BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

Improved Oversight And Guidance Needed To Achieve Regulatory Reform At DOE

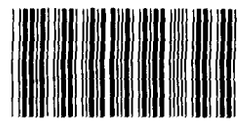
The Department of Energy has not fully achieved the goals of regulatory reform. The primary overall goal is to regulate in an effective but least burdensome manner.

This report raises questions as to the adequacy of information available to decisionmakers to provide a full perspective of the need, merits, and costs of the proposed regulations. All three of the regulatory analyses GAO examined had information gaps that significantly minimized their usefulness in the decision process.

GAO found these data deficiencies result primarily from a lack of specific guidance in preparing effective regulatory analyses and recommdends that the Secretary of Energy, among other actions,

--designate organizational responsibility for oversight of the regulatory reform process, including the monitoring of regulatory analyses, and

--provide guidance to program managers by issuing a revised Departmental order covering the requirements of the regulatory reform process.



EMD-82-6

NOVEMBER 6, 1981

Request for copies of GAO reports should be sent to:

U.S. General Accounting Office
Document Handling and Information
Services Facility
P.O. Box 6015
Gaithersburg, Md. 20760

Telephone (202) 275-6241

The first five copies of individual reports are free of charge. Additional copies of bound audit reports are $3.25 each. Additional copies of unbound report (i.e., letter reports) and most other publications are $1.00 each. There will be a 25% discount on all orders for 100 or more copies mailed to a single address. Sales orders must be prepaid on a cash, check, or money order basis. Check should be made out to the "Superintendent of Documents".

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-204757

To the President of the Senate and the
Speaker of the House of Representatives

This report discusses the Department of Energy's regulatory reform efforts. This report identifies several weaknesses and recommends corrective actions to better assure that Departmental decisionmakers receive the information needed for developing the most effective and least costly regulations.

We performed this assignment at the request of Senator Howard H. Baker, Jr. However, because of continued Congressional interest in this matter, Senator Baker agreed that the report should be addressed to the Congress as a whole.

Copies of this report are also being sent to the Director, Office of Management and Budget, and the Secretary of Energy.

Charles A. Bowsher

Comptroller General
of the United States

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

IMPROVED OVERSIGHT AND GUIDANCE NEEDED TO ACHIEVE REGULATORY REFORM AT DOE

D I G E S T

At the request of Senator Howard H. Baker, Jr., GAO evaluated the effectiveness of the Department of Energy's (DOE's) process for developing regulations.

GAO evaluated DOE's procedures by reviewing the development of three regulations. All three met the "significant regulation" criteria of DOE and are fully and clearly representative of DOE's regulatory process. This report is concerned with the adequacy of the DOE process for developing regulations rather than the adequacy of individual regulations.

GREATER COMMITMENT NEEDED TO ACHIEVE REGULATORY REFORM

DOE has not fully achieved the goals of Executive Order 12044. During the period from October 1977 to January 1981, DOE used two different approaches to regulatory reform; however, both efforts were largely ineffective because DOE lacked

--a focal point for strong departmental oversight of the regulatory reform effort;

--clear policy and program guidance, and delegation of organizational responsibilities for those involved in developing regulations; and

--effective application of the policy by the program managers in the execution of their responsibilities.

Based on existing documentation the information made available to the various levels of decisionmakers was not complete and did not allow for a full perspective of the need, merits, and costs of the proposed regulations nor allow for effective executive oversight. Moreover, DOE's recordkeeping practices

need improvement to assure that the information which is developed is properly documented and readily available to decision-makers.

GAO believes the data deficiencies resulted primarily from the need for more specific guidance in preparing effective regulatory analyses.

Oversight by top management was not effective because of the lack of understanding of what was happening at the program manager level and/or indifference to what was happening because DOE was not fully committed to regulatory reform. (See p. 7.)

TWO INEFFECTIVE ATTEMPTS AT REGULATORY REFORM

DOE's first two attempts at regulatory reform were largely ineffective. DOE's first approach was to identify 42 initiatives or specific projects as a means of effecting reform, and to establish a group to coordinate and monitor progress on the initiatives.

However, it became clear that achieving reform was not a priority with DOE when emergency rulemakings needed quick approval during the 1979 Iranian oil cutoff. Work on the initiatives became a low priority with only 17 being completed.

DOE later discarded the specific project approach and emphasized improved procedures for developing regulations and increased oversight by top management in development of regulations. However, the individual responsible for exercising oversight was unable to devote the time necessary to effectively carry out his responsibilities. Consequently, regulatory reform again suffered because of the absence of a strong departmental oversight activity. (See pp. 7-9.)

BETTER ANALYSES ARE NEEDED TO IMPROVE THE REGULATORY PROCESS

All three of the DOE regulatory analyses GAO examined had information gaps that significantly minimized their usefulness in the decision process. Two of the three analyses did not include estimates of costs and benefits for alternative methods of regulating and the other case contained these estimates in a technical support document issued six weeks after the issuance of the regulatory analysis. Also, the analyses did not adequately address the potential enforceability of the regulations.

Consequently, questions arise as to whether top decisionmakers had the key information needed to decide whether the proposed method of regulating would be the most effective and the least burdensome.

The principal causes underlying DOE's inadequate analyses are

--no clear identification of who is to monitor the quality of analyses,

--no minimal requirements on what critical issues the analyses are to address, and

--a limited amount of time to prepare the analyses. (See pp. 10-15.)

PROCEDURES FOR OVERSIGHT OF THE PUBLIC PARTICIPATION PROCESS NEED IMPROVEMENT

DOE should improve its procedures to make sure that there is sufficient oversight of the public participation process. This would ensure that

--each program office has an effective public outreach program for effective liaison with consumer groups, Congress, and State and local governments, and that

--advance notices are more widely used. (See pp. 16-18)

IMPROVED RECORDKEEPING WOULD STRENGTHEN OVERSIGHT

DOE established a policy for the materials to be included in the administrative record; however, critical intra-department memoranda and summaries of significant oral, informal communications were often omitted. Furthermore, while staff summaries of public written and oral comments were prepared, they were of limited usefulness. (See pp. 20-24.)

Such documents could give regulation writers and decisionmakers a better understanding of the particular basis for the regulatory approach selected as the rule is being developed, thus making contributors to the process more accountable for their decisions.

For example, in one case, the pertinent files did not contain critical internal comments concerning the enforceability of a proposed regulation. Furthermore, GAO could find no evidence that this critical information was provided to the Secretary. DOE officials later informed GAO that this matter was orally discussed with the Deputy Secretary, but that no written record was maintained.

DOE should make sure that the necessary material is maintained as regulations go through the drafting process and establish responsibility for retaining the material. Such actions are needed so that those in the oversight role can determine proper accountability for decisions. DOE also needs to insure that adequate summaries of public comments are prepared and disseminated to those involved in the decision process. (See pp. 20-24.)

RECOMMENDATIONS TO THE SECRETARY OF ENERGY

The Secretary should

--ensure proper organizational responsibility by designating

(1) an individual within the Office of the Secretary responsible for oversight of regulatory reform, including monitoring the quality of regulatory analyses;

(2) the group within the Department responsible for assuring that public participation activities are properly carried out, including providing comments on plans for obtaining public participation contained in action memoranda; and

(3) the office responsible for maintaining the regulatory decision file.

--Provide guidance and direction to program managers by issuing a DOE Order which will

(1) require an action memorandum to include information on (1) the problem the regulation addresses, its legislative authority, and enforceability, (2) affected groups and plans for obtaining their comments, (3) the need for a regulatory analysis, and (4) the availability of cost/benefit information;

(2) specify what information must be included in the regulatory analyses, particularly with regard to the estimates (or ranges of estimates) of the costs and benefits of each alternative and the enforceability of the proposed and any related existing regulations;

(3) ensure enhanced public participation by defining when to use notices of inquiry and advance notices of proposed rulemakings;

(4) make sure that necessary documentation is maintained for the Secretary's review; and

(5) require the Office of General Counsel to summarize all the public comments as soon after the close of the comment period as reasonable, and disseminate them to those involved in the regulatory process. (See pp. 26-27.)

AGENCY COMMENTS AND GAO'S EVALUATION

DOE disagreed with most of GAO's conclusions and recommendations although all of them were not addressed. DOE said that GAO had failed to reflect a realistic understanding of regulatory and management principles. GAO

disagrees with this comment and emphasizes that its review was conducted in accordance with the management and regulatory principles set forth in Executive Order 12044 and 12291, which govern regulatory reform.

Also, DOE stated that GAO's conclusions and recommendations may be of limited utility in advancing the cause of regulatory reform because they do not address DOE's problems and successes in regulatory reform. GAO disagrees. GAO has clearly shown how DOE's regulatory process fails to comply with the Executive Orders governing regulatory reform. The principal problem identified was a lack of executive oversight of the process, a key reform element that was highlighted in both Executive Orders. DOE, however, was not fully responsive to the oversight problems discussed in GAO's draft report. Although DOE's written comments on the draft report were not fully responsive and failed to acknowledge any problems in DOE's current rulemaking process, GAO is hopeful that the current DOE leadership will commit to improving its regulatory reform program, by assuring top level oversight of the regulatory process.

GAO has reviewed DOE's comments and made changes where appropriate. Some of the comments were technical in nature and others were substantive, as discussed on pages 27 through 34.

Contents

ABBREVIATIONS

DOE	Department of Energy
ERA	Economic Regulatory Administration
GAO	General Accounting Office
OGC	Office of General Counsel
OMB	Office of Management and Budget

CHAPTER 1

INTRODUCTION

Government regulation has been the target of much criticism in recent years. A desirable goal, reflected in recent Executive Orders, is that the Government should regulate only when necessary, and then in a manner that is effective yet imposes the least costs. Regulations which are not carefully developed may impose unnecessary costs on industry and consumers, and may not be effective because repeated amendments are needed or because they are difficult to enforce. Given these concerns, Senator Howard H. Baker, Jr. requested that we examine the development of regulations by the Department of Energy (DOE).

