."

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15 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

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17 SECTION 1. Purpose. The General Assembly hereby determines and
18 declares that protection of the environment is of paramount governmental
19 interest in the State of Arkansas, and that standards which will permit
20 administrative inspections consonant with the United States and Arkansas
21 Constitutions must be established which clarify the ADPC&E's inspection
22 authority, and provide for the issuance of administrative inspection warrants
23 when circumstances require. Therefore, the purpose of this act is to clarify
24 and supplement the inspection authority vested with the department. This act
25 shall be given a liberal interpretation so as to implement its remedial
26 intent.

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28 SECTION 2. Section 8-1-106 is hereby added to the Arkansas Code
29 Annotated of 1987, reading as follows:

30 "8-1-106 Inspections - Definitions - Administrative Warrants -
31 Exceptions.

32 (a) General. Whenever it shall be necessary for the purpose of
33 implementing or monitoring the enforcement of any law charged to the authority
34 of the department, any authorized employee or agent of the department may
35 enter upon any public or private property for the purpose of obtaining

1 information or conducting investigations or inspections, subject to the
2 following provisions.

3 (b) Definitions. As used in this section, the following terms shall
4 have these ascribed meanings:

5 (1) 'Administrative Inspections:' Any investigation by
6 department personnel at facilities operating within the department's apparent
7 regulatory jurisdiction.

8 (2) 'Facility:' Any public or private area, premises,
9 curtilage, building or conveyance described as the subject of administrative
10 inspection. For the purpose of this section, a rebuttable presumption
11 concerning the jurisdiction of the department's regulatory authority is
12 established as it regards the department's authority to inspect any facility.

13 (3) 'Pervasively regulated facility or activity:' Any activity
14 or facility which is the location of activity authorized by the department
15 through a permit, license, certification or operational status approval.

16 (4) 'Probable cause:' *A showing that an administrative search*
17 *limited in scope is necessary to ensure compliance with or enforcement of*
18 *laws, regulations or orders charged to the department for implementation. For*
19 *the purpose of conducting administrative inspections or applying for*
20 *administrative warrants, probable cause may be provided to the department*
21 *through complaints or other means which reasonably justify a limited and*
22 *controlled administrative inspection.*

23 (c) Administrative Inspections. Whenever the department obtains
24 information which supports reasonable cause to believe that a violation of any
25 law within its regulatory authority is being or has been violated, or that
26 unauthorized regulated conduct is occurring or has occurred, department
27 personnel or its agents may demand entry onto any property, public or private,
28 to inspect any facility. The department's investigation or inspection shall
29 be limited to that necessary to confirm or deny the cause which prompted the
30 investigation or inspection, and shall be conducted during daylight, during
31 regular business hours or, under emergency or extraordinary circumstances, at
32 *a time necessary to observe the suspected violation or unauthorized conduct.*
33 *Except under emergency circumstances, the department shall inform such*
34 *facility's owner or agent of all information which forms the basis of its*
35 *probable cause at the time of the inspection. Nothing in this subsection*

1 shall be construed as requiring the department to forfeit the element of
2 surprise in its inspection efforts. Also, nothing in this act shall be
3 construed as limiting the frequency of the periodic or random inspections of
4 pervasively regulated facilities or activities.

5 (d) Administrative Warrants. If consent to inspect is denied, the
6 department may obtain an administrative inspection warrant from a judicial
7 officer. Issuance and execution of administrative inspection warrants shall
8 be as follows:

9 (1) Any judicial officer otherwise authorized to issue search
10 warrants within his jurisdiction may, upon proper oath or affirmation showing
11 probable cause as defined by this section, issue warrants for the purpose of
12 conducting administrative inspections authorized by any law or regulation
13 administered by the department.

14 (2) A warrant shall issue only upon an affidavit of a department
15 official, employee or agent having knowledge of the facts alleged, sworn to
16 before the judge or magistrate and establishing the grounds for issuing the
17 warrant. If the judge or magistrate is satisfied that grounds for the
18 application exist or that there is probable cause to believe they exist, he
19 shall issue a warrant identifying the facility to be inspected, and the
20 purpose of the inspection. The warrant shall:

21 (i) state the grounds for its issuance and the name of
22 each person whose affidavit has been taken in support thereof;

23 (ii) be directed to a department officer or employee;

24 (iii) command the person to whom it is directed to inspect
25 the area, premises, building, or conveyance identified for the purpose
26 specified;

27 (iv) specifically identify any documents or samples to be
28 gathered during the inspection;

29 (v) direct that it be served during normal business hours
30 unless emergency or extraordinary circumstances compel otherwise; and;

31 (vi) designate the judge or magistrate to whom it shall be
32 returned.

