



U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

# Early Warning Report: Use of Contractors to Conduct Clean Air Act Risk Management Program Inspections in Certain States Goes Against Court Decisions

Report No. 12-P-0376

March 28, 2012



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## Abbreviations

CAA: Clean Air Act  
EPA: U.S. Environmental Protection Agency

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

THE INSPECTOR GENERAL

March 28, 2012

**MEMORANDUM**

**SUBJECT:** Early Warning Report: Use of Contractors to Conduct Clean Air Act Risk Management Program Inspections in Certain States Goes Against Court Decisions Report No. 12-P-0376

**FROM:** Arthur A. Elkins, Jr.  
Inspector General

A handwritten signature in black ink, appearing to read "Arthur A. Elkins, Jr.", is written over the typed name.

**TO:** Cynthia Giles  
Assistant Administrator  
Office of Enforcement and Compliance Assurance

The Office of Inspector General is currently evaluating whether the U.S. Environmental Protection Agency (EPA) has adequate management controls for ensuring the effectiveness of its Clean Air Act (CAA) Section 112(r) risk management program inspections. During the preliminary research phase of our evaluation, we learned that EPA has used contractors to perform risk management program inspections in Kansas, Kentucky, and Tennessee despite federal court decisions prohibiting EPA's use of contractors to conduct CAA inspections in these states and the EPA policy memo that incorporated the decisions. While we continue our evaluation in the field work phase, this situation requires your immediate attention.

**Background**

Under the CAA 112(r) risk management program, stationary sources that have more than the threshold quantity of regulated substances on-site in any one process must implement a risk management program. All covered facilities must submit a Risk Management Plan to EPA that describes and documents the facility's hazard assessment and its prevention and response programs. When properly performed by trained, knowledgeable inspectors who are authorized representatives of the Administrator, CAA 112(r) risk management program inspections are an essential component of the program for ensuring that facilities comply with risk management program requirements. Compliance with risk management program requirements helps to prevent accidents and mitigate the harm to human health and the environment from those that do occur.

Case law is split on the use of contractors to perform CAA inspections.

- The Tenth Circuit Court, in *Stauffer Chemical Co. v. EPA* (1981), and the Sixth Circuit Court, in *United States v. Stauffer Chemical Co.* (1982), had ruled that contractors may not be designated by EPA as “authorized representatives” of the Administrator under CAA Section 114 on recordkeeping, inspections, monitoring, and entry. [*Stauffer Chemical Co. v. EPA*, 647 F.2d 1075 (10<sup>th</sup> Cir. 1981); *U.S. v. Stauffer Chemical Co.*, 684 F.2d 1174 (6<sup>th</sup> Cir. 1982).]
- The Ninth Circuit Court, in *Bunker Hill Co. v. EPA* (1981), and one District Court in the Fourth Circuit, in *Aluminum Co. of America v. EPA* (1980), had ruled that EPA may designate contractors as authorized representatives under CAA Section 114. [*Bunker Hill Co. v. EPA*, 658 F.2d 1280 (9<sup>th</sup> Cir. 1981); *Aluminum Co. of America v. EPA*, No. M-80-13 (M.D.N.C. Aug. 5, 1980).]

EPA’s authority to designate contractors as “authorized representatives” of the Administrator to conduct inspections under CAA Section 114 was one of two issues presented to the U.S. Supreme Court in *United States v. Stauffer Chemical Co.* in 1983 [*U.S. v. Stauffer Chemical Co.*, 464 U.S. 165 (1984)]. The case was heard by the Supreme Court on November 2, 1983, and decided on January 10, 1984. Because the Supreme Court did not address the question of statutory authority, its decision left unresolved the pre-existing split in the Circuit Courts on the question of EPA’s statutory authority to use contractors for CAA inspections.

EPA issued a policy memo on February 22, 1984, stating that contractors should not, absent express permission from headquarters, be designated as representatives of EPA to conduct CAA inspections in states located in the Sixth and Tenth Circuits. The states in the Sixth and Tenth Circuits are: Colorado, Kansas, Kentucky, Michigan, New Mexico, Ohio, Oklahoma, Tennessee, Utah, and Wyoming. These states are within EPA Regions 4, 5, 6, 7, and 8.

### **EPA Is Using Contractors to Conduct CAA Risk Management Program Inspections in Kansas, Kentucky, and Tennessee**

EPA Regions 4 and 7 use contractors to conduct CAA 112(r) risk management program inspections in Kansas, Kentucky, and Tennessee despite decisions by the Sixth and Tenth Circuit Courts prohibiting this practice and the EPA policy memo that reiterated this prohibition. The Region 4 risk management program coordinator told us that he was aware of EPA’s 1984 guidance on this subject but neither the region nor headquarters had questioned this practice, and inspected facilities have not challenged the region’s use of contractors in Kentucky and Tennessee. The staff coordinator confirmed that Region 4 had not obtained approval from counsel to use contractors for these inspections. The risk management program team leader in Region 7 told us that he was not aware of EPA’s 1984 policy memo prohibiting the use of contractors in Kansas. The team leader was not aware of any specific discussions with counsel regarding the use of contractors to conduct inspections in Kansas.

EPA should immediately review the legality and appropriateness of its practice of using contractors to perform CAA risk management program inspections in the states covered by the

Sixth and Tenth Circuit Courts (Colorado, Kansas, Kentucky, Michigan, New Mexico, Ohio, Oklahoma, Tennessee, Utah, and Wyoming). This review should also determine whether contractors are used to conduct other CAA program inspections in states covered by the Sixth and Tenth Circuit Courts. If needed based on the results of its review, EPA should take immediate action to eliminate or revise its use of contractors to conduct risk management program inspections. EPA should also update and reissue its policy memo on the use of contractors to perform CAA inspections.

Thank you for your prompt attention to this important matter. If you have any questions, please contact me at (202) 566-0847 or [elkins.arthur@epa.gov](mailto:elkins.arthur@epa.gov), or Elizabeth Grossman at (202) 566-0838 or [grossman.elizabeth@epa.gov](mailto:grossman.elizabeth@epa.gov).