LAWS AND EXECUTIVE ORDERS AFFECTING REGULATORY REFORM AT DOE

In developing regulations, DOE must follow basic requirements contained in the Administrative Procedure Act, as amended, and the DOE Organization Act. In addition, Executive Orders 12044 and 12291 1/ set out a series of procedures which executive agencies are to adopt to improve the regulatory process. 2/ Executive Order 12044, 43 Fed. Reg. 12661 (1978), instructed executive agencies to assure that the agency head oversees the development of regulations; that the public has an opportunity to comment on regulations; and that alternative methods of regulating, and the costs and benefits of each method, are considered before the regulation is issued. Executive Order 12291 superseded the prior Order, although both have similar goals.

Administrative Procedure and DOE Organization Acts

Congress has routinely delegated the writing of specific rules to Federal agencies. However, agencies are required to

---

1/Executive Order 12291, dated February 17, 1981, superseded Executive Order 12044, issued March 23, 1978.

2/Although agencies are expected to comply with the Orders, these Orders do not establish additional legal requirements which must be satisfied before a regulation is considered validly promulgated. As noted in Executive Order 12291, "This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable by law by a party against the United States, its agencies, its officers or any person."

comply with certain statutory procedures when developing rules. The Economic Regulatory Administration (ERA) and the Conservation and Renewable Energy Office, which are the DOE program offices we reviewed, issue regulations primarily through an informal rulemaking process. 1/ Such DOE rules must comply with the Administrative Procedure Act and the DOE Organization Act. These laws establish minimum requirements for proposed rulemakings, including that public notices be issued on proposed rules, an opportunity be provided for public comment, and a concise statement of the basis and purpose of the final rules be issued in the Federal Register.

Executive Order 12044

Executive Order 12044 directed each Federal agency to establish procedures to improve both existing regulations and those being developed. Although these procedures were to be tailored to the agency's specific needs, they were to include the following:

--Agencies were to give the public "an early and meaningful opportunity to participate in the development of regulations" and allow at least 60 days for comment on significant regulations.

--The agency head was to exercise effective oversight. Before a significant regulation was published for public comment, the agency head was to determine, among other things, that the proposed regulation was needed, and that alternative approaches had been considered with the least burdensome acceptable alternative chosen. The public comments received should be considered and an adequate response prepared.

--A "regulatory analysis" was to be prepared early in the decisionmaking process on significant regulations. The analysis was to include a brief statement of the problem, major alternative methods of regulating to solve the problem, the estimated economic consequences of each alternative, and a detailed explanation of why the proposed alternative was tentatively chosen.

1/This report discusses only informal rulemaking, which does not require formal, evidentiary hearings. Rulemaking which includes such hearings and involves the presentation of evidence, the calling of witnesses, and cross-examination, is called "formal rulemaking" and is generally required by a specific statute.

DOE issued its procedures in DOE Order 2030.1 dated December 18, 1978, "Procedures for the Development and Analysis of Regulations, Standards, and Guidelines," 44 Fed. Reg. 1040 (1979). These DOE procedures attempted to define the basis on which its regulatory decisions are made.

Executive Order 12291

President Reagan revoked Executive Order 12044, as amended, and issued Executive Order 12291. Both Orders were intended to improve the development of Federal regulations, but they differ in some of their methods.

Important similarities and differences are that

--both specify that for significant regulations alternative methods of regulating are to be analyzed and that an effective but least costly alternative be chosen;

--both recognize the importance of public comments in the development of regulations. However, the new Order does not stress the importance of according the public an early and meaningful opportunity to participate in the development of regulations as set out in Executive Order 12044;

--both assign to the Office of Management and Budget (OMB) oversight and monitoring responsibilities. However, the new Order gives OMB the responsibility for reviewing all agency regulatory actions, subject to the direction of the Presidential Task Force on Regulatory Relief.

Following the issuance of Executive Order 12291, the Office of Management and Budget issued Bulletin No. 81-13, dated February 23, 1981, which set forth interim reporting requirements for compliance with Executive Order 12291. This bulletin was followed by DOE's cancellation of DOE Order 2030.1, through DOE Notice 2030, dated March 16, 1981. According to this Notice, DOE's Office of General Counsel would be responsible for assuring compliance with Executive Order 12291 and a DOE Order would be developed after the Office of Management and Budget had published final implementing procedures. The Office of Management and Budget issued interim procedures in June 1981, but DOE had not developed or published an order as of September 1, 1981.

DOE'S REGULATORY PROCESS

DOE's regulatory process, as set forth in DOE Order 2030.1, dated December 18, 1978, was developed to comply with Executive

Order 12044. DOE had proposed to rescind DOE Order, 2030.1 on February 25, 1980, and to replace it with a new Order "Guidelines for the Development and Analysis of Regulations" but the proposed Guidelines were never adopted and DOE Order 2030.1 was finally cancelled effective March 16, 1981.

During the course of our review, DOE followed several basic steps in promulgating regulations. These were based on requirements of the Administrative Procedure Act, Executive Order 12044, and the DOE Organization Act as well as the December 13, 1979, policy statement from the Secretary of Energy. These steps provided that:

--Drafting of any significant final regulation, proposed regulation, or public notice concerning a possible significant regulatory action must have advance express authorization from the Secretary or Deputy Secretary.

--When DOE lacks sufficient information on a regulation, a notice of inquiry or an advance notice of proposed rulemaking is to be used.

--If a significant regulation is likely to have a major impact, a draft regulatory analysis must be prepared. The analysis should briefly discuss the major regulatory and non-regulatory alternatives for dealing with the problem and explain the reasons for choosing the preferred alternative.

--A general notice of proposed rulemaking must be published in the Federal Register containing the proposed regulation and a brief preamble that is understandable to non-experts and non-lawyers. The preamble must explain the need for the regulation; summarize the objectives, terms, and anticipated effects; and briefly summarize the draft regulatory analysis.

--The lead office will summarize and analyze the public comments and revise the proposed regulation and the draft regulatory analysis where appropriate.

--The lead office is responsible for obtaining Secretary, Deputy Secretary, or Under Secretary approval for publication of a final regulation; preparing the final regulatory analysis, and an analysis in the preamble of how major public comments were considered in the development of the final regulation.

OBJECTIVE, SCOPE, AND METHODOLOGY

The purpose of our review was to determine how effectively DOE's regulatory development process meets the stated goals of Executive Order 12044 (see pages 2-3). For the purposes of this evaluation we accepted the goals indicated in Executive Order 12044 as being reasonable and sought to determine how effectively DOE was carrying them out. After most of our information gathering had been completed, Executive Order 12291 dated February 17, 1981, was issued, superseding this Order. However, both have the same overall goal of regulating in an effective but least burdensome manner. Therefore, we believe our findings, conclusions, and recommendations are applicable to the goals of the new Order.

We realize that there are limits to the time and expense that DOE can devote to analyzing and developing regulations. Therefore, in this report we identify only what we believe are reasonable improvements in regulatory development that DOE needs to make.

We evaluated DOE's procedures by reviewing its development of three regulations. All three met the significant regulation criteria of DOE and are fully and clearly representative of DOE's regulatory development process. Two were developed by ERA and one was developed by the Office of Conservation and Renewable Energy. We selected these three proposed regulations because they were being developed under DOE's latest procedures, a regulatory analysis had recently been prepared for each, and DOE estimated that two of the three would be final regulations by the time our report was issued. 1/ For each of the three regulations, we examined information that is generally available to the public, such as the notice of proposed rulemaking, DOE's regulatory analyses of the rulemaking, and public comments. We also examined information not available to the public, such as internal DOE comments on the evolving regulations. We interviewed DOE officials involved in the development of the three regulations and discussed DOE's general regulatory reform efforts with DOE and Office of Management and Budget officials.

Our report is concerned with the adequacy of the DOE process for developing regulations rather than the adequacy of individual regulations. We do not render an opinion on the conclusions DOE reaches in its regulatory analyses; instead, we discuss only whether the analyses sufficiently cover the topics required by the Executive Order. Likewise, we do not attempt to judge the

---

1/The supplier/purchaser rule was issued in final; the rulemaking on changes to motor gasoline allocation regulations was split with half of the provisions finalized; and the Building Energy Performance Standards rulemaking was still under development, as of September 1981.

value of the public's comments on the three regulations, or whether DOE obtained a sufficient volume of public comments; instead, we examined DOE's procedures for using the comments in the reglatory process.

Although one of the regulations we examined was revoked and development of another was stopped when most of ERA's crude oil pricing and allocation controls were lifted, our findings and conclusions are based on a process-oriented evaluation and have applicability to continued use of that process for future regulations. Since this report is a case study of the development of regulations, it shows what problems DOE has had and what it must do to sharpen its regulatory development process. Thus, it can serve as a useful vehicle for examining possible regulatory problems and solutions at other regulatory agencies.

CHAPTER 2

GREATER COMMITMENT NEEDED TO ACHIEVE REGULATORY REFORM

DOE has not fully achieved the goals of Executive Order 12044. During the period from October 1977 to January 1981, DOE used two different approaches to regulatory reform; however, both efforts were largely ineffective, because DOE lacked

--a focal point for strong departmental oversight of the regulatory reform effort,

--clear policy and program guidance, and delegation of organizational responsibilities for those involved in developing regulations, and

--effective application of the policy by the program managers in the execution of their responsibilities (reinforced by Secretarial oversight).

Based on existing documentation the information made available to the various levels of decisionmakers was not complete and did not allow for a full perspective of the need, merits, and costs of the proposed regulations nor allow for effective executive oversight. We believe the data deficiencies resulted primarily from lack of guidance in preparing effective regulatory analyses. Moreover, DOE's recordkeeping practices need improvement to assure that the information which is developed is properly documented and readily available to decisionmakers.

Oversight by top management was not effective because of the lack of understanding of what was happening at the program manager level and/or indifference to what was happening because DOE was not fully committed to regulatory reform.

TWO INEFFECTIVE ATTEMPTS AT REGULATORY REFORM

DOE's first two attempts at regulatory reform were largely ineffective.

