



# **Office of Inspector General**

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## **Report of Audit**

### **Region 6's Oversight of Arkansas Air Enforcement Data**

**E1GAF7-06-0014-7100295**

**September 26, 1997**

**Inspector General Division  
Conducting the Audit**

**Central Audit Division  
Dallas, Texas**

**Region Covered**

**Region 6**

**Program Offices Involved**

**Compliance Assurance and  
Enforcement Division**

**Multimedia Planning and  
Permitting Division**

September 26, 1997

**MEMORANDUM**

SUBJECT:   Region 6's Oversight of Arkansas  
              Air Enforcement Data  
              Audit Report Number E1GAF7-06-0014-7100295

FROM:       Bennie S. Salem  
              Divisional Inspector General

TO:          Jerry Clifford  
              Acting Regional Administrator

Attached is our audit report on *Region 6's Oversight of Arkansas Air Enforcement Data*. The overall objectives of this audit were to determine whether the Arkansas Department of Pollution Control and Ecology: (1) identified significant violators in accordance with the Environmental Protection Agency's (EPA) timely and appropriate enforcement guidance, (2) reported significant violators to EPA, and (3) performed inspections that were sufficient to determine if a facility violated the Clean Air Act. This report contains findings and recommendations that are important to both EPA and Arkansas.

This report contains findings that describe deficiencies the Office of Inspector General (OIG) has identified and corrective actions OIG recommends. This report represents the opinion of OIG. Final determinations on matters in this report will be made by EPA managers in accordance with established EPA audit resolution procedures. Accordingly, the findings contained in this audit report do not necessarily represent the final EPA position.

**Action Required**

In accordance with EPA Order 2750, you, as the action official, are required to provide us within 90 days, a report on the actions the Agency plans or has taken as a result of our recommendations. Your responses to the position papers and the draft report were sufficient to satisfy this requirement. Consequently, we are closing this report upon issuance of the report.

If you wish to discuss this report, please contact me at (913) 551-7831 or Dave Boyce, Audit Manager in our Dallas office, at (214) 665-6620. Please refer to the report number on all related correspondence.

Attachment

## EXECUTIVE SUMMARY

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### PURPOSE

The purpose of this audit was to determine whether the Arkansas Department of Pollution Control and Ecology (Arkansas):

- ▶ Identified significant violators in accordance with the Environmental Protection Agency's (EPA) timely and appropriate enforcement guidance,
- ▶ Reported significant violators to EPA, and
- ▶ Performed inspections that were sufficient to determine if a facility violated the Clean Air Act (CAA).

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### BACKGROUND

The Clean Air Act, as amended in 1990, provides EPA authority to set and enforce national standards to protect human health and the environment from emissions that pollute the air. CAA lists 188 toxic air pollutants that must be reduced. CAA separately regulates six of the more serious air pollutants — ground level ozone, particulate matter, carbon monoxide, sulfur dioxide, lead, and nitrogen dioxide. These six criteria pollutants are emitted in large quantities by a variety of sources. EPA sets national standards for each of these criteria pollutants, and the states must take action to ensure facilities meet EPA standards.

At the federal level, the air enforcement program is carried out largely by the regions. The regions are expected to perform inspections and take action against significant violators found through inspections or other means. The regions can also delegate portions of their air enforcement responsibility to the states and often rely on the states to conduct inspections and take enforcement actions.

## Region 6's Oversight of Arkansas Air Enforcement Data

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Region 6 negotiated a grant agreement and a Memorandum of Understanding for Enforcement with Arkansas. Region 6 uses these agreements as the basis for evaluating the State's performance under the grant. The agreements encompass activities such as inspections, monitoring, permitting, and enforcement, which include identifying and reporting significant violators in EPA's national database known as the Aerometric Information Retrieval System Facility Subsystem (AFS).

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### RESULTS IN BRIEF

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Although the Arkansas air enforcement program provided for an extensive inspection program, the Region 6 Compliance Assurance and Enforcement Division and Arkansas need to better identify and report significant violators. Due to wording in the guidance, Arkansas applied a different interpretation to the definition of significant violator than intended by EPA. Region 6 enforcement did not adequately use information provided by Arkansas to identify significant violators. Miscommunication between the Region and Arkansas led to significant violators not being entered into AFS. Without proper identification and reporting of significant violator information, Region 6 could not adequately monitor the progress of Arkansas in returning facilities to compliance. Also, information reported to EPA's Office of Enforcement and Compliance Assurance, Congress, and the public was not accurate.

Arkansas and Region 6 need to take actions to ensure significant violators are returned to compliance timely. Arkansas did not always set milestone dates for facilities to come into compliance and did not always set stipulated penalties. Region 6 did not elevate any enforcement actions. As a result, companies continued to violate permit limits by emitting pollutants such as volatile organic compounds, particulate matter, and methylene chloride.

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### RECOMMENDATIONS

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We recommend that the Acting Region 6 Administrator require the Region 6 Compliance Assurance and Enforcement Division to:

**Region 6's Oversight of Arkansas  
Air Enforcement Data**

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1. Develop a process with Arkansas to ensure that significant violators are accurately identified and reported,
2. Verify that significant violator information in AFS is complete, and
3. Perform more effective oversight of significant violators to ensure that Arkansas takes timely and appropriate actions that result in facilities returning to compliance. In instances where Arkansas does not act timely, the Region should consider taking its own enforcement actions.

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**REGION 6 RESPONSE**

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Region 6 generally agreed with our findings and recommendations and proposed taking the following corrective actions regarding significant violators:

- ▶ Continue to implement the Memorandum of Understanding, dated January 29, 1997, between the Region 6 Multimedia Planning and Permitting Division and the Compliance Assurance and Enforcement Division to better coordinate significant violator information and ensure the accuracy of information in AFS;
- ▶ Assist Arkansas with significant violator determination and verify that significant violator data is accurately reflected in AFS; and
- ▶ Ensure through effective oversight that Arkansas takes timely and appropriate enforcement actions regarding significant violators and consider taking a federal enforcement action in the instance where Arkansas' action does not follow the prescribed guidance.

Region 6 also provided corrective actions proposed by Arkansas.

## **Region 6's Oversight of Arkansas Air Enforcement Data**

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### **ARKANSAS RESPONSE**

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Arkansas' response to the draft report expressed concerns regarding the tonal quality of the report and did not discuss specific findings and recommendations. However, Arkansas' response to position papers addressed all findings and recommendations, including detailed summaries of the facilities reviewed. In that response, Arkansas generally agreed with the findings and provided proposed corrective actions. We incorporated their comments, as appropriate, in the draft and final reports.

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### **OIG EVALUATION**

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We agree with the corrective actions proposed by the Region and Arkansas. In response to Arkansas' concerns regarding the tone of the draft report, we made revisions to the final report, as the Region and Arkansas did respond very positively to our concerns during our fieldwork and to the findings in the position papers.

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# CHAPTER 1

## INTRODUCTION

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### PURPOSE

The purpose of this audit was to determine whether the Arkansas Department of Pollution Control and Ecology (Arkansas):

- ▶ Identified significant violators in accordance with EPA's timely and appropriate enforcement guidance,
- ▶ Reported significant violators to the Environmental Protection Agency (EPA), and
- ▶ Performed inspections that were sufficient to determine if a facility violated the Clean Air Act (CAA).

This audit was conducted as part of a nationwide audit of air enforcement data.

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### BACKGROUND

The CAA, as amended in 1990, provides EPA authority to set and enforce national standards to protect human health and the environment from emissions that pollute the air. CAA lists 188 toxic air pollutants that must be reduced. CAA separately regulates six of the more serious air pollutants — ground level ozone, particulate matter, carbon monoxide, sulfur dioxide, lead, and nitrogen dioxide. These six criteria pollutants are emitted in large quantities by a variety of sources. EPA sets national standards for each of these criteria pollutants, and the states must take action to ensure facilities meet EPA standards.

At the federal level, the air enforcement program is carried out largely by the regions. The regions are expected to perform inspections and take action against significant violators found

through inspections or other means. The regions can also delegate portions of their air enforcement responsibility to the states and often rely on the states to conduct inspections and take enforcement actions.

Section 105 of the CAA provided the authority for federal grants to help state and local agencies prevent and control air pollution. EPA awards section 105 grant money so that states can operate their air programs in accordance with their grant agreements. In fiscal 1996, EPA awarded Arkansas \$821,645 under the section 105 grant.

Region 6 negotiated a grant agreement, and a Memorandum of Understanding (MOU) for Enforcement with Arkansas. Region 6 uses these agreements as the basis for evaluating the State's performance under the grant. The agreements encompass activities such as inspections, monitoring, permitting, and enforcement, which include identifying and reporting significant violators in the Agency's database known as the Aerometric Information Retrieval System Facility Subsystem (AFS).

