United States General Accounting Office 131419

GAO

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

August 1986

# ENERGY REGULATION

# DOE Should Ensure Oil Industry Retains Records to Resolve Violations





GAO/RCED-86-153

GAO

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

**Resources, Community, and**
**Economic Development Division**

B-222720

August 18, 1986

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

Dear Mr. Chairman:

In response to your February 1, 1985, request, this report discusses the Department of Energy's (DOE's) development and implementation of the Economic Regulatory Administration's rule amending the recordkeeping requirements of the oil industry, and whether, in issuing the rule, the Economic Regulatory Administration ensured that all records needed for its enforcement program were being retained. The report recommends that the Secretary of Energy ensure that those records still needed for DOE's enforcement program are being retained by the oil industry by notifying those firms that did not receive notification and those firms that possibly received inaccurate notification to retain such records.

In addition, at your request, we looked into one oil producer's efforts, through correspondence with executive branch officials, including the Vice President of the United States and the Secretary of Energy, to have DOE significantly reduce the oil industry's recordkeeping burden. You also asked whether this correspondence should have been included in the public file on the recordkeeping rule. In summary, we could not determine to what extent the oil producer's correspondence influenced the rulemaking process. Also, in our opinion, the correspondence is not required to be part of the public files on the recordkeeping rule.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies to the Secretary, Department of Energy; the Administrator, Economic Regulatory Administration; the Director, Office of Management and Budget; and interested congressional committees. We will also make copies available to others upon request.

Sincerely yours,

J. Dexter Peach

J. Dexter Peach
Director

# Executive Summary

## Purpose

The Department of Energy estimates that, as of April 1986, about $4 billion of oil firms' alleged violations of crude oil and petroleum product price and allocation controls remain unresolved. In resolving these alleged violations, Energy uses the oil firms' records. In January 1985, Energy changed the rules associated with the firms' need to retain these records.

At the request of the Chairman, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, GAO examined the development of the January 1985 recordkeeping rule. In particular, the Chairman requested GAO to determine whether

- in issuing the rule, Energy risked the loss of records needed to resolve alleged violations and
- Energy had an adequate basis for selecting June 30, 1985, as the cut-off date for certain firms to retain their records.

## Background

Pursuant to the Emergency Petroleum Allocation Act of 1973 and the Economic Stabilization Act of 1970, Energy has audited oil firms to determine whether they complied with federal pricing and allocation regulations that were in effect between August 1973 and January 1981. In essence, Energy determines whether the oil firms charged more for oil and petroleum products than allowed by regulation. Oil firms' records are Energy's primary source of information for auditing and resolving alleged violations.

In the November 16, 1984, Federal Register, Energy proposed to amend its regulations to eliminate the recordkeeping requirements for oil firm records that were no longer needed to resolve alleged violations. On January 31, 1985, Energy issued the final, amended regulation, which identified six categories of firms that were required to continue to retain all or a portion of their records; all other firms could immediately dispose of their records.

The firms in two categories and some of the firms in two other categories had a June 30, 1985, cut-off date. That is, the firms could dispose of their records after that date unless otherwise notified by Energy. (See ch. 1.)

## Results in Brief

Energy mistakenly believed that it would not be able to enforce its recordkeeping requirements beyond January 31, 1985, unless it issued

its amended rule by that date. If Energy had been unable to enforce these requirements, it believed, the oil firms could have disposed of their petroleum pricing and allocation records without penalty. In its haste to issue the amended rule by January 31, 1985, Energy did not document and coordinate the actions it took to identify which oil firms should retain records and which records should be retained. As a result, records needed for enforcement proceedings may have been destroyed. (See ch. 2.)

Energy's June 30, 1985, cut-off date proved to be unrealistic, and in May and June 1985 Energy sent letters to 841 firms notifying them that their records were to be retained until further notice because Energy might need the records for its enforcement proceedings. Because Energy did not have current addresses for all the firms, 75 of the 841 firms did not receive their letters and might have disposed of their records, even though Energy could need them to effectively conclude its enforcement actions. (See ch. 3.)

# Principal Findings

## Rush to Issue Amended Rule

Energy could have taken until December 1987 to issue the amended rule and still have been able to enforce its recordkeeping requirements. However, because Energy officials believed that the amended rule had to be issued by January 31, 1985, they did not have time to adequately document all of their determinations of which firms were to continue to retain records or to verify that the determinations were accurate. Because there was no complete, documented trail to support Energy's basis for deciding which firms were to retain records, GAO reviewed Energy's information on third-party firms, i.e., firms whose records might be needed to assist Energy in its enforcement proceedings against other firms. GAO selected firms in the third-party category because these firms would not be aware of their status as third parties unless notified by Energy.

