

135918

United States General Accounting Office

GAO

Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives

April 1988

AIR POLLUTION

Better Internal Controls Needed to Ensure Complete Air Regulation Dockets



135918

RESTRICTED—Not to be released outside the General Accounting Office except on the basis of the specific approval by the Office of Congressional Relations.

RELEASED

541997/135918

GAO/RCED-88-128

Resources, Community, and
Economic Development Division

B-226223

April 26, 1988

The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

Your letters of May 7 and July 13, 1987, questioned the Environmental Protection Agency's (EPA) practice of submitting regulations to the Office of Management and Budget (OMB) for review concurrent with the agency's "Red Border" review.¹ Specifically, you raised the issue that concurrent review prevents the public from knowing whether EPA or OMB is responsible for changes to the regulations. You requested that we examine the policy and legal issues of concurrent review as they relate to rules that EPA has developed under the Clean Air Act (42 U.S.C. 7401-7642, 1982) over the last several years.

In summary, our work showed the following:

- Concurrent review—used routinely by EPA since early 1985—was discontinued in January 1988 for all regulations except those involving a legislative or judicial deadline, primarily because regulations were often sent to OMB before all issues associated with the regulations were resolved within EPA.
- Concurrent review is not prohibited by the Clean Air Act. Rather, the particular stage at which a regulation is sent for external review is an agency decision not governed by the act.
- Concurrent review does not prevent the public from knowing whether EPA or OMB is responsible for changes to draft regulations. Rather, the extent and thoroughness of documentation in the docket² is the dominant factor in the public's ability to determine how a regulation changes and whether OMB or EPA prompted the change.

¹Executive Order 12291 requires federal agencies to submit proposed and final regulations to OMB for review before publication. Red Border review represents the formal mechanism by which senior EPA management officials review, approve, and/or comment on regulatory packages before they are presented to the EPA Administrator for a final decision. Red Border review usually involves EPA's Assistant Administrator for Policy, Planning, and Evaluation and the General Counsel although other assistant administrators and regional administrators may participate.

²The docket is a public record which consists primarily of the information submitted to or considered by EPA after publishing a proposed rule. The exact contents of the dockets for Clean Air Act regulations are specified in section 307 of the act, 42 U.S.C. 7607.

- EPA is not complying with the requirement of the Clean Air Act that it place into the docket copies of draft regulations sent to OMB for review. Dockets for 10 of 21 air regulations that we reviewed did not contain copies of the draft regulations sent to OMB.

Regarding this last point, EPA's Deputy Assistant Administrator for Air and Radiation initiated a series of actions in March 1988 to improve the Office of Air and Radiation's (OAR) internal control procedures for managing its dockets and to ensure that current and future dockets meet Clean Air Act requirements. While these actions will be helpful, their ultimate success in improving OAR's docket management depends primarily on the individual project officers responsible for maintaining the dockets. These actions do not provide for OAR headquarters office oversight to ensure that the documentation requirements of the act are met.

Therefore, to improve OAR's overall internal control procedures for managing its dockets and complying with the documentation requirements of the Clean Air Act, we are recommending that the Administrator, EPA, direct that the OAR headquarters office, at the time it forwards a regulation for publication, verify that copies of draft regulations sent to OMB, as well as the other required material, are in the docket.

Dockets are also maintained for EPA's other environmental programs. We did not review these other dockets. However, considering the noncompliance we found with regard to the dockets in the air program, we believe that it may be appropriate for EPA to review the dockets in these other programs to ensure that they comply with their respective documentation requirements.

EPA's Use of Concurrent Review

EPA's regulation development procedures show that EPA has always considered concurrent review as an option for complying with Executive Order 12291. Basically, EPA's position has been that if no significant internal issues remain with a regulation at the time of Red Border review, the regulation can be submitted to OMB for concurrent review.

According to EPA's Acting Assistant Administrator for Policy, Planning, and Evaluation, concurrent review changed from an option to a routine procedure in early 1985 to help speed up the rulemaking process. Information we obtained on 44 air regulations that EPA proposed or finalized between January 1985 and mid-August 1987 showed that OMB reviewed 33 concurrently with and only 3 after Red Border review. (Dates of Red

Border and OMB review for the other eight regulations were not available, and we were unable to determine whether or not OMB's review occurred concurrently.)