The Region 6 Compliance Assurance and Enforcement Division (enforcement) is responsible for monitoring state enforcement activities, and the Multimedia Planning and Permitting Division (permitting) is responsible for verifying the accuracy of AFS. As a result of our previous audit entitled *Region 6's Enforcement and Compliance Assurance Program (E1GAF5-06-0056-6100309)* and dated September 26, 1996, the enforcement and permitting divisions entered into an MOU on January 29, 1997, to better define their responsibilities. The MOU requires that the Region 6 AFS compliance manager provide monthly AFS reports to the enforcement division and to the states for comments related to the accuracy of the data, including significant violator flagging. Responses to the AFS report are due by the end of the month. As of the date of our review, implementation of this MOU was still in process.

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**SCOPE AND  
METHODOLOGY**

We performed our audit in accordance with the *Government Auditing Standards* (1994 revision) issued by the Comptroller General of the United States as they apply to program audits. Our review included tests of the program records and other auditing procedures we considered necessary. Our audit focused on state inspections of major facilities during fiscal 1996. We conducted our fieldwork from January to June 1997.

To obtain an understanding of applicable laws and policies, we reviewed the CAA, the Code of Federal Regulations, EPA's Timely and Appropriate Enforcement Response to Significant Air Pollution Violators, the CAA Compliance/Enforcement Policy Manual, EPA's Compliance Monitoring Strategy, and the Arkansas State Code. We also reviewed the fiscal 1996 section 105 grant awarded to Arkansas under the CAA, and EPA's midyear reviews of the State's performance. During this audit, we used various printouts from AFS to obtain information about the inspections performed.

To evaluate Arkansas' enforcement of the CAA requirements, we reviewed the permit and compliance files maintained by Arkansas. These files contained items such as inspection reports, letters of violations, permits, permit applications, test results, emission monitoring records, and correspondence.

We conducted interviews at Arkansas and Region 6's Compliance Assurance and Enforcement Division and Multi-Media Planning and Permitting Division. We obtained listings from Region 6 of major sources and inspections performed for fiscal 1996.

To identify significant violators, we first obtained and reviewed a list of all Arkansas facilities contained in AFS. This list contained 343 major facilities. We judgmentally selected a sample of 23 facilities out of 343, or 6 percent of listed major facilities. We selected our sample based on a review of AFS reports and the monthly Enforcement Activities reports dated October 1, 1996, and March 10, 1997, provided by Arkansas. We reviewed the files for the selected facilities to identify any that were significant violators. During our analyses, we reviewed documents prior to fiscal 1996

to obtain historical information, such as how long problems persisted and the results of previous inspections.

Our audit disclosed several areas needing improvements that are discussed in Chapters 2 and 3. We provided position papers of our draft findings to the Region 6 enforcement office in June 1997. The Region forwarded a copy of the position papers to Arkansas for comments.

We reviewed management controls and procedures specifically related to our objectives, but did not validate the data associated with the input and processing of information into AFS or any other automated records system. Because of the inherent limitations in any system of internal accounting control, errors or irregularities may occur and not be detected. Except for the issues discussed in this report, nothing came to our attention which would cause us to believe the State's procedures were not adequate for our purposes.

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**PRIOR AUDIT  
COVERAGE**

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On February 14, 1997, the Office of Inspector General (OIG) issued report number E1KAF6-03-0082-710015 entitled *Validation of Air Enforcement Data Reported to EPA by Pennsylvania*. In this report, OIG reported that Pennsylvania did not report all significant violators to EPA and did not take aggressive enforcement action to bring all violating facilities into compliance.

On September 26, 1996, OIG issued report number E1GAF5-06-0056-6100309 entitled *Region 6's Enforcement and Compliance Assurance Program*. In this report, OIG reported that neither Texas nor Louisiana formally computed economic benefit when assessing fines; Region 6 and Texas were not timely in completing enforcement actions against significant violators for any of the cases reviewed; Region 6 and Louisiana did not adequately publicize their enforcement actions; Region 6 air enforcement data in AFS was incomplete, inconsistent, and untimely; and Region 6 did not work with states to develop and maintain active compliance assistance programs.

## CHAPTER 2

### ARKANSAS AND THE REGION COULD BETTER IDENTIFY AND REPORT SIGNIFICANT VIOLATORS

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Although the Arkansas air enforcement program provided for an extensive inspection program, Region 6 enforcement and Arkansas need to better identify and report significant violators. Arkansas applied a different definition of significant violators. Region 6 enforcement did not adequately use provided information to identify significant violators. Miscommunication between the Region and Arkansas led to significant violators not being entered into AFS. Without proper identification and reporting of significant violator information, Region 6 could not adequately monitor the progress of the cases to ensure return to compliance. Also, information reported to EPA's Office of Enforcement and Compliance Assurance, Congress, and the public was not accurate.

EPA's February 7, 1992, guidance entitled *Timely and Appropriate Enforcement Response to Significant Air Pollution Violators* (guidance) provides that the finding agency shall determine whether or not a facility is a significant violator, and EPA shall add the newly designated significant violator to the significant violator list. This significant violator information is to be reported in AFS. The fiscal 1996 section 105 grant required Arkansas to identify and report significant violators in accordance with EPA's guidance. Region 6 is currently working with its states to have the states input the significant violators directly into AFS.

The guidance defines a significant violator as any major stationary source of air pollution that violates emission, monitoring, or substantial procedural requirements; is a repeat or chronic violator; violates federal or state administrative or judicial orders; or constructs or performs major modifications without a permit. This guidance requires states to report significant violators to EPA within 1 month of the violation, and to maintain the facility on EPA's significant violator list until it achieves compliance. After the violation is reported, the state and EPA should monitor the

source until it achieves compliance. The state and EPA should determine an appropriate time schedule for achieving compliance and assessing a penalty, if necessary. The state and EPA conduct teleconferences to discuss new and existing significant violators. If EPA is dissatisfied with a state's enforcement action, EPA has the authority to override the state and assume the lead in resolving the violation.

Arkansas provides Region 6 enforcement with a monthly report (Enforcement Activities Report) that identifies significant violators and facilities which might be labeled as significant violators based on state inspections. The enforcement office reviews the report and tracks significant violators.

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**ARKANSAS  
MAINTAINED AN  
EXTENSIVE  
INSPECTION PROGRAM**

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According to an AFS report, Arkansas' inspection program provided more coverage of major sources than most other states. Arkansas conducted detailed inspections of each major facility at least once each year to ensure it met federal and state regulations. Arkansas also performed complaint inspections, as needed. Most states did not inspect each major facility each year. Arkansas' annual inspections met EPA's definition of Level 2 inspections, and the inspection reports were well documented. Arkansas' inspections provided support for enforcement actions and were a viable method for determining whether a facility was violating the CAA.

States can perform five different levels of inspections at air pollution facilities. Level 0, commonly called a "drive by," is the most basic inspection. To adequately evaluate a facility's compliance with the CAA, EPA required each state to perform at least a Level 2 inspection at major facilities. A Level 2 inspection includes:

- ▶ Reviewing facility records to determine compliance with applicable regulations and permits,
- ▶ Taking and analyzing samples when required,

- ▶ Recording process rates and control equipment performance parameters, and
- ▶ Performing visual observations of emissions.

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**ARKANSAS DID NOT  
ACCURATELY APPLY  
THE DEFINITION OF  
SIGNIFICANT  
VIOLATORS**

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For fiscal 1996, Arkansas only reported 2 significant violators in AFS for their 343 major sources. Arkansas and Region 6 officials agreed that all significant violators were not correctly identified as such because of definition differences. Region 6 held meetings and conference calls with Arkansas officials, since the initiation of our audit, to discuss the definition of significant violators. As a result, Arkansas identified 14 additional significant violators and input them into AFS. Further, based on our review of 23 facilities, we identified 10 additional significant violators.

While the severity of the violations varied, all 24 additional facilities met the definition for significant violators. Furthermore, some of these facilities violated the CAA for years without the State or EPA taking strong enforcement action. The 10 facilities that we identified included facilities that repeatedly constructed and operated unpermitted equipment that emitted pollution, repeatedly exceeded permit limits, operated without a prevention of significant deterioration of air quality (PSD) permit, violated a State Administrative Order, failed stack tests, failed to install control equipment, and repeatedly failed to control fugitive emissions.

For example, one facility added unpermitted sources on several occasions over the past 3 years and was 15 months late performing a stack test. In a letter dated July 29, 1994, Arkansas indicated that during the course of issuing the original permit, it learned that the facility was in the process or had already installed and was operating equipment not included in the application for a permit. (However, Arkansas issued the permit despite its findings.) The letter advised the facility that it was in direct violation of its state implementation plan and would be subject to possible enforcement actions. Arkansas went on to explain in this letter that the most

recent submittal for a permit revision was inadequate and indicated that the facility had once again commenced construction in clear violation of the regulations. Arkansas issued a revised permit on November 18, 1994. Arkansas inspectors identified additional unpermitted sources in inspections conducted on August 23, 1995, and June 14, 1996. Because the facility repeatedly constructed new equipment without a permit and repeatedly failed to perform stack testing requirements, this facility should have been identified as a significant violator.