Energy sent 424 notification letters to firms in the third-party category. However, GAO identified 19 firms that were not sent letters notifying them of their recordkeeping status because their addresses were unknown or for other indeterminable reasons. Nor were these 19 firms included in the list of third-party firms in the amended rule because (1) such list was prepared from the notification letters, and (2) Energy

acted in haste to issue the rule. Thus, the firms had no way of knowing that they should retain records and could, therefore, dispose of them.

GAO also determined that the recordkeeping requirements specified in 80 (19 percent) of the 424 notification letters sent to third parties were not supported by the documentation supplied by Energy. If the information in these letters was inaccurate, some oil firms may have been allowed to dispose of some records that Energy might need for effectively settling oil overcharge cases. (See ch. 2.)

## Unrealistic Cut-Off Date

Energy selected the June 30, 1985, cut-off date for certain firms to retain their records because it believed that by that date it would have substantially completed its enforcement program. In establishing this date, Energy relied on subjective judgments rather than preparing an analysis justifying why these firms' records would probably not be needed beyond that date. Because of the unrealistic cut-off date and the possibility that Energy might need these records for its enforcement proceedings, Energy mailed a second round of certified letters to 841 firms in four categories, notifying them to retain their records until further notice.

The June 30, 1985, cut-off date also caused Energy to risk the possible loss of records needed for its enforcement program. Of the 841 letters mailed in May and June 1985, 75 were undeliverable because of incorrect addresses. Energy hired private investigators to locate some of those firms with undeliverable letters in the first and second mailings. However, only 10 of the 75 firms were included in the investigators' search. Energy did not become aware of the undeliverable letters until just before or after the June 30, 1985, cut-off date. Therefore, because these firms could not be notified of their recordkeeping requirements until after the cut-off date, Energy did not believe it was worthwhile to continue efforts to locate these firms. GAO believes, however, that even though firms may receive a late notice, once notified, they would still be required to retain their records if they had not disposed of them. (See ch. 3.)

## Recommendations

To ensure that oil firms retain records that Energy may need for its enforcement program, GAO recommends that the Secretary of Energy,

for the firms that did not receive a notification or possibly received inaccurate notification of Energy's recordkeeping requirements, (1) determine which firms' records are still needed and (2) notify the firms of their recordkeeping requirements. (See chs. 2 and 3.)

## Agency Comments

GAO did not request official agency comments on a draft of this report. However, the views of directly responsible officials were sought during the course of our work and are incorporated in the report where appropriate.

# Contents

## Tables



### Abbreviations

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| DOE | Department of Energy |
| EIA | Energy Information Administration |
| EPAA | Emergency Petroleum Allocation Act of 1973 |
| ERA | Economic Regulatory Administration |
| GAO | General Accounting Office |
| IPAA | Independent Petroleum Association of America |
| NPRM | Notice of proposed rule making |
| OGC | Office of General Counsel |
| OMB | Office of Management and Budget |
| RCED | Resources, Community, and Economic Development Division |

# Introduction

From August 22, 1973, through January 28, 1981, price and allocation controls were imposed on the sale of crude oil and refined petroleum products pursuant to the Emergency Petroleum Allocation Act of 1973 (EPAA). The act was primarily intended to

- prevent price gouging by domestic crude oil producers who were able to produce oil at a fraction of the cost of imported oil and
- assure fair allocation of crude oil supplies and petroleum products to all in the marketing chain.

As a result of government reorganizations and presidential executive orders, the regulatory authority under EPAA was vested in several different government agencies before being delegated to the Secretary of Energy in October 1977.[1] The Secretary subsequently delegated his authority to the Administrator of the Economic Regulatory Administration (ERA).

ERA carries out this authority and responsibility through its enforcement program. Specifically, ERA is responsible for (1) identifying violations of petroleum pricing and allocation regulations, (2) recovering overcharges, and (3) obtaining restitution for injured parties. Crude oil producers and resellers, petroleum refiners, and refined petroleum product resellers and retailers were subject to the pricing and allocation regulations. ERA considered them to be in violation of the regulations if they (1) obtained a price higher than the regulations permitted or (2) imposed terms or conditions not customarily imposed. Such violations included, but were not limited to: making use of inducements, kickbacks, premiums, and discounts; falsifying records; substituting inferior commodities; or failing to provide the same service and equipment previously provided. In identifying and resolving alleged violations, ERA uses the oil firms' records as the primary source of information. As of April 30, 1986, ERA estimated that about 370 cases involving about $4 billion in alleged violations remained to be resolved.