33 (3) If appropriate, the warrant may authorize the review and
34 copying of documents which may be relevant to the purpose of the inspection.
35 If documents must be seized for the purpose of copying, the person serving the

1 warrant shall prepare an inventory of documents taken. The inventory shall be
2 made in the presence of the person executing the warrant and of the person
3 from whose possession or facility the documents were taken, if present, or in
4 the presence of at least one credible person other than the person executing
5 the warrant. A copy of the inventory shall be delivered to the person from
6 whom or from whose facility the documents were taken. The seized documents
7 shall be copied as soon as feasible under circumstances preserving their
8 authenticity, then returned to the person from whom the documents were taken.

9 (4) The warrant may authorize the taking of samples of materials
10 generated, stored or treated at the facility, or of the water, air or soils
11 within the facility's control or which may have been affected by the
12 facility's operations. The person executing the warrant shall prepare an
13 inventory of all samples taken. In any inspection conducted pursuant to an
14 administrative warrant in which such samples are taken, the department shall
15 make split samples available to the person whose facility is being inspected.

16 (5) A warrant issued pursuant to this section must be executed
17 and returned within ten (10) days of its date unless, upon a showing of a need
18 for additional time, the court orders otherwise. The return of the warrant
19 shall be made promptly, accompanied by a written inventory of any documents or
20 samples taken.

21 (6) The judge or magistrate who has issued a warrant shall
22 attach thereto a copy of the return and all papers returnable in connection
23 therewith and file them with the clerk of the circuit court for the judicial
24 district in which the inspection was made.

25 (7) This subsection does not prevent the inspection without a
26 warrant of books and records pursuant to an administrative subpoena issued in
27 accordance with duly adopted administrative procedures.

28 (8) *A copy of the warrant and all supporting affidavits shall be*
29 *provided to the person served or left at the entry of the facility inspected.*

30 (e) Notwithstanding the previous subsection, an administrative warrant
31 shall not be required for any inspection, including the review and copying of
32 documents and taking of samples, under the following circumstances:

33 (1) for pervasively regulated facilities or activities as
34 defined by this section *whose permit, license, certification, or operational*
35 *approval from the Department provides notice that the Department may inspect*

1 regulated activities to assure compliance. If the department has reason to
2 believe that a violation of any law has or is occurring, the basis for such
3 belief shall be communicated at the time of the inspection;

4 (2) if the owner, operator, or agent in charge of the facility
5 consents;

6 (3) in situations presenting imminent danger to public health
7 and safety or the environment;

8 (4) in situations involving inspection of conveyances if there
9 is reasonable cause to believe that the mobility of the conveyance makes it
10 impracticable to obtain a warrant;

11 (5) in any other exception or emergency circumstance where time
12 or opportunity to apply for a warrant is lacking;

13 (6) in situations involving conditions which may be observed in
14 an open field, from an area practically open to public access, or in plain
15 view; or

16 (7) in all other situations in which a warrant is not
17 constitutionally required.

18 (f) Any willful and unjustified refusal of right of entry and
19 inspection to department personnel as set out in this section shall constitute
20 a misdemeanor subject to a fine of up to twenty-five thousand dollars
21 (\$25,000) or civil penalties up to twenty-five thousand dollars (\$25,000)."

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23 SECTION 3. All provisions of this act of a general and permanent nature
24 are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code
25 Revision Commission shall incorporate the same in the Code.

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27 SECTION 4. If any provision of this act or the application thereof to
28 any person or circumstance is held invalid, such invalidity shall not affect
29 other provisions or applications of the act which can be given effect without
30 the invalid provision or application, and to this end the provisions of this
31 act are declared to be severable.

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33 SECTION 5. All laws or parts of laws in conflict with this act are
34 hereby repealed.

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/s/Pagan