Other examples included facilities which operated for long periods of time without permits and in noncompliance with their permits. Arkansas considered one facility as out of compliance since 1991 for not having a PSD permit. Another facility has been considered out of compliance with its permit since February 23, 1994. This facility has continued to operate with unpermitted sources and exceeded its permit limits for volatile organic compounds.

Region 6 enforcement stated in its response to our position papers, that Region 6 discovered that some problems existed with Arkansas in both interpreting the definition of a significant violator and reporting significant violators in the AFS database. However, through numerous discussions, the Region believed that both problem areas have now been resolved. Arkansas agreed that nine of the significant violators that we identified were significant violators. For the tenth significant violator that we identified, Region 6 and Arkansas responded that the violations were resolved in fiscal 1997 when a PSD permit was issued and a subsequent inspection in March 1997 disclosed no violations.

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**REGION 6  
ENFORCEMENT DID  
NOT ADEQUATELY USE  
PROVIDED  
INFORMATION**

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Because Region 6 enforcement did not make significant violator reporting a priority, it did not verify whether Arkansas had identified all significant violators and did not utilize information provided by the State concerning facilities' noncompliance. Case narratives in monthly reports usually provided enough information for Region 6 enforcement officials to question whether additional facilities should be classified as significant violators. Of the 14

significant violators added by Arkansas in March 1997, 10 facilities were not identified as significant violators in the monthly Enforcement Activities Report dated October 1, 1996, but the report generally contained sufficient information about the facilities to draw that conclusion.

For the 10 additional significant violators identified by OIG, the case narrative also usually provided enough information for Region 6 enforcement officials to question whether the facilities should be significant violators. For example, for 1 of the 10 facilities, the Arkansas monthly Enforcement Activities Report dated October 1, 1996, provided information that the past 2 inspections detected that the facility had unpermitted sources, exceeded permit limits, and had reporting violations. By definition, unpermitted sources and emission violations are significant violations. However, Region 6 and Arkansas did not identify the facility as a significant violator.

Arkansas did report 4 of the additional 14 facilities as significant violators to Region 6 enforcement personnel in the monthly Enforcement Activities Report dated October 1, 1996. Further, according to Region 6 enforcement personnel, enforcement was monitoring these four facilities as significant violators. However, these significant violations were not reported in AFS prior to March 1997 because Region 6 enforcement officials did not check to see if the facilities listed by Arkansas in their Enforcement Activities Reports were in AFS as significant violators.

It is too early to determine whether the MOU entered into in response to our previous audit will correct the reporting problems identified above. As of the date of our review, implementation of this MOU was still in process. Region 6 had not received comments from Arkansas related to the accuracy of the AFS reports. However, the MOU does provide a good basis for coordination of significant violator information and, if properly implemented, should correct problems related to differences between the monthly Enforcement Activities Reports provided by Arkansas and information in AFS. Better oversight will still be needed by the Region 6 enforcement office to assure that Arkansas correctly applies the definition of significant violators.

In response to the position papers, Region 6 enforcement stated that during the monthly significant violator conference calls, many facilities and their potential violations were discussed. Although some of those facilities that were determined to be significant violators were not adequately reflected in the AFS database (and Region 6 is in the process of resolving this issue with Arkansas), they were being tracked by Arkansas and Region 6 as significant violators.

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**MISCOMMUNICATIONS  
PREVENTED  
SIGNIFICANT  
VIOLATOR INPUT INTO  
AFS**

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Region 6 enforcement officials assumed that Arkansas officials were identifying significant violators in AFS. However, Arkansas officials told us that they did not have the capability to input a significant violator flag into AFS until March 24, 1997. They provided a letter dated March 3, 1997, from the Region 6 AFS Coordinator to all Region 6 states to provide this access and stated that this access was provided effective March 24, 1997.

Region 6 officials contend that, although state access to this field is new, states did have the capability to input significant violator designation in a day zero field. Arkansas officials stated that they did not have access to this field either. Arkansas sent a letter to Region 6 on April 21, 1997, to clarify who will have the responsibility to flag significant violators in AFS and requested that Region 6 flag the significant violators. Region 6 responded to Arkansas' letter on June 26, 1997, that the "Day Zero" action has been required as minimally reportable since fiscal 1995. Region 6 also responded, "Records concerning the identification and reporting of subsequent activity of SV's are minimally reportable data elements and therefore should be reported by the State."

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**CONCLUSION**

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Arkansas added 14 significant violators to AFS, as a result of our audit, and we identified 10 additional facilities that should have

## **Region 6's Oversight of Arkansas Air Enforcement Data**

been identified as significant violators for fiscal 1996. These additional 24 significant violators represent a significant increase from the two significant violators that were reported in AFS for Arkansas in fiscal 1996 prior to the initiation of our audit. Region 6 must assure that significant violators are correctly identified and reported in AFS. EPA needs accurate significant violator information so that it can provide adequate monitoring of state activities and can assure that information reported to Congress and the public is accurate.

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### **RECOMMENDATIONS**

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We recommend that the Acting Region 6 Administrator require Region 6 enforcement to:

1. Review the narratives of the monthly Enforcement Activities Reports to determine whether other facilities should be classified as significant violators;
2. Implement the MOU dated January 29, 1997, between the Multimedia Planning and Permitting Division and the Compliance Assurance and Enforcement Division;
3. Verify that significant violators reported in Arkansas' monthly Enforcement Activities Reports are included in AFS as significant violators, when appropriate; and
4. Resolve the issue of who will input the significant violator designation in AFS.

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### **EPA RESPONSE**

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Region 6 concurred with the findings and recommendations. Region 6 provided documentation of a June 26, 1997 response to the Arkansas letter to Region 6 dated April 21, 1997. In Region 6's

**Region 6's Oversight of Arkansas  
Air Enforcement Data**

response, the Region responded that the “Day Zero” action has been required as minimally reportable since fiscal 1995. Since records concerning the identification and reporting of subsequent activity of significant violators are minimally reportable data elements, they therefore should be reported by the State.

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**OIG EVALUATION**

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We modified the “Miscommunication Prevented Significant Violator Input Into AFS” section of our report to reflect Region 6's response.

## CHAPTER 3

### ENFORCEMENT ACTIONS AGAINST SIGNIFICANT VIOLATORS NEED IMPROVEMENT

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Arkansas and Region 6 need to take actions to ensure significant violators are returned to compliance timely. Arkansas did not take timely enforcement actions. Arkansas did not always set milestone dates for facilities to come into compliance and did not always set stipulated penalties. Region 6 did not elevate any enforcement actions. As a result, companies continued to violate permit limits by emitting pollutants such as volatile organic compounds, particulate matter, and methylene chloride.

According to EPA's Five Year Strategic Plan (plan) dated July 1994, EPA's mandate to protect public health and safety depends upon effective enforcement. EPA stated in the plan that:

Effective compliance and accountability are cornerstones of environmental protection. Real public health and safety, and a clean environment, cannot be achieved without compliance with the nation's environmental laws. Enforcement is a key tool for producing compliance. It engenders responsible behavior in the regulated community, provides a level, competitive playing field, ensures that goods and services reflect their true costs, and establishes a baseline of integrity for EPA's programs. Protection and enhancement of the environment are dependent on public awareness and accountability.

EPA's *Timely and Appropriate Enforcement Response to Significant Air Pollution Violators* (guidance) requires that by day 150 a source be either resolved, addressed, or subject to a referral to the state's Attorney General or the U.S. Department of Justice for an adjudicatory enforcement hearing or judicial action. The guidance defines resolved as in compliance and addressed as on a

legally enforceable and expeditious administrative or judicial order. Day 150 equals 180 days from the inspection date since day zero (when the clock starts) is defined as 30 days after the discovering agency first receives information concerning a federally enforceable violation. If the state's action is not timely, EPA has the authority to take its own action.

The guidance further requires that all state enforcement actions against significant violators assess civil penalties of sufficient magnitude to maintain a credible deterrent effect, and that EPA will consider overfiling when state penalties fail to meet the criteria.

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**ARKANSAS NEEDED TO  
TAKE TIMELY  
ENFORCEMENT  
ACTIONS**

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Arkansas adequately addressed the violations of only 1 of 15 sampled significant violators within the 180 day timeframe required by the guidance. The remaining 14 facilities were out of compliance an average of 940 days, as of May 2, 1997. Four of the facilities were out of compliance in excess of 3 years. For example, as discussed in Chapter 2, one facility added unpermitted sources on several occasions over the past 3 years. Another facility has been considered out of compliance with its permit since February 23, 1994. This facility has continued to operate with unpermitted sources and exceeded its permit limits. However, as of the date of our review, Arkansas has not taken any enforcement action for these violations.

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**ARKANSAS NEEDED TO  
SET MILESTONE DATES  
AND STIPULATED  
PENALTIES**

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Consent administrative orders reviewed usually did not contain compliance milestone dates and did not contain stipulated penalties, if the facility did not come into compliance. Without setting formal deadlines for compliance or submitting permit modifications in the consent administrative order, Arkansas could not ensure that facilities returned to compliance timely.