DOE's first approach, basically, was to identify 42 specific reform initiatives as a means of achieving reform. These initiatives were developed through a series of four regional public hearings and were intended to focus agency attention on specific reform actions. They included such diverse items as simplification of oil pricing regulations and clarification of contractor roles in developing regulations. The Department

established a group within the Office of Policy and Evaluation to coordinate and monitor progress on the initiatives. A former DOE official who headed this group said that most program officials did not want to pursue the reform measures, and that his primary power was the threat that the Deputy Secretary wanted adherence to regulatory reform. However, his office lost any potential influence when it became clear that achieving reform was not a priority. When emergency rulemakings needed quick approval during the 1979 Iranian oil cutoff, work on the initiatives became a low priority. DOE officials said the initiatives accomplished nothing, and the Office of Policy and Evaluation did not have the staff needed to review them.

As we discussed in our report, "Gasoline Allocation: A Chaotic Program In Need of Overhaul" (EMD-80-34, April 23, 1980), DOE's inability to allocate gasoline effectively during the summer of 1979 was caused by the poor design and inadequate implementation of its gasoline allocation regulatory program. We found that the Department's allocation problems were caused in part by its failure to update and revise its 5-year old regulations before the emergency occurred. As a result, DOE was forced to make 11 changes to its motor gasoline allocation regulations between February 22 and July 16, 1979.

The frequency of the changes and their immediate implementation caused significant problems, both for the industry in complying with the changes and for DOE field offices in retraining staff and dealing with the increased workload. The changes were made without benefit of regulatory analyses and, in many cases, without public hearings, nor was there more than minimal time for written comments from interested parties. This ad hoc approach forced DOE to make its decisions based on limited information and invited further changes.

DOE later discarded the specific project approach and emphasized improved procedures and increased oversight by top management in development of regulations. To gain control of the regulatory process, the Secretary of Energy issued a policy statement on December 13, 1979, to all Department heads requiring express authorization to be obtained from the Secretary or Deputy Secretary before drafting could begin on any significant final regulation, proposed regulation, or public notice concerning a possible significant regulation. He directed the General Counsel to revise DOE's internal regulatory procedures--DOE Order 2030.1--to make them consistent with his new policies. This authorization requirement became effective on January 1, 1980, and could be sought either through an action memorandum or through a meeting. In either case, the lead office proposing the action was to discuss (1) the legislative basis, (2) the need for the regulation, and (3) the substantive issues involved.

Also, the Office of the Secretary was to become directly involved in the regulatory process, with one staff member being assigned to oversee the Department's efforts in regulatory reform. However, this individual was unable to devote his full time to regulatory reform and was unable to carry out this role effectively. Furthermore, this official failed to (1) issue the revised procedures, and (2) assure that the Office of Policy and Evaluation provided effective oversight of the preparation of regulatory analyses. This individual told us that it would have been better if the revised procedures had been issued because it had been difficult to get the program offices to carry out the reform program. Inadequate regulatory analyses were not rejected by the Office of the Secretary and regulatory reform again suffered because of the absence of a strong departmental oversight activity.

BETTER ANALYSES ARE NEEDED TO IMPROVE THE REGULATORY DEVELOPMENT PROCESS

All three of the DOE regulatory analyses we examined had information gaps that significantly minimized their usefulness in the decision process. Two of the analyses did not include estimates of costs and benefits for alternative methods of regulating and the third only had such estimates in a technical support document issued six weeks after the issuance of the regulatory analysis. The other two regulatory analyses contained no concise explanation as to why such estimates were not present. Also, the analyses did not sufficiently address the potential effectiveness of the regulations because they did not fully discuss the enforceability of the regulations. Therefore, it is not clear whether DOE decisionmakers had the benefit of the information needed to decide whether the proposed method of regulating would be the most effective and the least burdensome. There are several causes underlying DOE's inadequate analyses. Specifically,

- --there was no clear identification of who is to monitor the quality of analyses,
- --there were no minimal requirements on what critical issues the analyses are to address, and
- --there is a limited amount of time to prepare analyses.

To correct these problems, DOE's written procedures should require that the regulatory analyses include a discussion of costs and benefits and the enforceability of the regulations. Also, exceptions to this should only be allowed after adequate justification. A monitor should be appointed in the Office of

the Secretary responsible for assuring that deficient analyses are rejected. This should improve analyses because project managers would know what is expected (what standard must be met) and know that compliance will be monitored. While time may always be a constraint on the development of a thorough analysis, better advance planning should help relieve this problem.

Roles and responsibilities not clearly established

DOE Order 2030.1 of December 1978 stated that the lead office was to assure that the regulatory analyses were properly prepared, but did not delegate responsibilities for monitoring their quality. The proposed Guidelines as they appeared in the February 25, 1980, Federal Register provided that the lead office would prepare any necessary regulatory analyses and the Assistant Secretary for Policy and Evaluation was responsible for reviewing draft and final regulatory analyses. A February 12, 1980, memorandum to the Associate Director, Management and Regulatory Policy, Office of Management and Budget, from the Staff Assistant to the Secretary of Energy stated that DOE's Office of Policy and Evaluation was to review, criticize, and improve regulatory analyses. However, these responsibilities were not clearly communicated to this office because the proposed Guidelines were never finalized.

The Deputy Assistant Secretary for Systems Analysis, Office of Policy and Evaluation, told us that his office had not issued any guidance on how regulatory analyses are to be conducted. As shown on pages 12-15, DOE's analyses have been deficient, and program offices have not been taking the necessary steps to assure that analyses provide the information needed by top decisionmakers, including the Secretary of Energy.

As an illustration of the need for better coordination of the responsibilities concerning regulatory analyses, we found that ERA has its own Economic and Data Analysis staff which is to provide analytic support for ERA's development of regulations. We believe this staff should review and comment on the regulatory analyses of all significant ERA regulations. The program office which is responsible for preparing the analysis should assure such coordination. ERA's Office of Regulations and Emergency Planning issued a memorandum in March 1980 requesting that the analysis staff receive copies of all draft and final ERA regulatory analyses. However, as of January 1981, the group was still not receiving copies of all of them. For example, the group head had never seen the draft of the final regulatory analysis of the proposed amendments to the supplier/purchaser rule until we showed it to him almost 2 months after the final rule was issued.

We are concerned as to why this group did not conduct a formal review of the regulatory analysis. DOE, in its February 12, 1980, memorandum to the Office of Management and Budget, admitted that the Department's regulatory analyses were still not uniformly satisfactory. As a means of improving analyses DOE had cited three planned or recent organizational changes. One was the increased size of the Office of Regulations and Emergency Planning's regulatory analysis group from 4 to 7 persons over the past six months. We believe this only further reflects the need for Department-wide oversight of the development of regulatory analyses and criteria for their development.

Clear standards needed for regulatory analyses information

DOE has not communicated to its program managers what essential issues regulatory analyses must address. As a result there is no assurance that DOE's analyses will provide the decisionmakers with the information needed for decisionmaking purposes. We believe this is well illustrated by the absence of certain key information from the three regulatory analyses we reviewed.

DOE, in the Federal Register notice for its new DOE Order stated that the proposed Order redefines the requirements of a regulatory analysis, in an effort to yield documents that will be of greater assistance to those in the Department who make decisions on regulations. While the proposed Order listed topics that these analyses were supposed to address, the fact that they were referred to as merely, "information that might be useful," raised the question of whether this was a requirement.

Program office officials who prepared analyses or supervised the contractors that helped prepare the analyses told us that DOE had no standard criteria for minimum required information for such analyses, other than that listed in DOE Order 2030.1. An Office of Management and Budget letter 1/ and DOE's proposed Order suggested extensive questions that analyses could address. According to officials in DOE's Office of Policy and Evaluation, no minimum standards were established because of the uniqueness of each regulation and the need for flexibility in the analysis of each one.

1/Office of Management and Budget letter to the heads of all departments and agencies, dated November 21, 1978, which discusses what regulatory analyses were to contain to comply with Executive Order 12044.

The need for some flexibility, however, should not deter the establishment of minimum standards. Some of the most basic questions were not addressed in the regulatory analyses we reviewed (see pp. 12-15), although they would appear to be critical to the decision process. Two especially important questions which the analyses did not sufficiently cover were the enforceability of the proposed regulation, and the costs and benefits of alternative methods of regulation.

Some of the most basic questions that any regulatory analyses should address, as identified in the DOE Order 2030.1 and the November 21, 1978, Office of Management and Budget letter are:

--What is the problem to be corrected?

--How will the proposed regulation correct the problem?

--Is the proposed regulation the least costly method of correcting the problem? If not, why not?

--How enforceable is the proposed regulation?

Alternatives' costs and benefits not estimated

Two of the three analyses did not provide dollar estimates of the costs and benefits of alternative methods of regulation. The third had the estimates in a technical support document issued six weeks after the regulatory analysis. The draft regulatory analysis for the regulation, Building Energy Performance Standards, provided a dollar estimate of the cost and benefits of the proposed methods in some detail, but the costs of the alternative methods were discussed only in general terms. For example, it stated that "less stringent" energy efficiency standards would have fewer impacts on the construction industry (in terms of volume of material and labor used) and would probably cost less to comply with as well as to enforce, but energy savings (a benefit) would be less.

Estimates of the costs and benefits of alternatives while not specified in the analysis, were later included in the technical support document. Ideally, as stated by an official in the Office of the Secretary, information on important topics such as this should be summarized in the regulatory analysis for early review by the Secretary and the public. The cost estimates of the alternatives are important considerations as illustrated by the DOE estimate that just the initial training of State and local building officials could cost $40 million.

The second proposed regulation would amend the supplier/purchaser rule on crude oil allocation. The draft and final

analyses primarily examine how the various alternatives affect competition in the industry, which is an important topic for this regulation, but do not contain complete dollar estimates of the costs and benefits of any of the alternatives, i.e., the dollar cost or benefit to the oil producers and refiners involved. Although the analysis stated that small independent refiners would be affected by changes in allocation regulations, it did not show how greatly or how many would be affected. Without this information, it did not demonstrate the need for or the best method of regulation. DOE officials disagreed among themselves over whether DOE had enough information to know the impact of the regulation (the total amount of crude oil affected by the rule).