[1]The pricing regulations applicable to the sale of covered petroleum products were originally promulgated on August 19, 1973 (38 F.R. 22536, Aug. 22, 1973), by the Cost of Living Council under the Economic Stabilization Act of 1970, as amended (12 U.S.C. 1904, note). In December 1973, the Federal Energy Office was established and was delegated authority to enforce both the pricing regulations and the allocation regulations implemented under the EPAA of 1973. The President later transferred the pricing and allocation regulations to the Federal Energy Administration by Executive Order No. 11790 (39 F.R. 23185, June 27, 1974) and Executive Order No. 12009, along with all authority vested in the President by the EPAA of 1973. Subsequently, the Department of Energy Organization Act (42 U.S.C. 7151) transferred all functions vested by law in the Federal Energy Administration to the Secretary of Energy. Further, the authority previously granted to the Federal Energy Administration by Executive Order No. 11790 was delegated to the Department of Energy, effective October 1, 1977.

## ERA's Recordkeeping Requirements

Firms that were subject to price controls had to comply with extensive reporting and recordkeeping requirements to aid the government's enforcement of those controls. According to the Department of Energy (DOE), more than 200,000 firms were required to comply with those recordkeeping requirements since the beginning of the period of controls. Thus many firms were required to maintain records for almost 12 years.

On January 28, 1981, in Executive Order 12287 (46 F.R. 9909, Jan. 30, 1981), the President removed all remaining price and allocation controls from crude oil and refined petroleum products. The order continued the reporting and recordkeeping requirements then in effect but directed the Secretary of Energy to "promptly review those requirements and . . . [to] eliminate them, except for those that are necessary for emergency planning and energy information gathering purposes required by law."

On March 30, 1981, ERA modified or eliminated most of the reporting requirements. At the same time, however, ERA adopted regulations to require all firms to retain their historical records compiled as a result of the requirements that were in effect on January 27, 1981, the final day of controls. These regulations required that all historical records relative to EPAA be retained to enable enforcement actions to be initiated and to bring all enforcement activity to an orderly conclusion.

In 1983 ERA expressed its intent to reduce the recordkeeping burden on industry and, when circumstances allowed, take the appropriate action to reduce the record preservation requirements of its regulations. By November 1984, according to ERA, the number of firms that had records necessary for enforcement purposes decreased substantially. Therefore, on November 16, 1984, ERA published in the Federal Register a notice of proposed rulemaking (NPRM) to amend the regulations and on January 31, 1985, issued the final, amended regulation. Although ERA had primary responsibility for developing the rule, DOE's Office of General Counsel (OGC) was responsible for writing the proposed rule and coordinating its review, from a legal perspective, with the appropriate officials within DOE and other federal agencies. In addition, OGC was responsible for rendering legal interpretations on all legislation and regulations that influenced the proposed rule's content, approval, and publication in the Federal Register.

According to the final amended rule, only firms in several categories were still required to retain records. (All other firms were exempt from the recordkeeping regulations.) These categories were:

- Firms in litigation—firms that are or become engaged in administrative or judicial proceedings involving alleged violations of price and allocation statutes and regulations.
- Firms with restitutionary payments—(1) firms, as of November 30, 1984, that had completed making payments but whose payments were subject to distribution by DOE and (2) firms that were still required to make payments. These payments to DOE could have resulted from a negotiated settlement of alleged price and allocation violations set forth in a consent order or an obligation imposed by an administrative or judicial order.
- Firms under audit—(1) firms with audits in progress or with completed audits in which ERA had not yet made a determination to initiate a formal enforcement action and (2) firms that had outstanding subpoenas for audit records.
- Firms with newly discovered crude oil—firms that reported their crude oil production to ERA as newly discovered. This classification allowed them to sell the oil at a price higher than that set by price controls. Newly discovered crude oil generally means crude oil that was produced between January 1, 1979, and January 27, 1981, from a new lease on the Outer Continental Shelf or from a property from which no crude oil was produced in calendar year 1978. ERA used the records of firms reporting such crude oil to verify that the reported production qualified as newly discovered crude oil.
- Firms in entitlements program—firms that participated in the program to allocate the benefits of price controls by transferring costs among refiners so that they all had approximately the same average crude oil acquisition costs.
- Third-party firms—firms whose records were needed to aid ERA in its enforcement proceedings involving another firm. These firms were required to retain only those records specified by ERA as essential to the completion of enforcement actions.