For example, one facility has been operating without a permit and has continuously violated limits of an expired permit since 1991. State files contained a consent administrative order dated

November 1, 1994, for the facility for failure to certify its Continuous Emission Monitoring and exceeding its volatile organic compounds, carbon monoxide, and total sulfur emission limits. The consent administrative order was based on an inspection conducted in September 1991 and additional stack testing performed in November 1991. The consent administrative order required the facility to pay a fine of \$40,000, which was paid on December 12, 1994. However, the order did not contain any milestone dates to ensure that the facility returned to compliance and did not contain stipulated penalties if those milestone dates were not met. An inspection conducted on August 7, 1996, disclosed that the facility was still out of compliance for exceeding permit limits for volatile organic compounds, carbon monoxide, and total sulfur. According to the inspection report, the facility had been out of compliance for 3 years and will continue to be until a PSD permit is issued. As of April 27, 1997, the PSD permit still had not been issued.

In response to our position papers, Arkansas stated that all consent administrative orders for significant violators will now contain milestone dates and provisions for stipulated penalties in the event that requirements of the orders are not met.

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**REGION 6 DID NOT  
ELEVATE ANY  
ENFORCEMENT  
ACTIONS**

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Despite the problems identified with the Arkansas enforcement program, Region 6 did not elevate any enforcement actions for Arkansas in fiscal 1996. Region 6 generally allowed states to run their own enforcement programs and therefore did not overfile or take any other enforcement actions in Arkansas since 1994. Region 6 did not monitor 12 of the 15 significant violators reviewed as significant violators because of the identification and reporting problems identified in Chapter 2 of this report. Also, as discussed in Chapter 2, some of these facilities violated the CAA for years without the State or EPA taking strong enforcement action. The 10 facilities that we identified included facilities that repeatedly constructed and operated unpermitted equipment that emitted pollution, repeatedly exceeded permit limits, operated without a PSD permit, violated a State Administrative Order, failed

stack tests, failed to install control equipment, and repeatedly failed to control fugitive emissions.

Region 6's most recent Enforcement Activities Report for Arkansas indicated that it was aware that 3 of the 15 facilities reviewed were significant violators. These three facilities have been classified as significant violators since 1993 on the Enforcement Activities-Arkansas list maintained by Region 6 enforcement. However, two of these facilities remain in noncompliance and unresolved. According to Arkansas, the violations for the third facility were resolved in March 1997. All three facilities were operating without a PSD permit. Region 6 had not taken its own actions against any of these facilities.

For example, a review of enforcement data identified one facility which failed a stack test in May 1992. At the time, the facility notified Arkansas that the facility may need to apply for a PSD permit. In response, Arkansas issued a consent administrative order requiring the facility to submit a PSD air permit application not later than March 1, 1994, and assessed a penalty of \$60,000. The facility failed to satisfy the consent administrative order resulting in Arkansas filing a complaint and requesting a permanent injunction and reduction of particulate emissions. In exchange for dropping the complaint, the facility agreed to a second consent administrative order dated June 7, 1995. This order required the facility to obtain a PSD permit, establish a compliance schedule, and set stipulated penalties. The facility filed a PSD permit application on November 30, 1995, which is still under review. On September 20, 1995, the facility lost a citizen suit with a penalty of \$226,250. The facility was found negligent for releasing nitrous oxide, carbon monoxide, and other volatile organic compounds into the air. However, this decision was reversed. Residents living near the facility filed at least three other lawsuits. Further, we found that the facility, as of March 10, 1997, was still considered out of compliance by Arkansas.

Another facility entered into a consent administrative order dated June 21, 1991, for violation of emission limits between January 1, 1991, and March 31, 1991. The facility is considered a major stationary source under PSD regulations for particulates, sulfur

dioxide, nitrogen oxides, carbon monoxide, and volatile organic compounds. The facility agreed to submit a plan of action to comply with emission limits no later than June 10, 1991. Additionally, the facility was required to pay \$3,000 as a voluntary civil penalty. The order expired October 1, 1991, and during the interim of June 3, 1991, to October 1, 1991, Arkansas waived penalties for noncompliance. Arkansas issued a second consent administrative order on September 30, 1991, because the facility failed to comply with the previous consent administrative order milestone date. To resolve the alleged violations, the facility was required to submit a complete PSD permit application no later than January 1, 1992. The facility was fined \$14,000 as a voluntary assessment. A routine inspection conducted June 24, 1994, disclosed that the facility was out of compliance pending issuance of a PSD permit. Enforcement files reviewed at both the State and the Region verified that the facility had been out of compliance since 1991. In response to our position papers, Region 6 and Arkansas responded that a PSD permit was issued in fiscal 1997, and the facility was subsequently found to be in compliance during a March 1997 inspection. Fines of \$3,000, \$14,000, and \$5,000 were levied on the facility, but it continued to operate out of compliance until March 1997.

In response to the position paper, Region 6 enforcement agreed that significant violators need to be addressed and resolved in a timely manner. However, three of the significant violators that were reviewed by OIG required the issuance of a PSD permit in order to be considered “resolved.” This type of permit generally takes more than 150 days from receipt of a “complete” permit application to final issuance of an enforceable permit.

In response to our position paper, Arkansas agreed that it did not always take timely enforcement actions and will implement the following corrective actions:

1. Upon identification of a significant violator, Arkansas will immediately begin enforcement action.

2. All consent administrative orders will now contain milestone dates for compliance.
3. All air inspectors and air inspector supervisors have been provided a copy of the criteria for defining a significant violator as outlined in the guidance. Air inspectors have been instructed to submit a memorandum to their supervisor each time they believe they have identified a significant violator. Inspector supervisors have been instructed to review every inspection report so that all significant violators are identified and referred for enforcement action.
4. All consent administrative orders for significant violators now contain provisions for stipulated penalties in the event that requirements of the orders are not met.

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## **CONCLUSION**

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Region 6 and Arkansas have not addressed or resolved significant violations timely. Significant violations have remained unresolved an average 940 days.

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## **RECOMMENDATIONS**

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We recommend that the Acting Region 6 Administrator require Region 6 enforcement to perform more effective oversight of significant violators to ensure that Arkansas takes timely and appropriate actions that result in facilities returning to compliance timely by :

1. Ensuring that Arkansas implements its proposed corrective actions outlined in its response to our position papers and Region 6's response to our draft report, and
2. Taking its own enforcement action when Arkansas does not take timely enforcement action and

considering overfiling when the State action does not result in timely resolution of the violations.

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## EPA RESPONSE

Region 6 concurred with our findings and recommendations but provided comments related to the second sentence of our Conclusion section. Region 6 responded that the number of days that significant violations have remained unresolved (“an average of 940 days”) is based upon inaccurate data entry into AFS (i.e., incorrect day zero dates, failure to include the date that violations were “addressed,” incorrect “addressed” date, etc.). Region 6 also responded that *Guidance on the Timely and Appropriate Enforcement Response to Significant Air Pollution Violators* does not require a company to be returned to compliance within 180 days but states that the source shall either be in compliance (resolved) or addressed (on a legally-enforceable and expeditious administrative or judicial order, or be subject to a referral to the (State) attorney general or (Federal) Department of Justice for an adjudicatory enforcement hearing or judicial action). Region 6 also responded that at least three of the significant violators required a PSD permit, which generally takes more than 150 days from receipt of a “complete” permit application to final issuance of an enforceable permit.

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## OIG EVALUATION

We based our computed average days on actual file documentation, not AFS. Further, we discussed in the first sentence of our conclusion that Region 6 and Arkansas have not **addressed or resolved** significant violators timely (emphasis added). While the guidance does not specifically require that facilities be returned to compliance within 180 days, we believe that 2 or 3 years is excessive. The guidance does allow for some flexibility related to PSD issues; however, the three facilities that operated without PSD permits have been considered significant violators since 1993. The State should be able to bring facilities into compliance within a more reasonable timeframe.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 6  
1445 ROSS AVENUE, SUITE 1200  
DALLAS, TX 75202-2733

SEP 16 1991

MEMORANDUM

SUBJECT: Region 6's Oversight of Arkansas  
Air Enforcement Data  
Draft Audit Report No. E1GAF7-06-0014-XXXXXXX

FROM: Sam Becker *Sam Becker*  
Acting Assistant Regional Administrator  
For Management (6MD)

TO: Bennie S. Salem  
Divisional Inspector General  
Central Audit Division

The draft audit report number E1GAF7-06-0014-XXXXXXX has been reviewed as requested. The review of the draft report was made by the staff of the Region 6 Compliance Assurance and Enforcement Division (6EN) and Multimedia Planning and Permitting Division (6PD). The Region's comments on subject draft audit report were coordinated between the Compliance Assurance and Enforcement Division (6EN) and Multimedia Planning and Permitting Division (6PD). The corrective actions that we and the Arkansas Department of Pollution Control and Ecology (ADPC&E) will be taking to address the findings and recommendations contained in the draft audit report are reflected on the attachment.

