October 2003

CLEAN AIR ACT

New Source Review Revisions Could Affect Utility Enforcement Cases and Public Access to Emissions Data

GAO Accountability • Integrity • Reliability

Highlights

Highlights of GAO-04-58, a report to the Ranking Minority Member, Committee on Environment and Public Works, U.S. Senate, and another requester

Why GAO Did This Study

Recent Environmental Protection Agency (EPA) revisions to the New Source Review (NSR) program—a key component of the federal government's plan to limit harmful industrial emissions—have been under scrutiny by the Congress, environmental groups, state and local air quality agencies, the courts, and several industry groups. The revisions more explicitly define when companies can modify their facilities without needing to obtain an NSR permit or install costly pollution controls, as NSR requires. GAO was asked to determine (1) whether EPA and the Department of Justice (DOJ) assessed the potential impact of the revisions on the ongoing enforcement cases against coal-fired utilities and, if so, what the assessments indicated; and (2) what effect, if any, the revisions might have on public access to information about facility changes and their resulting emissions.

What GAO Recommends

To ensure monitoring of NSR compliance, GAO recommends that EPA specify (1) what constitutes a "reasonable possibility" that a facility change is subject to NSR, (2) that companies maintain data on reasonable possibility decisions, and (3) how the public can access companies' on-site information on these decisions. EPA took no position on the first two actions; it is reconsidering the reasonable possibility test through October 2003. EPA agreed with the third recommendation.

www.gao.gov/cgi-bin/getrpt?GAO-04-58.

To view the full report, including the scope and methodology, click on the link above. For more information, contact John Stephenson at stephensonj@gao.gov.

What GAO Found

EPA staff assessed the potential impact of the NSR revisions on the utility enforcement cases and, according to current and former EPA enforcement officials, determined that some of the revisions could affect the cases. EPA staff discussed the potential effects of the revisions with DOJ. In part as a result of the assessments, EPA changed some of the revisions before issuing them as final and proposed rules in December 2002. Specifically, EPA changed the content and wording of some of the provisions included in the final rule and determined that the rule would not affect the cases. However, EPA enforcement officials were very concerned that the proposed rule—addressing when a company could consider a facility change "routine maintenance, repair, or replacement" and exempt from NSR—could have a negative impact on the cases. The concern was that proposing one specific definition for this exclusion that differed from the way the agency had applied it in the past could affect the cases' outcome. Consequently, EPA instead proposed several alternative definitions—different cost thresholds below which a company could make a change that is exempt—for public comment. Nevertheless, some of the enforcement officials and stakeholders believe that industry's knowledge that EPA could be defining the exclusion in terms more favorable to industry delayed some settlements while the rule was being developed, jeopardizing expected emissions reductions.

Subsequently, in August 2003, despite seven ongoing cases, EPA announced a final rule specifying a 20 percent cost threshold below which a company could make certain changes and consider them routine replacement and exempt from NSR. EPA and DOJ maintain that the rule will not affect the cases because it applies only to future changes. But some EPA enforcement officials and stakeholders are concerned that even if judges find companies to be in violation of the old rule, judges could be persuaded, when setting remedies, to not require the installation of pollution controls—limiting emissions benefits—because under the 20 percent threshold, most of the facility changes in dispute would now be exempt.

Certain provisions in the December 2002 final rule could limit assurance of the public's access to data about—and input on—decisions to modify facilities in ways that affect emissions. This would make it more difficult for the public to monitor local emissions, health risks, and NSR compliance. Under the rule, fewer facility changes may trigger NSR and thus the need for permits and related requirements to notify the public about changes and to solicit comments—unless state and local air quality agencies have their own permit and public outreach rules. However, the scope of these state and local rules varies widely. Also under the rule, companies will now determine whether there is a "reasonable possibility" a facility change will increase emissions enough to trigger NSR—in effect policing themselves. But EPA has not defined "reasonable possibility," required that companies keep data on all of their reasonable possibility determinations, or specified how the public can access the data companies do keep on site.