DOE officials told us that the draft regulatory analysis contained a statement that DOE's analysis was limited to available data and that the analysis provided no definitive answers as to the best approach. However, we found that this statement provided no specific explanation as to why the more detailed information was not gathered.

Furthermore, the analysis of the proposed revisions to the motor gasoline allocation regulations lacks a specific estimate of costs and benefits either for consumers or for the types of businesses in different geographic regions. ERA's Assistant Administrator for Regulations and Emergency Planning told us that the gasoline allocation regulations were generally of an emergency nature and decisions were made that prompt action was more important than blind adherence to form. Therefore, ERA used such data as were available from reports submitted to it and from other sources. He stated that improving on those data would have required industry surveys, which in turn require Office of Management and Budget approval. Again we agree that time is a critical element; however, when such positions are taken they should be explained in detail within the regulatory analysis.

Regulation enforceability not adequately considered

To be effective, a regulation must be complied with. Unfortunately, compliance is only superficially discussed in DOE's analyses of the three cases.

The regulatory analysis for the Building Energy Performance Standards rulemaking merely notes in general terms that substantial training may be required to implement and enforce the regulation but states that the costs would be estimated later. This is an inadequate response to the overwhelming number of public and industry objections that the proposed regulation was particularly complex and burdensome and that the regulation would establish higher energy efficiency standards which would

require much time and expense for builders to understand and comply with. DOE officials explained that enforceability was excluded from the Building Energy Performance Standards regulatory analysis because the Department of Housing and Urban Development was responsible for enforcing the rule. Nevertheless such an important issue should be fully discussed in the regulatory analysis.

Neither the draft nor final analysis for the proposed amendments to the supplier/purchaser rule discussed potential compliance problems. ERA's Office of Enforcement officials raised several questions in a memorandum to the lead office, on increased problems of enforcement which would result if the rule was changed. These potential problems were not discussed in either the regulatory analysis or the action memorandum to the Secretary.

The Office of Enforcement had stated that it had been using this rule to take enforcement actions against parties who were engaged in illegal agreements. Enforcement had concerns that relaxation of the rule could have substantially increased the amount of crude oil that was available for paper or "daisy chain" transfers, increased the number of violators, and eliminated a basic tool Enforcement has used to enforce related pricing regulations. This could occur because it would be difficult to trace oil transactions to identify those transactions meant only to increase the price illegally. Office of Enforcement officials believed there would be an increase in such transactions.

DOE has had significant problems in enforcing some regulations. The Office of Enforcement has found numerous violations of petroleum regulations. Companies allege that some of these regulations were poorly developed, i.e., they are vague and incomplete. There are at least 130 court cases 1/ involving various types of challenges based on the promulgation of DOE's regulations. For the Secretary to be sure a new regulation or a change will be effective, he must know if it is clear and specific enough to prevent misinterpretation, thereby avoiding compliance problems.

In oral comments on this matter DOE officials said that concerns over possible compliance problems were discussed throughout the process. They told us that the Deputy Secretary was made aware of Enforcement's concerns by oral, unrecorded discussions with the ERA Administrator. They said that while

---

1/These actions include appeals from the administrative process, challenges to certain regulations brought directly by private parties, and cases brought by DOE.

the regulatory analysis excluded discussion of enforceability, the preamble to the Notice of Proposed Rulemaking discussed potential enforceability problems. The discussion in the preamble, while summarizing Enforcement's concerns, was basically a request for comments as to whether this would be a problem.

As previously noted, according to an Office of Management and Budget letter, regulatory analyses are to contain a discussion of alternative means of ensuring compliance with the regulation. In addition, we believe the regulatory analysis is the logical place for such a discussion since it is to be a forum for considering all important factors in deciding which methods of regulation are the best. Furthermore, it allows agency decisionmakers and the public to have one standard document on which they can depend, thus permitting more effective executive oversight.

Time constraints hamper regulation development

Proposed regulations may not be thoroughly analyzed because of time constraints. When an emergency arises, a thorough analysis may not be possible. However, we believe DOE can do more advance planning and analysis in areas where it can anticipate the probable need for future regulatory actions.

DOE officials told us that limited time can constrain the development of thorough regulatory analyses. They noted that all significant DOE regulations are tracked by DOE's Action Coordination and Tracking System. Under it, program managers establish schedules for completion of various major steps in the development of the regulation. Periodic meetings are held to discuss progress. Program officials complained that unrealistically short deadlines (for analyses and other steps) may be set as DOE tries to react quickly to a need for new or revised regulations.

At times, DOE has had to develop a new regulation or revise an existing regulation quickly to deal with an "emergency" situation. In other instances, an emergency may not exist, but DOE becomes aware of the need to amend an existing regulation because it is not acheiving its goal or it is causing new problems. In these cases, also, DOE wants to take quick action. Although limited time does constrain the development of a thorough regulatory analysis, we believe that DOE is aware of the speed with which such crises or problems arise and can do more advance planning and analyses in areas where it can reasonably anticipate that a new or amended regulation is needed or that an emergency may arise. For example, in 1974, one of DOE's predecessors, the Federal Energy Office, issued gasoline allocation regulations. Then in 1975 the Federal Energy

Administration (and later DOE) began considering the need to revise the regulations but failed to make the needed changes. As noted in our report, "Gasoline Allocation: A Chaotic Program In Need of Overhaul," (EMD-80-34, April 23, 1980), the crude oil shortage of 1979 forced DOE to update the regulations. DOE made 11 changes to these regulations without regulatory analyses and often without public hearings. The lack of proper planning and analysis forced DOE to make its decisions based on limited information, which opened the way for further changes.

PROCEDURES FOR OVERSIGHT OF THE PUBLIC PARTICIPATION PROCESS NEED IMPROVEMENT

DOE should improve its procedures for assuring effective oversight of the public participation process. This is needed to insure that

- --each program office has an effective public outreach program for effective liaison with consumer groups, Congress, and State and local governments, and 1/
- --advance notices are more widely used.

Oversight of program offices' public outreach activities needed

Better oversight of the program offices' public outreach activities is needed. The existing process does not assure that the critical knowledge maintained within the public interest offices is being transmitted to the individual program offices. We believe this is significant because such public interest offices were established by DOE to provide the Secretary a broad range of public comment to assist in the regulatory process. Currently, each program office determines the degree of involvement it solicits from the public interest offices. While we believe it is appropriate for the program offices to be responsible for ensuring proper public participation, we are concerned that there is insufficient oversight to assure that effective coordination is taking place between the program office and the public interest offices, especially with the Office of Consumer Affairs.

1/These public interest offices include the Office of Consumer Affairs, Intergovernmental Affairs, Public Affairs, Legislative Affairs and Minority Economic Impact.

ERA and the Conservation and Renewable Energy Office seldom ask the Office of Consumer Affairs to help plan and hold public hearings or to provide a consumer perspective in the regulation development. A Consumer Affairs official told us that the involvement of the public interest offices in these activities was a result of DOE's efforts to provide public interest groups some opportunity to make their views known. He was concerned that the well-organized and funded industry groups dominate the public comment, and those groups which are not well-organized and funded are not substantially involved. The official said that there is expertise and information available in DOE's public interest offices which the program offices should take advantage of. As a result, the broad perspective needed to make an informed decision on how to best regulate may be limited.

Although coordination responsibilities were not clearly stated, the public participation activities to be conducted were. Existing guidance in DOE Order 2030.1 stated that it was DOE's policy to develop regulations in an open and accountable manner with extensive public participation early in the process. Furthermore, the lead office and the others involved in developing the regulation were to work with the Office of Intergovernmental and Institutional Relations to include the public in the consideration of significant regulations, by various methods including

--notifying interested parties, State governors, DOE regional representatives, and appropriate Federal advisory committees;

--distributing appropriate notices or press releases describing the regulatory action to trade journals, newspapers, magazines, and newsletters that may be read by interested parties;

--holding public hearings and conferences with interested groups and individuals; and

--undertaking any other actions that may be required to provide DOE with a broad range of public opinion.

The new guidelines replacing DOE Order 2030.1 would have done little to clarify who is responsible for assuring that coordination took place, or how.

In the absence of clear coordination guidance, we found that each of the program offices determined the degree of involvement they solicit from the public interest offices. When we mentioned to a DOE program manager our concern that potential Office of Consumer Affairs involvement may be overlooked, he responded that they can always go to the Action

Coordination and Tracking System to identify rulemakings which may have some effect on public interest groups. He further mentioned that the Office of Consumer Affairs was to receive copies of the draft rulemakings. We believe this is a very hit or miss approach. In fact, officials from the Office of Consumer Affairs told us they often do not learn of new rulemakings until late into the process and that while they were on certain mandatory distribution lists they often did not receive copies of the drafts. Furthermore, the broad nature of the tracking system description may limit their ability to effectively identify pending rulemakings that may affect consumers.

The draft revised DOE Order also included a requirement that the action memorandum requesting approval to begin developing a rulemaking include proposed procedures for obtaining public comment. The procedures would identify the main interests that would be harmed or benefited by the regulation. However, none of the action memoranda we reviewed contained this information. DOE officials said this occurred because the Order was still a draft and not a requirement.

ERA program officials told us that they seldom ask the Office of Consumer Affairs officials to help with the program offices public hearings. They did note, however, that they periodically provided notices about pending rulemakings to the Office of Consumer Affairs and said that Consumer Affairs personnel were invited to the ERA's weekly regulation development meetings. They said that the program offices already use the methods previously cited to involve the public in significant regulations.

Office of Consumer Affairs personnel told us that they did not always participate because of funding and staffing limitations. They stated that they were not always provided copies of drafts which they were supposed to get.

Since concluding our audit work the Office of Consumer Affairs underwent a massive reorganization which resulted in a 50 percent reduction in staff and about an 85 percent reduction in its fiscal year 1982 budget from $1 million to about $160,000. The exact scope, purpose, and direction of the Office of Consumer Affairs is now being reconsidered within DOE.