Thank you for the opportunity to comment on the subject draft report. If you have any questions, please call me, or you can contact Jim Ealey, Audit Resolution Coordinator, Resource Branch at (214) 665-6534.

Attachment

cc: Dave Boyce (6OIG)

**Region 6's Comments on the OIG Draft Audit Report No. E1GAF7-06-0014-XXXXXXX, dated August 9, 1997**

**Summary of Finding/Recommendations**

| <u>Area</u>                                                                                   | <u>Remark</u>                       |
|-----------------------------------------------------------------------------------------------|-------------------------------------|
| 1. Executive Summary                                                                          |                                     |
| A. Results in Brief                                                                           | Concur                              |
| B. Recommendations                                                                            | Concur                              |
| 2. Chapter 1 - Introduction                                                                   |                                     |
| A. Purpose                                                                                    | Concur                              |
| B. Background                                                                                 | Concur                              |
| C. Scope and Methodology                                                                      | Concur                              |
| D. Prior Audit Coverage                                                                       | Concur                              |
| 3. Chapter 2 - Arkansas and the Region Could Better Identify and Report Significant Violators |                                     |
| A. Arkansas Maintained an Extensive Inspection Program                                        | Concur                              |
| B. Arkansas Did Not Accurately Apply The Definition of Significant Violators                  | Concur                              |
| C. Region 6 Enforcement Did Not Adequately Use Provided Information                           | Concur                              |
| D. Miscommunications Prevented Significant Violators Input Into AFS                           | Concur with comments<br>(See below) |
| E. Conclusion                                                                                 | Concur                              |

|    |                                                                                |                                     |
|----|--------------------------------------------------------------------------------|-------------------------------------|
|    | F. Recommendations                                                             | Concur                              |
| 4. | Chapter 3 - Enforcement Actions Against Significant Violators Need Improvement |                                     |
|    | A. Arkansas Needed to Take Timely Enforcement Actions                          | Concur                              |
|    | B. Arkansas Needed to Set Milestone Dates and Stipulated Penalties             | Concur                              |
|    | C. Region 6 Did Not Elevate Any Enforcement Actions                            | Concur with comments<br>(See below) |
|    | D. Conclusion                                                                  | Concur with comments<br>(See below) |
|    | E. Recommendations                                                             | Concur                              |

**Comments on Specific Sections of the IG Draft Report**

1. Chapter 2 - Section entitled “Miscommunications Prevented Significant Violators Input into AFS”, 2nd paragraph

“Region 6 officials are currently in the process of drafting a response to Arkansas’ letter.”

This statement is no longer accurate. Region 6 sent a response to Keith Michaels of the ADPC&E on June 26, 1997, a copy of which is attached.

In the April 21, 1997 letter, ADPC&E stated that they did not have access to the “day zero” field. However, in the June 26, 1997, response letter, Region 6 makes the statement that “The ‘Day Zero’ action has been required as minimally reportable since FY95.”

ADPC&E also requested a clarification of who will have the responsibility to flag significant violators in AFS and requested that Region 6 flag the significant violators. In response, Region 6 stated the following: “Records concerning the identification and reporting of subsequent activity of SV’s are minimally reportable data elements and **therefore should be reported by the State.**” (emphasis added)

2. Chapter 2: Arkansas and the Region Could Better Identify and Report Significant Violators:

We believe that the reporting weaknesses outlined in Chapter 2 (data not adequately reflected in the Aerometric Information Retrieval System (AIRS) Facility Subsystem (AFS), confusion of data entry responsibilities) are symptomatic of problems with the interpretation of the definition of “Significant Violator” (SV). The reporting accuracy of the AFS has never been emphasized due to the reliance of manual activity reports submitted by the State to the Environmental Protection Agency (EPA).

As noted on page 9 of the OIG report, the State was confused about its ability to report SV information in AIRS. The EPA responded to the April 21, 1997, letter clarifying its reporting options. This June 26, 1997, response is attached.

In our efforts to improve data quality, the Multimedia Planning and Permitting Division (6PD) has instituted the policy “if it’s not in AIRS, it doesn’t count.” Our Memorandum of Understanding (MOU) with the Compliance Assurance and Enforcement Division further enforces that policy across the Divisions in Region 6. The procedures in the MOU will continue toward the goal of timely and accurate reporting of significant violator activities. The proposed actions by the Enforcement Division, however, will resolve the real issue of determination of “Significant Violator”.

4. Chapter 3 - Section entitled “Conclusion”

“Significant violations have remained unresolved **an average 940 days**, which far exceeds the **180 day time frame required by the policy** to help return companies to compliance.”

This statement is incorrect in two major ways. First of all, the number of days that significant violations have remained unresolved (“an average of 940 days”) is based upon inaccurate data entry into AFS (i.e., incorrect day zero dates, failure to include date that violations were “addressed” or incorrect “addressed” date, etc.).

Second, the “Guidance on the Timely and Appropriate Enforcement Response to Significant Air Pollution Violators” does not **require** a company to be returned to compliance **within 180 days**. It states that “By Day 150 (or 190 with lead change), the source shall **either be in compliance (RESOLVED) or ADDRESSED i.e.,** on a legally-enforceable and expeditious administrative or judicial order, or be subject to a referral to the (State) attorney general or (Federal) Department of Justice for an adjudicatory enforcement hearing or judicial action.” (emphasis added).

Furthermore, in the case where a prevention of significant deterioration of air quality (PSD) permit is required for a facility, the guidance states that “All SVs, **except** emergency episodes and **sources which construct without a valid PSD or Part D permit (where one is required)**, are subject to the following timelines and penalty requirements.” (emphasis added). At least 3 of the significant violators required a PSD permit, which generally takes more than 150 days from receipt of a “complete” permit application to final issuance of an enforceable permit.

4. As a general comment, it was noted that some of the language in the Executive Summary and Introduction sections of the Arkansas audit resembles that found in the Pennsylvania audit. While the information on “air toxins” may be particularly appropriate for the industrial makeup in Pennsylvania, it may not be completely accurate and appropriate for Arkansas. Of the facilities that were audited in Arkansas, only one of the 10 additional significant violators even emitted a “hazardous air pollutant”, as defined in the Clean Air Act.

### **Corrective actions to be taken in response to the IG Audit**

ADPC&E has proposed the following changes to their enforcement policy regarding Significant Violators:

## APPENDIX 1 - EPA RESPONSE

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- There will now be a three-tiered review of all violations discovered during an inspection to determine SV status (i.e., Inspector receives copy of definition of a SV and writes a memo to Supervisor if a SV is suspected during inspection; Supervisor reviews every inspection report for SV determination, even if inspector did not note facility as a possible SV; enforcement personnel will also review all reported violations in order to promptly and correctly identify SVs.
- Within 45 days after a facility is designated as a SV, ADPC&E will issue a written SV notice to the facility, informing them of the violation and directing that corrective action be taken. Copies of such letters will be sent to Region 6 Air Enforcement.
- A formal transmittal memo from ADPC&E Air Enforcement to the AIRS Data Manager has been created and will contain all of the information needed to update AIRS concerning an enforcement case and SV status.
- ADPC&E will continue to send monthly enforcement reports regarding all out-of-compliance sources, including all facilities believed to be SVs, to Region 6 and will continue to hold monthly SV conference calls. Both ADPC&E and Region 6 Air Enforcement personnel and AIRS Data Managers will be present at the conference calls.
- All ADPC&E Consent Administrative Orders for SVs will now contain milestone dates for compliance and provisions for stipulated penalties.

### EPA Region 6 proposes to take the following actions regarding Significant Violators:

- Continue to implement the MOU dated January 29, 1997, between 6PD and 6EN.
- Assist ADPC&E with SV determination and verify that SV data is accurately reflected in AIRS.
- Ensure through effective oversight that ADPC&E takes timely and appropriate enforcement actions regarding SVs and consider taking a federal enforcement action in the instance where ADPC&E's action does not follow the prescribed guidance.

## APPENDIX 2 - ARKANSAS RESPONSE

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STATE OF ARKANSAS  
DEPARTMENT OF POLLUTION CONTROL & ECOLOGY  
8001 National Drive, P.O. Box 8913  
Little Rock, Arkansas 72219-8913  
Phone: (501) 682-0744 Fax: (501) 682-0798



September 12, 1997

Bennie S. Salem  
Divisional Inspector General  
Environmental Protection Agency  
Office of Inspector General  
Central Audit Division  
726 Minnesota Avenue  
Kansas City, Kansas 66101

Dave Boyce  
Audit Manager  
Environmental Protection Agency  
Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, Texas 75202-2733

Re: Arkansas' Response to Draft Audit Report

Dear Ms. Salem and Mr. Boyce:

Please find enclosed final hard copies of ADPC&E's response to the final draft of the audit report prepared by the EPA Office of Inspector General. This is identical to the document "e-mailed" to Dave Boyce (through Dan Howard) two days ago.