EPA Discontinues Routine Use of Concurrent Review

In January 1988, the EPA Administrator announced that EPA would discontinue concurrent review for all regulations except those for which EPA is compelled to meet a legislative or judicial deadline.

According to EPA's Deputy Assistant Administrator for Policy, Planning, and Evaluation, EPA made the decision primarily because regulations were being sent to OMB for review before all internal issues associated with the regulations were identified and resolved. He said that several assistant administrators had expressed concern about EPA's Office of General Counsel (OGC) making what they considered editorial changes during Red Border review to regulations that OGC staff attorneys had cleared earlier in the regulatory development process. He said that this resulted in regulations going to OMB too soon because of the subsequent controversy that arose during Red Border review and the changes made to the regulations. The Deputy Assistant Administrator also told us that concurrent review can reduce regulation development by several weeks but, considering that regulations often take years to develop and issue, that this time-saving feature was not considered to be a significant benefit and therefore that concurrent review was not worth continuing as the routine practice.

Concurrent Review Is Legal

Section 307 of the Clean Air Act establishes the requirement with regard to the written material that must be in the dockets for air regulations. Our review of section 307 and its legislative history showed that section 307 does not prohibit concurrent review. Our October 21, 1987, letter to you on the legality of concurrent review (B-221421) stated that, while section 307 requires that EPA place copies of draft regulations sent for interagency review in the docket, it does not specify the particular stage of internal review at which it is appropriate for EPA to circulate a draft to OMB. Therefore, we concluded that whether a draft of an air regulation is sufficiently complete to be distributed outside the agency is an EPA decision not governed by section 307.

Concurrent Review Does Not Affect Public Knowledge of Regulation Changes

Whether OMB's review occurs concurrently with or after Red Border review does not prevent the public from distinguishing between EPA and OMB changes. Rather, our examination of regulations that OMB reviewed concurrently with, as well as after, Red Border review showed that the extent and thoroughness of documentation in the docket is the dominant factor in the public's ability to determine how a regulation changes and whether the change was prompted by OMB or EPA.

As noted earlier, OMB reviewed 3 of the 44 air regulations after the Red Border review was completed. We reviewed the dockets for the three regulations and found that two of them did not contain any of the draft regulations sent to OMB for review or any documents from OMB regarding its review comments. Thus, EPA's original position on the regulations and how, if at all, the regulations may have changed as a result of OMB's review cannot be determined from the dockets. The docket for the third regulation contained the drafts sent to OMB but no OMB review comments. To determine the changes to the regulation as a result of OMB's review, an interested party would have to make a detailed comparison of the preamble to the final regulation and the proposed and final versions of the regulation.

Similar situations exist with regulations concurrently reviewed by OMB. For example, the docket for the regulation establishing work practices to limit radon emissions from uranium mill tailings (the waste resulting from conventional milling of uranium) contained copies of the proposed and final drafts sent to OMB for review with OMB comments annotated and a detailed 12-page memo from OMB outlining its concerns and disagreements with the final regulation. In contrast, the docket for EPA's regulation to control gasoline vapor emissions from motor vehicle fuel tanks, carburetors, and fuel-injection systems (evaporative emissions) contained only revisions to the regulation preamble that EPA submitted to OMB in response to OMB concerns. The docket did not identify these concerns, nor did it contain the draft regulation that EPA submitted to OMB.

EPA Not Complying With Recordkeeping Requirements of the Clean Air Act

EPA is not complying with the requirements of section 307 of the Clean Air Act that copies of the drafts of proposed and final air regulations sent to OMB for review be placed in the docket no later than the date that the proposed or final regulation is published in the Federal Register. Dockets for 10 of the 21 regulations that we reviewed in detail did not contain copies of the draft regulations that EPA had sent to OMB for

review. For example, we found during our docket reviews made in December 1987 that

- a regulation sent to OMB in March 1987 (and proposed in August 1987) to control evaporative emissions from motor vehicles was not in the docket 4 months after proposal;
- a regulation sent to OMB in September 1986 (and proposed in January 1987) to amend EPA's motor vehicle emission control system performance warranty regulation and its after-market parts certification program was not in the docket 11 months after proposal; and
- a regulation sent to OMB in January 1986 (and proposed in August 1986) regarding emission standards and test procedures for methanol-fueled new motor vehicles was not in the docket 16 months after proposal.