In view of the substantial budget and staffing cuts experienced by the office designated to assure the public's input to significant regulations, we believe DOE should give special attention to seeing that effective oversight of public outreach programs is provided.

Early public involvement should be encouraged

DOE has no standard criteria for the use of notices of inquiry and advance notices of proposed rulemaking except for a broad statement in DOE Order 2030.1 that they are to be used when DOE lacks sufficient information on a regulation. These documents describe a problem and seek public response concerning the need for regulation and the adequacy of the agency's anticipated regulatory response.

In one of the three cases we reviewed, an advance notice was successfully used to obtain a large volume of public and industry comment. Yet in a second case where a notice of inquiry or advance notice of proposed rulemaking could have been used, it was not. In the former case, the advance notice approach on the Building Energy Performance Standards proposal was very helpful in encouraging the regulated industry and the public to provide comments on a very complex issue. We believe DOE was successful in this case because it clearly identified what it wanted to know from the public and what DOE's thinking was on the issue.

In the gasoline allocation revision case, ERA's Assistant Administrator for Regulations and Emergency Planning said that DOE decided not to use an advance notice because DOE already knew what the problems were with the program and that others including GAO were pressing DOE to take immediate corrective action.

Out of 14 major, significant regulations proposed during 1980, ERA published no notices of inquiry and no advance notices of proposed rulemaking. The Conservation and Renewable Energy Office did not have readily available data on the number of proposed or final regulations which were preceded by such notices during 1980. Increased use of these notification methods by DOE would help DOE increase the public's early participation in developing technical and complicated regulations. For example, two industry representatives, in commenting on DOE's proposed guidelines to implement Executive Order 12044, said that notices of inquiry could be better utilized. One commentor suggested that the new Order's section on notices of inquiry be revised as follows:

> "Notices of inquiry or advance notices of proposed rulemaking can be a significant advantage in securing increased and more effective public participation and thereby helping the department develop regulations based on more complete knowledge of public concerns. Accordingly, the use of such notices are favored and should be used as often as possible, especially in areas of regulation involving complicated, technical matters

in those areas of heightened public debate and awareness and in other areas where the process of departmental development of regulations would be benefited."

The increased use of these advance notification methods could assist DOE in obtaining early public comment critical to effective decisionmaking. Such comments could aid DOE's regulatory analyses which, as shown on pages 12-15, are sometimes incomplete. Petroleum industry representatives noted that DOE needed to make wider use of notices of inquiry. For example, one industry representative noted that with more openness as to what information is needed DOE's program offices would be able to receive suggestions from all parties affected by the regulation on approaches toward solving the problem before expending substantial sums of money in arriving at a proposed solution.

IMPROVED RECORDKEEPING WOULD STRENGTHEN OVERSIGHT

DOE established, on November 5, 1979, a policy for the materials to be included in the administrative record for each DOE rulemaking; however, DOE's files did not contain all these materials. The policy is essentially consistent with a recommendation of the Administrative Conference of the United States 1/ to the Congress and Federal agencies, (1 CFR 305.74-4). DOE administrative records are to include the Advance Notice of Proposed Rulemaking and/or Notice of Proposed Rulemaking, formal comments received during the comment period, records of oral comments made at public meetings, reports of any advisory committees and the preamble to the final rule.

The records should also contain any other documents or information which provided substantial support for the final rulemaking decision. Such documents may include staff summaries of public written or oral comments, inter and intra-agency memoranda, informal communications, summaries of significant oral informal communications, studies and material from DOE's files. DOE's administrative files did not generally contain these kinds of documents. We were particularly concerned about (1) the absence of critical intra-agency memoranda, (2) the lack of summaries of significant oral, informal communications, and (3) the poor quality of staff summaries of public

---

1/The Administrative Conference of the United States is a permanent independent agency of the United States, whose aim is to develop improvements in procedures by which Federal agencies administer regulatory and other programs.

written or oral comments. Such material would give regulation writers and decisionmakers a better understanding of the particular basis for the regulatory approach selected as the rule is being developed, thus making contributors to the process more accountable for their decisions.

When we requested these types of information on the supplier/purchaser and the gasoline allocation rules, program officials said they assumed such information was kept on file by the Office of General Counsel attorneys. The attorneys, however, said recordkeeping was the responsibility of the program offices and there is no legal requirement to maintain all internal comments.

In one case we were unable to locate critical internal comments in the file of the attorney responsible for drafting the rule, the program manager's file, or the official docket file. In commenting on several internal drafts of the proposed supplier/purchaser rule, the Office of Enforcement wrote several memoranda opposing its issuance. They expressed concern that the proposed rule would be difficult to enforce and that it would hamper the enforceability of certain existing crude oil pricing regulations. The attorney responsible for drafting this rule explained that he does not maintain any record of internal comments, whether oral or written, and said we would have to go to the originating office to obtain copies. Instead, as the comments on each draft are received, they are noted on the working draft and then discarded. The working drafts are also destroyed with each succeeding version.

Furthermore, we could find no documentation that this critical information was provided to the Secretary. The action memorandum made no reference to enforceability. In addition, although DOE's Office of Enforcement officials told us that they had two meetings with the Administrator, ERA, to discuss the basis for their nonconcurrence, we could find no record of these meetings in the official file, the program office files, or the attorney's files.

Another problem was that summaries of key staff discussions on the evolving rules were seldom in the administrative files. DOE's regulations are primarily developed through detailed discussions between representatives of the Office of Policy and Evaluation, the program offices, and OGC. General Counsel officials contend that preparing such summaries would take excessive time and reduce the candor of participants. They said there is always a lot of give and take and everyone receives an opportunity to state their position and rationale. They believe there is no need for a written summary because the next draft circulated for comment summarizes the results of the past meeting.

However, we found that there was not always such a clarity of purpose and direction. For example, one Office of Petroleum

Operations' representative told us that, although the working group participants usually were permitted a free forum to voice their opinion, he was never really sure what the next draft would look like. When we brought this to the attention of the OGC attorneys, they agreed that sometimes the approach OGC selected to solve a particular problem was subject to disagreement. But these officials believed that there is generally a good understanding of what takes place in the group discussions and it is generally understood what the next draft will look like.

Improved Summaries of Public Comments Needed

DOE needs to improve its (1) summaries of public comments, and (2) dissemination of comments among officials responsible for developing regulations. The lack of criteria and the low priority that program managers give to the preparation of summaries prevent this valuable decision-aiding tool from being effectively used. Furthermore, DOE is unable to assure that adequate, accurate, timely and useful summaries are prepared.

The DOE Organization Act requires that a final rule be accompanied by an explanation responding to major comments, criticism, and alternatives offered by the public. To help highlight important issues and to present the range of comments regarding them to others, program offices began to prepare summaries of major comments. However, DOE has no guidance on the format for the summaries nor on the critical information these summaries should contain to be useful to persons responsible for responding to the public. As a result, ERA's comment summaries vary in quality, accuracy and usefulness.

An ERA official told us that there is no legal requirement that summaries be prepared, and that they are only as good as the quality of public comments ERA receives. Furthermore, the ability of the contractor or in-house officials to determine the best format also affects the quality of the summaries. We believe, however, that DOE can do a better job of analyzing and preparing summaries of public comments. For example, the summaries for the two ERA rulemakings we examined were little more than tallies of how many were for and against the rulemakings.

An OGC official who prepared the official response to public comments on the motor gasoline allocation regulation revisions told us that it is not OGC's responsibility to prepare summaries of public comments on a rulemaking. However, they are responsible for preparing the official response to the public in the final regulation notice and assuring this response meets the legal requirements of the Administrative Procedure Act, the DOE Organization Act and the Executive Order.

The same OGC official said that the summary of public comments on the proposed revisions to the motor gasoline allocation regulations, which was prepared by a contractor, was of little value. Therefore, to prepare the official response he reviewed the hearings records, including over 100 written and oral statements, circulated draft versions of the response to the public comments, and asked DOE officials who had been involved in developing the regulation to comment on whether the draft represented an adequate discussion of the public's significant comments. The Assistant General Counsel for Petroleum Regulations told us that it is normal practice for OGC attorneys to read, analyze and summarize the public comments before drafting the official response. Furthermore, it is DOE's policy that all participants developing the rulemaking must read all the comments.

In addition, not all comments were in the record. For example, when we asked what constitutes the public comment record of an ERA regulation, an ERA official who assisted in the development of the proposed revisions of the motor gasoline allocation regulations told us that it includes all the written and oral comments ERA receives in its docket room during the comment period. He said that because the compilation and summarization of comments have been incomplete in the past, he also included comments received shortly after the close of the comment period so that as many as possible would be used to prepare the written summary. An OGC official involved in writing the proposed motor gasoline allocation regulation revisions told us that public comment records include petitions for rulemaking, congressional inquiries, and written and oral comments. He also told us that, although they should be included, there is no assurance that Congressional inquiries which comment on a regulation are ultimately included in the public comment record. For example, our examination of the public comments on the supplier/purchaser rule revealed that Congressional correspondence that should have been reflected in the summary of comments on this rule was not a part of the public comment record used to prepare the summary.

As discussed above, we believe DOE's record keeping practices need improvement. The program offices which receive and answer Congressional inquiries should distinguish between those requesting information and those stating a position and make sure that the statements of position are made a part of the public comment file for consideration during the development of a regulation. These problems raise questions as to the adequacy of ERA's internal process for receiving, handling and compiling an adequate public comment record to be used by those officials responsible for preparing responses to the public on DOE's actions on the public comments.

In the Building Energy Performance Standards regulatory proposal, only a partial summary of the public's comments had

been prepared as of March 1981 even though extensive public comments had been obtained at hearings and through written statements sent directly to DOE. A contract representative who was given the task of analyzing and summarizing the public's comments on this rulemaking told us that oral and written comments presented at the hearings in March-April 1980 were summarized in May 1980. This summary was not considered to be complete as it only addressed comments presented at the hearings, did not go into great detail about the issues, and was not an official document. It was merely a working draft and a first attempt to analyze a portion of the public comments. An updated version of public comments was available in February 1981. This version also was not considered to be complete, although it included the information from the first draft and comments that were sent directly to DOE.