We appreciate your patience and flexibility regarding submittal of our response. As you are surely aware, several Department employees insisted on input to this response up to the last minute. The enclosed response is not substantively different from the "watermarked" copy faxed September 9, 1997, with the exception of the Section entitled "Timely and Appropriate Enforcement." This section, for reasons lost in the document's software history, was clearly a very rough draft that somehow got incorporated into what we thought was our final draft.

The tone of our response is, at times, quite combative, for reasons discussed in the text. We, of course, welcome further discussions concerning the tone and general impact of OIG's final report.

## APPENDIX 2 - ARKANSAS RESPONSE

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Ms. Salem and Mr. Boyce  
Page 2 of 2  
September 11, 1997

If you have any questions or comments, feel free to call me at  
(501) 682-0691.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Weaver", with a long horizontal flourish extending to the right.

Steve Weaver  
Policy Advisor to the Director

cc: Michelle Kelly  
Keith Michaels

***ARKANSAS' RESPONSE TO DRAFT REPORT  
ISSUED BY THE U.S.E.P.A. OFFICE OF INSPECTOR GENERAL***

**A. Introduction.**

As reflected in Arkansas' past comments and the EPA Office of Inspector General's (OIG's) latest Draft Report, the Arkansas Department of Pollution Control & Ecology (ADPC&E) immediately implemented in-house procedures to address EPA Headquarters' recent concern about this agency's use of the "Timely and Appropriate Enforcement Response to Significant Air Pollution Violators" Guidance (T&A/SV Guidance). Remembering the Pennsylvania experience, ADPC&E hoped that cooperation would be matched by an appropriate degree of comity from the OIG. The Final Draft on which we comment today, however, continues to relay a deliberate tone designed to humiliate rather than improve this agency's air enforcement program.

For years, ADPC&E has maintained a generally amicable relationship with the oversight officials of EPA Region 6 in its air programs as well as all other major environmental programs. In fact, Arkansas has been authorized or delegated more responsibility for more federal regulatory programs than any other State in Region 6. For a relatively small agency, ADPC&E juggles numerous multi-media expectations from EPA, a problematic task in the 1990's as EPA Headquarters sends mixed signals concerning its dedication to efficient and flexible regulation.

In order for meaningful cooperative federalism to work, the dialogue between state and national officials must be candid, mutually respectful, and (most importantly in this context) consistent. As the

OIG previously noted in a 1996 audit, Region 6 had not made reporting to the AFS data base a consistent priority in its oversight of state programs. *See Region 6's Enforcement and Compliance Assurance Program* at 14-17. While the focus of that Report was Region 6's oversight of air enforcement in Louisiana and Texas, obviously the same low priority on AFS reporting would apply to other Region 6 states as well. Rather than following through with recommendations from that Report, however, OIG launched an independent audit of Arkansas' program, knowing already that consistent AFS reporting was not demanded of Region 6 States. And in a disturbing rerun of the Pennsylvania experience, OIG chose to extend its report beyond the stated scope of its audit into one paragraph synopses of specific cases, ignoring the considerations that any environmental enforcement agency must contend with in allocating its limited resources.

Apparently, OIG rejects ADPC&E's effort to resolve the narrow issues raised by this audit reasonably and constructively, and prefers to issue a Report that is unnecessarily inflammatory, based upon a controversial and apparently unworkable policy, and totally antithetical to any attempt to advance cooperative federalism between EPA and the State of Arkansas. Rather than make a defense at the expense of our partners at Region 6, ADPC&E charges OIG and EPA Headquarters with promoting an arcane accounting procedure as the bureaucratic litmus test of a State's commitment to its own environmental integrity.

### **B. The OIG Report Is Unnecessarily Inflammatory.**

#### **1. Irrelevant Introductory Language.**

## APPENDIX 2 - ARKANSAS RESPONSE

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Both the Executive Summary and the Introduction of the OIG Draft Report begin with alarming statistics describing the worst-case consequences of air pollution, including threats of 3,000 cancer deaths and brain damaged children. This language is lifted virtually verbatim from the controversial audit report on the Pennsylvania program (*Validation of Air Enforcement Data Reported to EPA by Pennsylvania, Report No. 7100115*)(hereafter “*Pennsylvania Report*”). When identical or even broader issues are discussed in reports on the enforcement performance of EPA Offices, OIG does not use such sensationalistic prose. Cf. *Region 6's Enforcement and Compliance Assurance Program* (hereafter “*Region 6 Report*”) at 1-2 (“Background”); *Region 5's Air Enforcement and Compliance Assistance Program* (hereafter *Region 5 Report*) at 1-3 (“Background”).

Apparently, OIG is using the *Pennsylvania Report* as the word-processor template for audit reports on States, and reserving its more judicious introductory sections for reports on EPA’s own activities. Since the controversy of the *Pennsylvania Report* is so notorious, OIG’s “cut-and-paste” strategy in this Draft Report must be designed to achieve the same unwarranted reaction for Arkansas’ environmental programs.

The fact is, OIG did not come to Arkansas to audit cancer deaths, brain-damaged children, or even air pollution. The stated purpose and actual scope of the audit was to discern whether ADPC&E identified and reported “significant violators” to EPA in accordance with a widely disputed policy, and whether ADPC&E performed adequate inspections. Only the last of these inquiries (inspections) is directly tied to discovering the effect of point source air emissions on public health and the environment. In contrast, identifying and reporting “significant violators” is described by OIG as a contract obligation,

an accounting task tied more to the receipt of federal grant funds than discovering harmful air emissions.

*See Pennsylvania Report* at Chapter 2, pg.10.

The purpose and the content of this Draft Report do not support the inflammatory nature of its introductory paragraphs. This language should be deleted in its entirety. At the very least, we ask that the initial paragraph in the Executive Summary and Introduction of the Draft Report be moved under the heading “Background” consistent with the other audit reports issued by OIG on similar issues.

### **2. The Section 105 Grant.**

The Inspector General’s draft report states that in fiscal 1996, the EPA awarded Arkansas an \$821,645 grant pursuant to Section 105 of the Clean Air Act, and justifies EPA’s demands on Arkansas’ enforcement program based upon this grant amount. A breakdown of this grant money, however, reveals that most of it passed through the Air Division to other state agencies or Department branches. Only approximately \$250,000 was actually for use by the Air Division. The annual budget of the Air Division is approximately 3.2 million dollars. Thus, the federal government’s actual monetary contribution to Arkansas’ air enforcement program is quite small. The final report should reflect this fiscal reality.

### **3. ADPC&E’s Inspection Program.**

The OIG’s Draft Report states

Arkansas’ inspection program provided more coverage of major sources than most other states. Arkansas conducted detailed inspections of each major facility at least once each year to ensure that it met federal and state regulations. Arkansas also performed complaint inspections, as needed. Most states did not inspect each major facility each year. Arkansas’ annual inspections met the EPA’s definition of Level 2 inspections, and the inspection reports were well

## APPENDIX 2 - ARKANSAS RESPONSE

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documented. Arkansas' inspections provided support for enforcement actions and were a viable method for determining whether a facility was violating the CAA.

Ironically, OIG uses the fruits of this inspection program as the evidence for damning Arkansas' enforcement program.

The OIG audit focused on 23 facilities, following the regulatory history of these facilities back to, in some cases, 1991. From 1991 through the end of fiscal year 1996, ADPC&E performed approximately 6,624 inspections of permitted facilities. These facilities each have one to more than one hundred sources. Even a conservative average of twenty-five sources per facility would indicate that Arkansas inspected 165,600 permitted sources of pollution during the referenced time period. In most cases, the facilities reviewed by OIG had violations at a single source, indicating that OIG reviewed only 0.0001389% of the sources of pollution inspected by Arkansas since 1991. ADPC&E performs a similar level of inspection and complaint response concerning its state law mandates, which are vastly more inclusive than the single federal guidance document that is the subject of the OIG audit. The sheer volume of thorough inspections performed in Arkansas creates the context for judging ADPC&E's enforcement response, which OIG claims to be inadequate. Consider then that the most pressing and resource-intensive air pollution issues facing this agency during the period audited fell outside federal jurisdiction. And through inspections procedures that were admitted by OIG to be more than adequate, ADPC&E identified violations that existed at major sources falling within federal jurisdiction through monthly reports and other informal communications. These routine communications with Region 6, which ADPC&E assumed were the essence of EPA/State partnership, are now used by OIG as evidence for indicting this State's commitment to environmental protection.

#### **4. ADPC&E's Authorization to Enter AFS Data.**

The most galling example of OIG's selective attention to detail is its handling of information proving that ADPC&E did not have authority to directly enter SV information into the AFS data base until after the OIG audit was initiated. During the course of the audit, ADPC&E provided OIG with a copy of the March 3, 1997 letter from Region 6 granting ADPC&E the authority to input a significant violator flag into AFS effective March 24, 1997. Given the audit's stated purpose -- to determine whether ADPC&E identified and reported significant violators to EPA -- one would think that this documented evidence would be the linchpin of any report issued by OIG.