Dockets for the 11 remaining regulations contained copies of the draft regulations. For nine of the regulations, drafts were in the dockets by the regulations' publication dates and complied with section 307. For one of the remaining two regulations, a copy of the draft of the final regulation sent to OMB was not placed into the docket until 30 days after the final regulation was published. For the other regulation, we were unable to determine whether or not a copy of the draft of the proposed regulation was in the docket by the publication date.

In our opinion, inadequate internal control procedures for managing dockets have contributed to this situation. Our discussions with various OAR officials, including the Director, Office of Program Management Operations, showed that the project officers are responsible for ensuring that copies of draft regulations sent to OMB, as well as the other required written material, are in the docket. At the same time, however, these officials told us that OAR (1) has not issued written procedures that define these responsibilities or the material that should be in the docket and (2) has not routinely inspected the dockets to ensure that project officers are maintaining them in accordance with section 307.

OAR Actions to Correct Problem of Missing Docket Material

Prompted by the results of our review, EPA's Deputy Assistant Administrator for Air and Radiation initiated a series of actions on March 1, 1988, to improve OAR's internal control procedures for managing its dockets and to ensure that current and future dockets meet the requirements of section 307. Specifically, the Deputy Assistant Administrator

- requested that EPA's Office of General Counsel issue final guidance for OAR staff to follow in managing air regulation dockets and meeting section 307 requirements;
- directed that the guidance be incorporated into the OAR project officer certification procedures and, as appropriate, into the performance standards of project officers and staff attorneys working with section 307 dockets;
- directed that OAR project officers who have not had training in section 307 docket management procedures receive such training by September 1988 and that other current project officers receive refresher briefings;
- directed that OAR project officers document, by written memorandum, any interagency verbal communications that result in new factual information relevant to a proposed rule;
- directed that OAR project officers check the dockets, at least annually, to ensure docket completeness; and
- directed that (1) all OAR program offices, when forwarding a regulation for signature, include a statement indicating that copies of all required documents will be ready for submission to the docket concurrently with the regulation's publication and (2) the docket statement be added as a sign-off step in OAR's regulatory process manual.

Finally, to ensure that all current dockets meet section 307 requirements, the Deputy Assistant Administrator requested that all OAR program offices conduct a review of the dockets under their respective programs and take the measures necessary to ensure that these dockets comply with the documentation requirements.

Conclusions and Recommendation

EPA is not always complying with the Clean Air Act requirement that copies of draft air regulations sent to OMB for review be in the docket. Dockets for 10 of the 21 air regulations we reviewed did not contain copies of these documents. OAR's inadequate internal control procedures for managing its dockets contributed to this situation. Without these documents, the ability of the public and groups affected by the regulation to effectively participate in the rulemaking is hampered because they are prevented from knowing EPA's original position on a regulation and how the regulation may have subsequently changed.

OAR is in the process of implementing actions that should be helpful in improving its internal procedures for managing current and future dockets, but their ultimate success in doing so depends primarily on the individual project officers, whose responsibility it is to maintain the dockets. These actions, however, do not provide for OAR oversight of the

project officers. Such oversight is needed to ensure that the requirements of section 307 are being met.

The Clean Air Act specifically requires that copies of draft regulations sent to OMB for review be in the docket no later than the regulation's publication date. A check of the docket at the time a regulation is forwarded for publication would provide the opportune time and method for verifying that copies of draft regulations, as well as other required written material, are in the docket. If they are not, a check of the docket at this time would provide OAR ample opportunity to contact the project officers and program offices to assure itself that no problems exist and that materials will be in the dockets by the regulations' publication dates. Furthermore, such a check would provide OAR with feedback on the overall success of its actions and point out the need for any additional actions.

Consequently, to improve OAR's overall internal controls for managing its dockets and complying with the requirements of section 307 of the Clean Air Act, we are recommending that the Administrator, EPA, direct that the OAR headquarters office, at the time it forwards an air regulation for publication, verify that copies of all draft regulations sent to OMB, as well as the other required materials, are in the docket. As part of this effort, EPA could also review the dockets maintained to support rulemaking in EPA's other programs to ensure that they comply with their respective documentation requirements.