The contract representative told us that a final version of the public's comments is being prepared, and that several incomplete, working drafts have been prepared. She also told us that the working drafts will eventually be combined into a final summary of the public's comments, and be available to decisionmakers for use in preparing an official response to the public on the Conservation and Renewable Energy Office's actions on the rulemaking relative to the public's comments. Such a summary of public comments would be more useful to the decisionmaker if it was complete and made available as early as possible rather than more than a year after the comment deadline.

DOE officials told us that they considered the summary of public comments to have been completed. They explained that it was made up of (1) the May 1980 summary of public comments presented at the hearings and (2) a three volume document entitled, "Building Energy Performance Standards Public Comment Data Base, December 1980". The three volume document is a computer listing of about 1,740 public comments arranged by issue. However, we did not consider such a voluminous document to be useful to top decisionmakers.

- - - -

We believe the indications are clear that DOE needs to assure that the necessary material is maintained as regulations go through the drafting process and to establish responsibility for retaining the material. Such actions are needed to assure that those in the oversight role can determine proper accountability for decisions. Furthermore, because the OGC is presently preparing a summary of comments for the preamble, we believe time and money could be saved if OGC were made responsible for compiling their summaries as early as possible after close of the comment period and circulating them to those involved in the decision-making process.

CHAPTER 3

CONCLUSIONS, RECOMMENDATIONS, AND AGENCY COMMENTS

DOE was unable to meet the goals of regulatory reform as stated in Executive Order 12044 primarily because in the past the Department has not placed a continuing high priority on achieving its goals. It was not fully committed to regulatory reform and allowed its initial efforts to lose momentum with the result that there has been little real change in the way regulations are developed. We are concerned that this trend may continue if DOE does not understand the need for continuing commitment.

With waning oversight from top management, efforts to improve the policy and program guidance and the delegation of organizational responsibilities have faltered and stopped and, correspondingly, those responsible for developing regulations have given higher priority to their other responsibilities. Clearly, regulatory reform is more than procedures--it is also an attitude which starts with top management, and extends throughout the Department.

We recognize that other factors must be dealt with by the Secretary with respect to regulation development, such as time constraints, political pressures, and emergencies. But the impact of these factors on the proper development of regulations must be carefully weighed by the Secretary and not allowed to have a continuing detrimental influence on regulatory reform. Indeed, we believe adherence to the goals of Executive Order 12291 will give the Secretary a firm basis for dealing with these other factors.

We believe it is imperative that the Secretary of Energy make a strong commitment to regulatory reform by

- --designating an official in the Office of the Secretary to be responsible for oversight, and giving that official strong and continuing support;
- --providing clear policy and program guidance, and making delegations of organizational responsibilities for those involved in developing regulations;
- --assuring that the policy is adhered to by the program managers in the execution of their responsibilities (reinforced by Secretarial oversight); and

--recognizing that, while legitimate energy emergencies may occur, waiver of standard processing procedures should be granted only in rare cases, and only by Secretarial approval for individual regulations.

Our specific recommendations for improving DOE's regulatory development process are stated below:

RECOMMENDATIONS TO THE SECRETARY OF ENERGY

We recommend that the Secretary

--Ensure proper organizational responsibility by designating

(1) one individual within the Office of the Secretary responsible for oversight of regulatory reform, including monitoring the quality of regulatory analyses;

(2) the group within the Department responsible for assuring that public participation activities are properly carried out, including providing comment on plans for obtaining public comment contained in action memoranda; and

(3) the office which is responsible for maintaining the regulatory decision file.

--Provide guidance and direction to program managers by issuing a DOE Order which will

(1) require an action memorandum which would include a discussion of (a) the problem to be addressed, the legislative authority for the regulation, the substantive issues raised by the proposed regulation, the regulations' enforceability and its impact on other regulations, (b) those groups most likely to be affected and in what manner, with a plan for obtaining comment from these groups, (c) whether a regulatory analysis will be needed, and (d) the extent to which cost/benefit information is readily available;

(2) specify what information must be included in the regulatory analyses, including estimates (or ranges of estimates) of the costs and benefits of each alternative; a brief discussion of how the estimates were computed; the underlying assumption on which the estimates were based; the reason why estimates or a particular estimate

could not be determined; and a discussion of how effectively the alternatives can be enforced, as well as their potential impact on the enforceability of existing regulations;

(3) ensure enhanced public participation by defining when to use notices of inquiry and advance notices of proposed rulemakings (e.g. when subject material is new or controversial, or when DOE lacks complete information on the subject);

(4) make sure that necessary documentation is maintained for the Secretary's review; and

(5) require the Office of General Counsel to summarize all the public comments as soon after the close of the comment period as reasonable, and disseminate them to those involved in the regulatory process.

AGENCY COMMENTS AND OUR EVALUATION

DOE disagreed with most of the conclusions and recommendations in our draft report although it did not specifically respond to all of them. DOE said we had failed to reflect a realistic understanding of regulatory and management principles. We are somewhat puzzled by this comment because our review centered on the adequacy of DOE's regulatory process to carry out the management and regulatory principles set forth in Executive Orders 12044 and 12291, which govern regulatory reform.

Also, DOE stated that our conclusions and recommendations may be of limited utility in advancing the cause of regulatory reform because they do not address DOE's problems and successes in regulatory reform. We disagree. We have clearly shown how DOE's regulatory process fails to comply with the Executive Order governing regulatory reform. The principal problem identified was a lack of executive oversight of the process, a key reform element that was highlighted in both Executive Orders. DOE, however, was not fully responsive to the oversight problems discussed in the draft report. Although DOE's written comments on our draft report were not fully responsive and failed to acknowledge any problems in DOE's current rulemaking process, we are hopeful that the current DOE leadership will commit to improving its regulatory reform program, by assuring top level oversight of the regulatory process.

We have reviewed DOE's comments and made changes where appropriate. Some were technical in nature; others were more substantive as discussed below.

Roles and responsibilities not clearly established

DOE disagreed with our conclusions that DOE had not clearly identified who was responsible for monitoring the quality of the regulatory analysis. It noted that DOE Order 2030.1, dated December 1978, specifically placed responsibility for conducting the analysis in the program office and provided that the Office of Policy and Evaluation was to review the regulatory analyses.

Although DOE Order 2030.1 did provide for general office responsibilities, it was apparently not clear as to the specific responsibility for monitoring the quality of the regulatory analyses because the Deputy Assistant Secretary for Systems Analysis, Office of Policy and Evaluation, believed that such responsibility was with the program offices. Consequently, no one person or office has been responsible for the quality of the regulatory analyses nor has it been explained how quality was to be measured. In fact, the Office of Policy and Evaluation, although responsible for reviewing and improving regulatory analyses, has not provided any guidance to the program offices on how to prepare such analyses. Furthermore, ERA's regulatory analysis group has not been fully effective because it is not afforded the opportunity to review the regulatory analyses for all significant regulations. For example, it did not see the regulatory analyses for the supplier/purchaser rule until 2 months after its issuance.

DOE also stated that our recommendation that one person monitor all DOE regulatory analyses was unrealistic because no one person or office could be expected to have the resources or expertise to monitor the quality of such analyses because of the technical complexity and diversity of DOE regulations. We believe such an oversight position is not only realistic, but basic to effective management and consistent with the requirements of the Executive Orders. We view this individual's role as a practical and realistic one of assuring that DOE's program offices produce analyses which are beneficial to decisionmakers and the public. The monitor would assure that the analyses were prepared in a timely fashion to meet certain minimum standards as discussed in this report and required by the Executive Order. This designated official could make sure that there was proper coordination between program offices and the offices providing technical assistance. For example, although the staff of the ERA regulatory analysis group had almost doubled, it had no assurance that it would have an opportunity to review and comment on each regulatory analysis. The monitor could assure that this step in the review process was taken.

Need for minimum standards in preparing regulatory analyses

DOE disagreed with our conclusion that there should be minimum standards for all regulatory analyses. DOE said that

such a conclusion is contrary to the views expressed by both DOE and Office of Management and Budget personnel experienced in the area, and that it was also inconsistent with the most recent guidance received from OMB regarding regulatory impact analyses under Executive Order 12291.

On the contrary, our conclusions and recommendations are directly in line with this recent guidance. On June 13, 1981, the Office of Management and Budget issued "Interim Regulatory Impact Analysis Guidance." This guidance noted that the fundamental test of a satisfactory regulatory impact analysis is whether it enables independent reviewers to make an informed judgement that the objectives of Executive Order 12291 are satisfied. It described five elements and asserted that a regulatory impact analysis that includes all these elements is likely to fulfill the requirement. The guidance recognized that variations consistent with the spirit and intent of the Order may be warranted for some proposed rules, but that most analyses were expected to include these elements. Each of our recommended minimal standards is consistent with the five elements contained in Executive Order 12291.

In commenting on the specific rulemakings we reviewed, DOE said that although the Building Energy Performance Standards regulatory analyses did not contain a discussion of costs and benefits, such a discussion did appear in a separate document called an "economic analysis." However, DOE failed to note that this separate analysis was in a document issued 6 weeks after the issuance of the regulatory analysis.

DOE was particularly concerned that we did not recognize the difficulties associated with costs and benefits, especially for allocation rulemaking. For both the gasoline allocation and supplier/purchaser rules DOE said that it was impossible to acquire the data necessary to translate costs and benefits into dollars. DOE said it had acknowledged to the public in preambles to the rules that such data could not be developed. Although true, we believe these explanations were inadequate. For example, in the supplier/purchase rulemaking, although admitting that all cost/benefits questions were not answered due to information gaps, DOE did not adequately explain why it did not gather the information or provide an estimate of the dollar costs to derive such data.