Instead, OIG discounts this hard evidence with a back-hand remark: "Arkansas officials *claimed* that they did not have the capability to input a significant violator flag into AFS until March 24, 1997." Draft Report at 9 (Emphasis added). Thus, OIG discounts what really happened regarding ADPC&E's implementation of the T&A/SV Guidance in favor of a statement insinuating the possibility of misrepresentation or unsubstantiated claims on ADPC&E's part.

This documented fact is clear and crucial. ADPC&E did more than "claim" that it did not have the ability to enter data to the AFS; we provided direct proof of this fact in EPA's own words. It is incomprehensible why OIG chooses to ignore this dispositive fact.

#### **5. Timely and Appropriate Enforcement.**

If the scope of this audit had remained true to its stated purpose, Chapter 3 of the Draft Report would not have been included. OIG's previous findings had already revealed a foregone conclusion: ADPC&E, like several other state agencies, was not consistently following the T&A/SV Guidance as it

## APPENDIX 2 - ARKANSAS RESPONSE

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applied to major sources in Arkansas.<sup>1</sup> Procedures addressing this deficiency were being established before the auditors left Arkansas.

Despite ADPC&E's efforts to cooperate, however, OIG embarks on cursory analysis of particular enforcement cases which leaves the impression that Arkansas' enforcement mechanism is unresponsive. The Draft Report purports to summarize more than six years of enforcement experiences in five pages of selected case narratives. ADPC&E objects to OIG's misleading and demoralizing history of Arkansas' enforcement efforts.

Certain issues raised by OIG can only be described as a prefabricated conclusion in search of a program deficiency. For instance, the Draft Report faults ADPC&E's enforcement program for not setting out milestone compliance dates and stipulated penalties in administrative orders, but fails to note refinements in administrative practice that preceded the OIG audit. Since mid-1996, well before the audit, all Consent Administrative Orders contain milestones for compliance, as well as stipulated penalties, as a boilerplate condition which will be deleted only upon a showing that it is inapplicable.<sup>2</sup>

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<sup>1</sup> OIG audits from the last two years indicate widespread disregard of the T&A/SV Guidance by the States. See *Pennsylvania Report*; *Region 6 Report* at 15; *Region 5 Report* at Chapter 6; *EPA Region 2 Review of the New York State Department of Environmental Conservation Program Relating to Significant Violators* at 6.

<sup>2</sup> Compliance schedules and stipulated penalties for delay are not always appropriate in enforcement orders. All ADPC&E Consent Orders contain a condition that the Order only applies to the specific violations addressed in the Findings of Fact. This condition assures that a particular Order will not foreclose enforcement action for environmental obligations discovered independent of the circumstances that prompted that Order. Case in point: A facility noted in the Draft Report at page 7 was the subject of a Consent Order assessing a penalty for construction of a source without a permit. The 1994 Consent Order assessed a penalty, but did not apply a compliance schedule or impose stipulated penalties for failure to comply, nor should it have. The

## APPENDIX 2 - ARKANSAS RESPONSE

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Similarly, OIG's recital of various examples of timeliness problems is based upon a false premise. The report states, "Arkansas addressed the violations of only 1 of 15 sampled significant violators within the 180-day time frame required by the policy. The remaining 14 facilities were out of compliance an average of 940 days, as of May 2, 1997. Four of the facilities were out of compliance in excess of three years.<sup>3</sup>" The T&A/SV Guidance, however, does not set out time lines for compliance. The minimum requirement in the Guidance is that violations are addressed within 180 days. Arkansas did take action on each violation within the 180-day time frame, but not always in a way that met the Guidance definition of "addressed." The timeliness of "compliance" is not, however, a fair or accurate measure of Arkansas' compliance with the Guidance or the success of its enforcement program.

Like other States, ADPC&E's adherence to the narrow enforcement options recognized by the T&A/SV Guidance is often affected by definition issues that stem from disagreement over what violations are actually "significant." Under the Guidance, a major source that violates any monitoring

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1994 Order acknowledged that the facility had already submitted the required application for the unpermitted source. In contrast, the same facility was issued an Order in 1996 for failure to conduct a scheduled stack test. The facility was fined, a stack test was scheduled for a date certain, and a stipulated penalty clause for failure to comply was included.

<sup>3</sup> Contrast OIG comments on failure to take timely enforcement concerning Arkansas with how similar circumstances were reported about Michigan and Illinois. The Arkansas Draft Report implies that agency inertia was the reason for up to three-year delays in compliance; a three-and-a-half year period for reaching compliance in a Michigan case was attributed to "Industry Delays." See *Region 5's Air Enforcement and Compliance Assistance Program* at Chapter 5, pg.3.

## APPENDIX 2 - ARKANSAS RESPONSE

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or substantial procedural requirement would be classified a “significant violator,” regardless of the emissions that caused its designation as a “major source” or the environmental impact of its emissions. Consequently, a major source that failed to keep required records of hours of operation of an emergency standby generator that operated only ten hours during a twelve month period would be a significant violator. Similarly, if a facility is found during an inspection to be operating an unpermitted source, that facility would be a significant violator even if the emissions and resulting environmental impact are insignificant. In order to correct the matter, the facility would be required to submit an application to modify its permit to include the source and its emissions at the same level of emissions that were emitted without a permit. At that point, the matter is out of the facility’s hands; it can only wait for ADPC&E to issue the modified permit. If manpower shortages, heavy workloads (at any one time 500 permit applications may be pending), and prioritization procedures delay ADPC&E’s issuance of the permit for up to two or three years, the facility in question is still required, according to the Guidance, to be carried as a significant violator until the permit is issued, even if the facility submitted the required application within thirty days of being notified of the problem. Therefore, while on its face the designation “significant violator” seems to present a weighty environmental issue, this is not often the case.

Judging from the experiences of Pennsylvania, New York, and Texas, ADPC&E sees no reason to submit a case-by-case rebuttal of each of OIG’s one paragraph synopses. Suffice it to say that OIG’s case analysis simply does not capture all of the competing considerations that must be weighed in any enforcement response.<sup>4</sup>

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<sup>4</sup> OIG’s review of one complex case continues to be grossly misleading. The MDF facility referenced on page 16 of the Draft Report was indeed the subject of a hotly contested

The actions or inactions of any enforcement agency, including EPA, are not easily captured with glib second-guessing. In a case involving approval of the Texas SIP, EPA successfully argued to the federal court of appeals that enforcement duties were inherently discretionary, subject to the agency's expert determination on "the significance of the alleged violation, the reliability or credibility of the information received, or the most efficient allocation of the agency's resources in carrying out its many statutory duties."<sup>5</sup> These principles generally stem from a seminal U.S. Supreme Court decision concerning enforcement discretion:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.<sup>6</sup>

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question of whether PSD had been "triggered" on a particular production line. After extensive information requests, ADPC&E has now resolved the PSD issue in the company's favor. The citizen suits have since been settled after reversal of one verdict in the Court of Appeals and summary judgment decisions in district court regarding two others. In all of these cases, the courts determined that the plaintiffs did not have sufficient evidence to prove negligence on the part of the company. Most important, in the last 2-3 years, this facility has been compelled to expend up to \$20 million on pollution control measures, a process that is still on-going. Notably, emission reductions were achieved through efforts by ADPC&E that would not be recognized in the Guidance as an enforcement option.

<sup>5</sup> City of Seabrook v. Costle, 659 F.2d 1371, 1374 (5th Cir. 1981).

<sup>6</sup> Heckler v. Chaney, 470 U.S. 821, 831 (1985).

These same principles are applicable to State enforcement programs. With the benefit of crystal clear hindsight and no concern about resource constraints, however, OIG charges ADPC&E with inertia because it did not take action consistent with a preconceived enforcement strategy. If such a charge were made in a context in which ADPC&E could mount a defense that would be given a fair hearing, OIG's indictment of ADPC&E's enforcement program would be dismissed out of hand. For these reasons, ADPC&E requests that Chapter 3 be deleted from the Report.

### **C. The OIG Report Is Based Upon a Disputed and Unworkable Policy.**

#### **1. T&A/SV Guidance in the Real World.**

The "SV" designation, as well as properly reporting such to the EPA, is a bookkeeping mechanism for tracking putatively noncompliant facilities that fall within the comparatively narrow ambit of federal jurisdiction. On its face, the EPA's T&A/SV Guidance provides mechanisms and time lines for addressing violations at major sources and reporting these violations to the EPA, providing EPA the option to initiate its own enforcement action if it deems Arkansas' response inadequate. In practice, strict application of the T&A/SV Guidance at the State level would divert limited resources to inconsequential violations simply because they fall within the ambit of a federal guidance document, and would force Regional attention away from national initiatives in favor of relatively inconsequential or otherwise addressed matters. In other words, compliance with the T&A/SV Guidance is not an accurate measure of overall

efficacy of a State's enforcement program. At most, it is a measure of how rigidly bureaucratic the regulatory dialogue between EPA and a State has become.