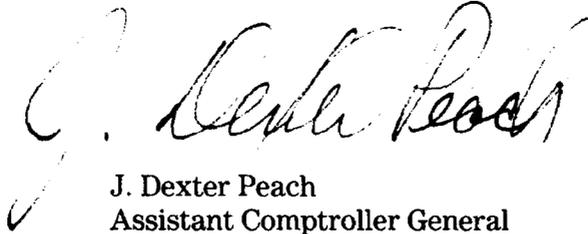
Information discussed in this report was obtained from our (1) interviews with EPA officials responsible for the air program and the agency's overall policy, planning, and evaluation activities; (2) review of agency procedures relating to concurrent review and management of the dockets for air regulations; and (3) examination of material in the dockets for selected air regulations issued between January 1985 and mid-August 1987. (App. I discusses our objectives, scope, and methodology in greater detail.)

Our review was conducted between July 1987 and February 1988 in accordance with generally accepted government auditing standards. We discussed the factual information contained in the report with EPA program officials and have included their comments where appropriate. However, in accordance with your request we did not obtain official agency comments on a draft of this report.

As arranged with your office, unless you publicly release its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, copies of the report will be sent to appropriate congressional committees; the Administrator, Environmental Protection Agency; and the Director, Office of Management and Budget.

This work was conducted under the general direction of Hugh J. Wesinger, Senior Associate Director. Other major contributors to this report are listed in appendix II.

Sincerely yours,



J. Dexter Peach
Assistant Comptroller General

Objectives, Scope, and Methodology

Our objective was to examine policy and legal issues raised concerning the Environmental Protection Agency's (EPA) practice of concurrent review of air regulations. For information on EPA's use of concurrent review, we reviewed EPA regulatory development procedures and discussed these procedures and concurrent review with various EPA officials, including EPA's Acting Assistant Administrator for Policy, Planning, and Evaluation. In addition, using (1) EPA's computerized Regulation Tracking System, (2) interviews with Office of Air and Radiation (OAR) and other EPA officials, and (3) EPA's Semi-Annual Regulatory Agenda, we determined the dates of Red Border and Office of Management and Budget (OMB) reviews for 44 air regulations that EPA proposed or finalized between January 1985 and mid-August 1987.

We reviewed the docket table of contents for each regulation for evidence of draft regulations sent to OMB for review and written material regarding OMB's review comments. We examined the actual docket contents for 21 of the regulations and verified whether or not copies of the drafts sent to OMB were in the docket, as required by section 307 of the Clean Air Act. For information on OAR's internal controls for managing the dockets for air regulations, we reviewed OAR's August 1987 Regulatory Process guidance and discussed OAR's docket management procedures with the Director of OAR's Office of Program Management Operations and other OAR officials.

For selected regulations that contained written material relating to OMB's review comments, we examined the materials to determine (1) their usefulness in providing information to the public on the issues raised and comments made by OMB and (2) the resulting changes to the regulations. While we determined which dockets contained such written material, we did not determine whether the dockets contained all the required documents, or that other dockets should have contained such documents. The scope of our work involved concurrent review's impact on the public's ability to discern regulation changes, not overall docket integrity.

Information on the legality of concurrent review reflected the position taken in our October 21, 1987, letter to the Chairman, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce.

For insight into the docket content requirements of EPA's programs other than the air program, we relied on the information in EPA's December

Appendix I
Objectives, Scope, and Methodology

1987 publication, A Pathfinder to Major EPA Dockets. We did not examine any of the dockets for other EPA programs to verify their content or compliance with respective program statutes.

Major Contributors to This Report

**Resources,
Community, and
Economic
Development Division,
Washington, D.C.**

Richard L. Hembra, Associate Director, (202) 252-0600
William F. McGee, Group Director
Stan Ritchick, Evaluator-In-Charge
Nancy Boardman, Evaluator
Molly MacLeod, Reports Analyst
Tajuana Leach, Secretary

Requests for copies of GAO reports should be sent to:

U.S. General Accounting Office
Post Office Box 6015
Gaithersburg, Maryland 20877

Telephone 202-275-6241

The first five copies of each report are free. Additional copies are \$2.00 each.

There is a 25% discount on orders for 100 or more copies mailed to a single address.

Orders must be prepaid by cash or by check or money order made out to the Superintendent of Documents.

**United States
General Accounting Office
Washington, D.C. 20548**

**Official Business
Penalty for Private Use \$300**

**First-Class Mail
Postage & Fees Paid
GAO
Permit No. G100**