In response to our criticism that the supplier/purchaser rule omitted a discussion of enforceability, DOE said that the preamble to the supplier/purchaser rule did discuss this problem. Such discussion, however, was inadequate. It was not a part of the regulatory analysis, and while summarizing Enforcement's basic concerns, it contained no information concerning the potential dollar costs which could result from these enforcement problems, nor did it specifically discuss any alternative enforcement approaches.

In summary, we agree with the thrust of both Exeuctive Orders that regulatory analyses need to discuss certain basic questions, including, to the extent possible, cost and benefits and enforceability. We recognize that detailed cost and benefit data is not always available. In such cases, ranges of estimates should be used, or a detailed explanation should be given as to why such estimates could not be made and how DOE assured the public that its concerns were properly considered.

We remain concerned that the agency head may not be able to exercise oversight because the critical decision information is not summarized in the regulatory analyses. The framework set forth by regulatory reform in general, and the regulatory analysis in particular, leads to better accountability and allows the public, decisionmakers, the judiciary and the Congress to more effectively oversee the decision process.

Time constraints hamper regulatory development

DOE did not believe it was relevant to mention time constraints as a cause for ineffective regulatory analyses especially because none of the three cases we examined were developed under emergency conditions.

We examined DOE's process for regulatory development and did not limit our work to the three cases. Accordingly, we pointed out how deficiencies noted in a past report 1/ could continue if appropriate actions are not taken. The report pointed out that some program problems resulted from DOE's failure to update its existing regulations. Moreover, DOE shortcut the process when pressure grew, and depended on ad hoc rule changes to respond to the problems without having the benefit of regulatory analysis and public comment, thus leading to frequent changes in the regulations.

In the February 25, 1980 Federal Register notice announcing its proposed Guidelines to replace DOE Order 2030.1, DOE expressed hope that improvements in their contingency planning efforts would minimize the need for emergency regulatory procedures. If not, it hoped that the increased flexibility in the proposed Guidelines would often permit the regulatory process to follow its procedures even when rapid action was important. These proposed Guidelines, however, were never issued. We believe time does constrain effective regulatory analyses as acknowledged by ERA program managers in our report. We believe, therefore, that the potential still exists for DOE to place undue dependence on emergency rulemaking, thus once more losing the benefits of regulatory analyses.

1/Gasoline Allocation: A Chaotic Program in Need of Overhaul, (EMD-80-34, April 23, 1980).

DOE wrongly implied that we did not approve of emergency rulemakings. On the contrary, we agree that emergency situtions do occur, and under such exceptional circumstances, waiver of the rulemaking and regulatory reform provisions are a consideration and in some instances necessary. However, this is not the same as abusing emergency waiver provisions which DOE itself has recognized it had done in the past.

Recordkeeping

DOE disagreed that there was any need to improve its recordkeeping practices. They disagreed with our proposal that DOE should establish the items which are to be included in the file, and to clearly identify the office responsible for maintaining the file. Among other comments on this subject, DOE said that our suggestions would result in (1) phenomenal costs in terms of time and resources, and (2) a massive file of relevant and irrelevant information which would not aid oversight and accountability.

We discuss in our report DOE's policy for the materials to be included in the administrative record for each DOE rulemaking. We have pointed out that DOE's standards are essentially consistent with those recommended by the Administrative Conference of the United States. Furthermore, we are not suggesting that DOE have a memorandum for every meeting involving a rulemaking; instead, we are stressing the importance of having documents which memorialize and reflect the positions of key agency personnel on substantive issues concerning a particular rulemaking. We have clarified our report and its recommendations to reflect this point.

The fact of the matter is that we were unable to determine the extent to which certain critical decision factors were weighed in the decision process because necessary records were not maintained. For example, had we not reviewed the detail work files of the Office of Enforcement, we doubt that we would have discovered the degree of significance that this office attached to its problems with the supplier/purchaser rule.

Any recordkeeping process needs to assure that the essentials of the decision are documented with minimal paperwork. Because there are a variety of users and uses of the rulemaking file, those keeping the file need to carefully consider what documents are to be kept, or which meetings are to be memorialized.

GAO, agency management, and others responsible for oversight of an agency programs, such as the Inspector General, need well maintained records to successfully accomplish their work. Information should be available, which among other things provides insight to the process. For example, with respect to a study of a regulatory analysis, material should exist that would allow oversight groups to evaluate the methodology used in preparing the analysis, and the thoroughness and adequacy

of the analysis. DOE's records, however, were inadequate for us to effectively perform our audit, and the process did not assure that key decisional documents would be maintained. We believe that because the file is to provide a permanent record of the bases and rationale on which the rule was developed, some memorialization of intra-agency discussions is needed. For example, when rulemaking matters are discussed with the Secretary or Deputy Secretary, records should be kept summarizing the matters discussed while recognizing that some of the discussion may need to remain private in order to encourage a full and frank exchange of opinions and advice.

Public participation

DOE did not address our recommendation that DOE establish a group to oversee public participation activities within the the Department. Instead, DOE expressed pride in the success of its public outreach efforts.

While we did not conduct a detailed analysis of the effectiveness of DOE's public participation programs, we believe that a Department-wide coordinator for public participation is needed. In the past DOE had also taken this position. In its Interim Regulatory Impact Analysis Guidance under Executive Order 12291 OMB points to the need for agencies to schedule out to whom benefits would accrue. We believe this is the essence of our recommendation on page 26 that the action memorandum should identify the parties benefited. The next logical step would be to plan how the comments or input of these parties would be sought, such as public hearings, advance notices of proposed rulemakings, specific conferences or open forums. The best way to ensure effective oversight of Department-wide public participation is to have one group responsible for coordinating these activities.

Advance notices need to be more widely utilized

DOE disagreed with our recommendations that they needed criteria for using advance notices of proposed rulemakings. It stated that the Department adhered to the criteria of DOE Order 2030.1 to use advance notices when they lacked sufficient information.

The broad nature of this criteria raises the question of how the Department's program offices can best decide whether or not to use an advance notice. In its comments, DOE stated that it would solicit comments through advance notices for new programs, but would not use advance notices for revisions to ongoing regulatory programs. We believe advance notices are appropriate for new and established regulatory programs. When it is determined that established programs need major revision (as in the case of the gasoline allocation program), it is an

indication that there is some deficiency in the regulatory approach being followed. This may indicate a need to consider new ideas, new combinations of old ideas, or simply a modification of the established regulatory approach. Furthermore, the experience with the program that had been established may have provided a basis for the public and industry to revise their views.

An advance notice provides additional time for everyone (industry, government, labor and consumers) to identify the problem and the causes and to advance proposals of alternative solutions. This would provide DOE a basis for developing practical alternative approaches, applying its knowledge and experience, including complete trade-offs of the alternative costs and benefits in the regulatory analysis.

We agree that the gasoline allocation revisions were very time sensitive, but this was even more reason to obtain the benefit of an advance notice. DOE could have issued the advance notice in March or April, and given the heightened public interest at that time, several alternative approaches could have probably been advanced. However, DOE did not issue its Notice of Proposed Rulemaking until June, 1980. Furthermore, DOE still had not developed regulatory solutions to all the gasoline allocation program's problems, when President Reagan exempted crude oil and refined petroleum products, including gasoline, from price and allocation controls in January 1981.

Summaries of public comments

In responding to our discussion of public comment summaries, DOE expressed the belief that some of our discussion might change pursuant to meetings with GAO staff. We had proposed in our draft report that as a method of assuring enhanced public participation, the Secretary of Energy provide guidance to program managers on how to prepare summaries of major public comments and their disposition.

DOE further stated that it wanted to make its views clear on the role of summaries of public comments. Specifically, DOE said that (1) summaries are not to be a substitute for the actual reading of all the written comments and attendance at, or a reading of the transcript of the public hearings, (2) it is DOE's policy for those primarily involved in the rulemaking process to familiarize themselves fully with all the public comments directly from the source materials, and (3) the legally required response to major comments contained in the preamble to a final rule is prepared directly from the source materials not from the summary.

DOE also said that such summaries are sometimes a useful tool, but that this usefulness differs from rule to rule, and it is not such an important tool that much attention should be paid to it.

We agree that summaries are a useful tool, but we also believe they are worth paying attention to. As pointed out in this report, the summaries prepared by the program offices are often of poor quality, and, as acknowledged by DOE officials, of little use in the rulemaking process. In view of the poor summaries prepared by the program offices and because OGC is legally required to respond to major comments, we believe that OGC could summarize all public comments and eliminate the duplication of effort that now exists. Of course, the OGC summary would have to be prepared as early as possible after the close of the comment period, and disseminated to all those involved in the rulemaking process. Accordingly, our recommendation has been revised.

Department of Energy
Washington, D.C. 20585

August 13, 1981

Mr. J. Dexter Peach
Energy and Minerals Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Peach:

The Department of Energy (DOE) appreciates the opportunity to review and comment on the General Accounting Office (GAO) draft report entitled, "Improved Oversight and Clearer Guidance Needed to Achieve Regulatory Reform at DOE." We have already provided to your staff detailed comments on the draft report. Although we do not know to what extent the final report will reflect our detailed comments, this letter will not reiterate those concerns but rather will address the larger issues contained in certain of the conclusions and recommendations of the draft report. We believe this is important because of our concern that the draft report does not present a balanced analysis of the problems and successes of regulatory reform at DOE.

The draft report is based upon case studies of three rulemakings that took place during the previous Administration. The thrust of the draft report is that those involved in the decisionmaking process in these rulemakings did not have the benefit of all the cost and benefit data and analysis that would provide a full perspective of the needs, merits, and costs of the proposed regulations. These deficiencies, it is said, were the result of a lack of guidance and the exigencies of situations that required regulatory decisions faster than would allow for full regulatory analyses. Finally, GAO believes that DOE's documentation of the process by which the three case-study regulations were developed somehow was inadequate to allow the Secretary of Energy to have meaningful oversight over these three regulations. In our view, these conclusions do not reflect an informed understanding of DOE's regulatory process. More importantly, we fear that the conclusions and recommendations may be of limited utility in advancing the cause of regulatory reform because they fail to address the real problem issues in regulatory reform.