When an inspection reveals noncompliance, ADPC&E seeks to address all violations, federal or State, at **all** sources, and follows through as resources permit to assure that these violations are corrected. As stated in our response to the initial position papers issued by the Inspector General, we did not apply the disputed Significant Violator definition in our enforcement program<sup>7</sup>. However, each violation was identified and reported to EPA Region 6 in our monthly Enforcement Activities Report. OIG admits as much in its Draft Report, which states that they selected their sample for the report from the "monthly Enforcement Activities reports dated October 1, 1996, and March 10, 1997, provided by Arkansas." Additionally, the report states that, "case narratives in monthly reports usually provided enough information for Region 6 enforcement officials to question whether additional facilities should be classified as significant violators," and, "because Region 6 enforcement did not make significant violator reporting a priority, it did not verify whether Arkansas had identified all significant violators and did not utilize information provided by the State concerning facilities' noncompliance." What the Draft Report fails to note is that, often, ADPC&E charted its efforts to "address" a putative "significant violator" only after consultation with its cohorts at Region 6.

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<sup>7</sup> Arkansas is not alone in its failure to adopt the federal data base as its primary tracking mechanism for enforcement actions. Every OIG audit report on this issue notes that States have developed their own tracking systems, mostly because the AFS system was deemed unwieldy as a practical tool.

ADPC&E does not seek to shift blame for its shortcomings to its partners at Region 6. Instead, the point here is that ADPC&E was conducting extensive inspections of facilities within its jurisdiction and was making extensive monthly reports to officials of Region 6. ADPC&E's contacts with Region 6 even included requests for advice or concurrence on how to proceed in particularly complex enforcement matters. Region 6 and ADPC&E maintained a constant dialogue on enforcement cases arising in Arkansas. The gist of this dialogue, however, was not always entered into the AFS computer system. In fact, the real world circumstances of some complex cases would thwart any effort to reduce the resolution or "addressing" of the matter to the narrow contexts allowed in the AFS system. Still, Arkansas and Region 6 are now called to task for failing to commit their already stressed resources to satisfy this relatively insignificant data entry problem. The policy implications of this controversy are next discussed.

### **2. EPA's Recent Implementation of the T&A/SV Guidance.**

The February 7, 1992, Seitz and Van Heuvelen Memorandum transmitting the revised T&A/SV Guidance to the Regions stated the promise of this new approach to oversight:

"This guidance is being revised largely to encourage a greater degree of team-building and cooperative resolution of Significant Violators by all responsible agencies, to encourage agencies to give priority attention to those violators which they believe are most environmentally important, and to permit an increased degree of agency flexibility in identifying and resolving [SV's]."

These are goals that any governmental agency would embrace. But ADPC&E must agree with her sister State agencies that EPA's recent application of the revised guidance is antithetical to achieving interagency cooperation, responsible prioritization, and common sense flexibility.

After five years' experience with its implementation -- culminating with OIG's recent use of this policy to unjustly pummel state enforcement programs -- the States' previous "buy-in" to this policy is now irrelevant. Serious and widespread dispute between the States and EPA continues over the definition of an SV. More specific to ADPC&E, the options provided for coding how the bureaucratic clock is stopped by a violation being "addressed" simply don't apply as a matter of law or practice in Arkansas (e.g., ADPC&E rather than the Arkansas Attorney General has primary jurisdiction to bring civil actions, and this State's AG does not have criminal prosecution authority.) Clearly, this guidance document should be fine-tuned to fit both generic and state-specific concerns. Until recently, however, this agency sincerely believed that by choosing a guidance document over a rigid command-and-control oversight regime, EPA valued case-specific narratives between professionals over the superficial logic of computer software, and substantive enforcement work over bureaucratic reporting requirements. At least, that is how ADPC&E negotiated its federal grants and worked enforcement cases with Region 6 oversight officials for years.

In the OIG's hands, however, the EPA Guidance document is now a rigid template that leaves no room for human interaction. Given the tenor of this and the previous audit report, OIG must be signaling that the flexibility implicit in regulatory guidance is gone, replaced by a adversarial attitude toward oversight of State programs. Whatever new rules apply now, ADPC&E had no notice that its regulatory program was so grossly out of sync with EPA's expectations until we received the first draft of the OIG's Report.

Most likely, OIG will insist, as it did in response to Pennsylvania’s objections, that the T&A/SV Guidance Document is a contractual obligation tied to the receipt of federal grant funds. If, however, this issue is to be understood in the terms of contracts, then it should be noted that the law recognizes that habitual or customary practice (i.e., “usage”) and past course of dealing between parties are established principles for judging the performance due under contracts. *See* Restatement of Contracts 2d, §§219-221; 223; *see also* Restatement of Contracts 2d, §205. Here, the parties to the delegation “contract” have been Region 6 and ADPC&E, with a working understanding of SV reporting requirements. It is EPA Headquarters, through OIG, that has inserted an unfamiliar usage and course of dealing into the federal relationship with the States. Thus, it is EPA’s unilateral change in how the T&A/SV Guidance is applied that is, to use the language of contract, unconscionable.

ADPC&E suggests that implementation of the T&A/SV Guidance is an issue best addressed in the context of grant negotiations between the State and Region 6, not inflammatory journalism by OIG. Furthermore, given recent developments, ADPC&E submits that this controversial document is no longer regulatory guidance, but a snare for capturing and humiliating States that have relied to their detriment on long-standing relationships with their partners in EPA Regional Offices. If EPA Headquarters, through OIG, has decided after five years to re-interpret this Guidance and institute an aggressive new implementation strategy, then EPA is obliged to discuss these new expectations with the States before launching media events

disguised as audits. **D. The OIG's Approach to This Issue Violates the Basic Tenets of Federalism.**

Federalism is “a commitment to partnership and active cooperation on the part of individuals and institutions *that also take pride in preserving their own respective integrities.*” The federal model is characterized by a spirit of negotiation, mutual forbearance and self-restraint, and consideration of the consequences of actions.<sup>8</sup> The EPA Guidance at issue in this audit was meant to promote the same principles: partnerships, flexibility, and efficient prioritization. The point of “guidance” as a regulatory tool -- as opposed to intractable regulations or contract obligations -- is to allow the participants in its implementation some latitude in reaching statutory goals with limited resources.

These OIG audits, however, apply the Guidance in such a categorical and intractable manner that the goals of the Guidance and the tenets of federalism are forgotten. The efficacy of State environmental programs is being measured against strict compliance with the T&A/SV Guidance, and most are found lacking. The States' widespread disenchantment with the Guidance is certainly evidence that it is not meeting its purported purpose and should be revisited. Experience has shown, however, that issuance of EPA audit reports such as this draft will lead to vivid generalizations in the press and feed ammunition to the opponents of regulatory agencies.

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<sup>8</sup> D. Elazar, *Exploring Federalism* at 154 (Univ. Of Alabama 1987).

EPA has now decided that strict compliance with the T&A/SV Guidance is a State reporting requirement of the highest priority. Realigning the bureaucracy to meet EPA's new expectations can be accomplished without demeaning the integrity of State environmental programs. If EPA is serious about partnerships with the States and its role in cooperative federalism, it will abandon oversight by ambush as a way of communicating its new policies to the States.

### E. Conclusion.

The T&A/SV Guidance is **not** an environmental indicator. It is not even a very efficient tool for prioritizing environmental violations or tracking program compliance. At most, it is a measure of how dutifully a State agency translates its real world observations into the constraints of a computer software program.

Now, in contrast to past local practice, EPA Headquarters demands strict adherence to the Guidance as a high-profile program requirement. In Arkansas, that was accomplished before OIG issued its first draft report. ADPC&E committed its resources to reviewing its enforcement records once again in light of the Guidance criteria. And, for the first time since the adoption of the policy, ADPC&E was given the authority to directly enter data into the AFS system in order to satisfy the demands of the Guidance.

## APPENDIX 2 - ARKANSAS RESPONSE

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State compliance with the Guidance is apparently not enough, however. Using the controversial Pennsylvania Report as a form document, OIG is prepared to issue a factually-slanted broadside criticizing ADPC&E's enforcement program despite this agency's good faith attempt to satisfy EPA's unexpected mandate. The Draft Report proceeds beyond the stated purpose and scope of the audit and second-guesses this agency on individual enforcement matters that range from the insignificant to the extraordinarily complex. Such an attack is unwarranted and counterproductive to any constructive dialogue between the State and EPA.

**ABBREVIATIONS**

|             |                                                                                    |
|-------------|------------------------------------------------------------------------------------|
| Arkansas    | Arkansas Department of Pollution Control and Ecology                               |
| AFS         | Aerometric Information Retrieval System Facility Subsystem                         |
| CAA         | Clean Air Act                                                                      |
| enforcement | Compliance Assurance and Enforcement Division                                      |
| EPA         | Environmental Protection Agency                                                    |
| guidance    | Timely and Appropriate Enforcement Response to Significant Air Pollution Violators |
| MOU         | Memorandum of Understanding                                                        |
| OIG         | Office of Inspector General                                                        |
| permitting  | Multimedia Planning and Permitting Division                                        |
| plan        | EPA's Five Year Strategic Plan                                                     |
| PSD         | Prevention of Significant Determination of Air Quality                             |