Alleged Insufficient Data and Analyses

The draft report focusses on the documents entitled "regulatory analysis" in three rulemakings and finds them lacking in certain respects, primarily the lack of quantification of costs and benefits of the proposed rule and its alternatives and the lack of discussion in the regulatory analysis of the regulation's enforceability. By focussing on the document entitled "regulatory analysis," the draft report implies this is the only document in which such issues might appropriately be addressed. But we believe that such an approach elevates form over substance, and that the true questions must be whether an agency has considered the relevant issues, weighed them, and reached a supportable conclusion--with this process reflected in the public record so as to provide opportunity for public comment. Thus, while it is true that in the Building Energy Performance Standards rulemaking there was no discussion of the quantitative analysis of dollar cost and benefit estimates of alternatives in the document called "regulatory analysis," such a discussion appeared in a separate document called an "economic analysis." In the Supplier/Purchaser rulemaking, the preamble to the rule discussed why the costs and benefits of that rule could not be expressed in dollar terms. The preamble also discussed the issue of enforceability. Consequently, DOE did consider and analyze these issues and did make discussion of them available to the public.

Second, GAO's preoccupation with quantitative cost/benefit analysis assumes that all costs and benefits of all rules can be easily reduced to dollar amounts. In two of the three rules GAO studied, Supplier/Purchaser and Gasoline Allocation, it is simply impossible to acquire the data necessary to translate costs and benefits into dollars. Moreover, no one has developed a methodology for determining the dollar costs and benefits of an allocation regulation such as were involved here. Some additional data could have been collected, but only after an enormous expenditure of resources and an increased burden on the regulated industry as well as the agency.

Because the draft report largely ignores public documents other than the regulatory analysis and fails to recognize either the theoretical or practical limitations on quantitative cost benefit analyses, the draft report's conclusion, that the data and analysis available to decisionmakers was not fully adequate with respect to the three rules, is simply not supportable.

APPENDIX I

Alleged Lack of Guidance with Respect to Regulatory Analyses

The draft report finds two deficiencies in DOE's guidance relating to regulatory analyses: the lack of formally recognized minimum standards for every regulatory analysis and alleged lack of focussed responsibility for regulatory analyses.

The draft report's conclusion that there should be an absolute basic minimum that should be included in all regulatory analyses is contrary to the views expressed by both DOE and OMB personnel experienced in this area. It is also inconsistent with the most recent guidance received from OMB regarding regulatory impact analyses under E.O. 12291. DOE initially intended to implement E.O. 12044 in the manner suggested by the draft report, but experience quickly indicated that absolute minimum standards were counterproductive. Consequently, we disagree with the conclusion that the lack of such minimum standards is a deficiency. But, as a matter of substance, in each case GAO examined DOE in fact met the draft report's minimum standards. There is, therefore, no basis for GAO to suggest that DOE's regulatory analyses in fact ignored any relevant consideration.

Contrary to GAO's assertion, during the period in question DOE's procedures clearly specified who was responsible for the regulatory analysis process. DOE Order 2030.1 specifically placed responsibility for conducting the analysis in the program office which was designated as the "lead office" for the particular regulation. The Order also specified that the Office of Policy and Evaluation was responsible for reviewing the regulatory analyses, and that the Energy Information Administration was responsible for helping to prepare documentation, upon request. Accordingly, the conclusion in the draft report that roles and responsibilities were not clear is simply unsupported by the facts. Moreover, GAO's suggestion that one person be designated to monitor all DOE regulatory analyses is unrealistic. No one person, or even one office, within DOE can be expected to have the resources or expertise to enable it to be responsible for monitoring the quality of every document that reflects the regulatory analysis in every DOE rulemaking, due to the technical complexity and diversity of DOE regulations.

Exigencies of Situations

The draft report also states that the "exigencies of situations" tended to require decisions faster than the regulatory reform process would allow. While there have been DOE

rulemakings in the past where the demands of the situation precluded full implementation of the entire panoply of regulatory reform procedure, such was not the case in the three rulemakings studied. This fact is demonstrated by the draft report's failure to indicate how this claimed problem is reflected in the three case-study rules that the draft report characterizes as fully representative of DOE's regulatory process. Of the three case-study rules none took less than eight months to adopt and one, the BEPS Rule, has not been made final almost two years after the proposed rule was published.

Instead, the draft report looks back to the Iranian oil shortage of 1979 and repeats a number of factual inaccuracies contained in an earlier GAO report. The suggestion is that, by utilizing emergency rulemakings during that crisis, DOE acted contrary to the spirit of regulatory reform. This, however, is simply not true. Both E.O. 12044 and E.O. 12291 expressly provide that the procedures of the Order do not apply when a regulation is issued in response to an emergency. In each case in which DOE utilized an emergency rulemaking, the decision was made by the Secretary, Deputy Secretary, or Under Secretary of Energy, often after consultation with the White House. Such exceptions to the normal process were made in recognition of the fact that an agency is acting in a manner entirely consistent with the intent of regulatory reform when it reacts by emergency rulemaking to a crisis situation upon determining that the diminishing returns to be gained by further refinements in its analysis of the situation will be outweighed by the additional harm to society that would result from further delay in responding to the crisis.

Recordkeeping

The draft report concludes that DOE's records relating to a rulemaking are inadequate to ensure that those in top decisionmaking and oversight positions will be able to determine proper accountability for decisions made by agency personnel during the regulatory development process. First, it should be noted that DOE follows the recommendations of the Administrative Conference of the United States in compiling its administrative record of a rulemaking. What the draft report suggests for recordkeeping has not been recommended, to our knowledge, by anyone knowledgeable in administrative law. Thoughtful reflection on this recommendation suggests that it might be a result of a lack of experience with the regulatory process and practical agency management.

The draft report would have DOE not only retain and file every document and every copy of every document related to a rulemaking, but also it would have DOE create a large volume of new documents--memoranda memorializing every meeting or telephone conversation within DOE relating to a rulemaking. The draft report in no way attempts to analyze the costs and benefits of such a novel recordkeeping regimen, and we believe the costs in terms of time and resources would be phenomenal. Moreover, the draft report does not explain how such a massive file of relevant and irrelevant material would aid oversight or accountability. It is not likely that senior Department executives would devote much time to studying such a file, nor do we believe that such activity would be a sound use of executive resources.
Moreover, the one purported example offered by the draft report for alleged failure of oversight or accountability does not support the need for or advisability of such a record. This example involved GAO's inability to find documentation that certain information regarding enforcement concerns had been communicated to the Secretary, acting in his oversight role,*/ in reviewing the proposed rule to amend the supplier/purchaser rule. While we have made it clear to GAO that the Secretary was, in fact, apprised of these concerns, it is also clear that the records the draft report would have DOE make and keep would not have in any way further assured that he was so apprised.

Summaries of Public Comments

In the draft report there was a discussion relating to summaries made by DOE of public comments. Pursuant to meetings with your staff, we believe some of this discussion may be changed, but we feel it is important to make clear what DOE views as the proper role of such summaries. They are not a substitute for the actual reading of all the written comments and attendance at or a reading of the transcript of the public hearing. It is DOE policy for those primarily involved in the rulemaking process to familiarize themselves fully with all the public comments directly from the source materials. The legally required response to major comments contained in the preamble to a

*/ Pursuant to delegation order the Administrator of ERA is the decisionmaker with regard to such rules. Information requested by the Secretary concerning rulemaking proceedings is intended to apprise him of his delegate's activities and decisions. While he may approve or disapprove those decisions, it is inconsistent with principles of effective management to suggest that he must first consider all issues as thoroughly as his delegate must, since then there would be no utility to the delegation of authority in the first place.

final rule is prepared directly from the source materials, not from the summary. Any other method of proceeding would, we feel, deprive the public comment procedure of at least some of its impact and influence. Summaries can be and sometimes are a useful tool as a simple tally sheet of those opposed or supporting aspects of a rule, as a source of notable or representative quotations, or as a refresher to the recollection of the comment itself by those involved in the process. The usefulness of the tool, however, differs from rule to rule, and it is not such an important tool that much attention should be paid to it.

Public Participation

We are proud of the success DOE has had in providing opportunities for public participation in its rulemakings generally and in the three case-study rules in particular. The draft report contained a number of methods by which the public could be included in the consideration of significant regulations. In conversations with your staff we pointed out that DOE regularly uses all of the listed methods.

We are concerned, however, with the suggestion that DOE lacks clear guidance on when to use advance notices of proposed rulemakings and notices of inquiry. Throughout the period during which the three rulemakings examined by GAO were being developed, it was DOE's policy, as reflected in paragraph 8(b) of DOE Order 2030.1, to publish notices of inquiry or advance notices of proposed rulemaking prior to drafting proposed significant regulations "in circumstances where DOE lacks sufficient information on the subject to be regulated." Only one of the three rules studied by the draft report met this standard, and it utilized an advance notice. The other two were proposed amendments to on-going regulatory programs concerning which DOE had already received numerous comments and with respect to which an advance notice or notice of inquiry would not have been beneficial. Any suggestion that an advance notice or notice of inquiry was not utilized on the basis of other considerations is simply false.

Conclusion

The Secretary of Energy is fully committed to both substantive and procedural regulatory reform. DOE's performance under E.O. 12291 has been complimented by the Office of Management and Budget. To the extent that GAO's final report contains

APPENDIX I

recommendations that would likely improve DOE's current performance at a reasonable cost, DOE will certainly be receptive to them. On the whole, however, we are concerned that the conclusions and recommendations in the draft report are not of this nature. Rather, as discussed above, we believe the draft report is seriously inaccurate and fails to reflect a realistic understanding of regulatory and management principles. As a result, the recommendations do not, in our opinion, point the way to improved rulemaking.

Sincerely,

William S. Heffelfinger
Assistant Secretary
Management and Administration

AN EQUAL OPPORTUNITY EMPLOYER

UNITED STATES
GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE,$300

POSTAGE AND FEES PAID
U. S. GENERAL ACCOUNTING OFFICE

THIRD CLASS