A firm could have been included in more than one category. Such a firm must comply with the requirements for all categories in which it is included. Also, as a firm progresses through the enforcement process, it may move from one category to another. For example, a firm that is currently under audit may subsequently become a party in litigation. Therefore, the final rule made it clear that when a firm drops out of one category and is no longer subject to the recordkeeping requirements of that category, the firm remains subject to the recordkeeping requirements of any other category in which it may fall.

ERA notified firms of their recordkeeping requirements through publication of the final rule in the Federal Register and through certified letters. Firms in the under-audit, newly discovered crude oil, and third-party categories were to receive direct notification by certified mail before the final rule was published. Firms in the litigation, restitutionary-payments, and entitlements categories were considered notified by the rule's publication. ERA's January 1985 letters to firms in the audit, third-party, and newly discovered crude oil categories explained the rule's purpose and the firms' recordkeeping requirements. As stated in the preamble to the final rule, firms in the audit and newly discovered categories might not be aware of their exact status in ERA's enforcement program. Therefore, ERA, as a matter of convenience and courtesy, notified the firms of their status through the certified letters, even though their status and recordkeeping requirements were set forth in the final rule. In contrast, the letters to firms in the third-party category were necessary to inform them of their recordkeeping requirements because the final rule listed only the names of the third parties, not their specific recordkeeping requirements.

According to the final rule, the recordkeeping cut-off dates (after which firms could dispose of their records unless otherwise informed by ERA) varied by category. The rule established a June 30, 1985, cut-off date for all firms in the newly discovered and third-party categories and some of the firms in the audit and restitutionary-payments categories. The remaining firms had cut-off dates contingent upon future events, such as compliance with ERA subpoenas or completion of litigation.

## Office of Management and Budget Responsibilities

Because these recordkeeping regulations placed a requirement on firms to maintain records, the regulations were subject to Office of Management and Budget (OMB) review under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520).

OMB's responsibilities under the Paperwork Reduction Act include reviewing the information-collection and recordkeeping requirements imposed by federal agencies on the public and issuing control numbers for this purpose. The act provided that for recordkeeping requests, among other things, made after December 31, 1981, no person shall be subjected to any penalty for failure to maintain or provide information to an agency that had not obtained an OMB control number for its request. OMB has authority over reporting and recordkeeping requirements in regulations that were in effect when the act was passed, as well as regulations subsequently issued.

The act states that paperwork requirements not be imposed unless the practical value of the information is worth the burden it imposes. Section 3504 (h) of the act gives OMB the authority to review, and in limited circumstances to disapprove, paperwork requirements contained in agency regulations. Because most agencies implement reporting and recordkeeping requirements through the use of regulations, OMB has authority to review and approve or disapprove the recordkeeping requirements contained in such regulations.

On March 31, 1983, OMB promulgated regulations (5 CFR Part 1320, Controlling Paperwork Burdens on the Public) to implement the provisions of the Paperwork Reduction Act concerning the collection of information. The regulations were designed both to minimize the federal paperwork burden for individuals, small businesses, and state and local governments, and to maximize the usefulness of information collected by the federal government. The regulations implement OMB authority under the Paperwork Reduction Act with respect to clearance procedures for collection of information requests and other paperwork control functions.

The regulations require that all information collection documents display a currently valid OMB control number. OMB considers the control number to be for the benefit of the public, as well as for the improved management of the paperwork process. The control number indicates that the OMB Director has ensured that the information is needed, is not duplicative of information already collected, and is collected efficiently.

## Energy Information Administration Responsibilities

Within DOE, the Office of Statistical Standards, Energy Information Administration (EIA), has responsibility for Paperwork Reduction Act matters. EIA administers DOE's program for obtaining OMB approval of energy information collections, including recordkeeping requirements. EIA assists the DOE sponsoring office (ERA in the case of the oil industry recordkeeping rule) in developing documentation supporting the proposed information collection activity; determines that the information sought is not available elsewhere within DOE; obtains DOE approval of the request; submits the clearance request to OMB; coordinates responses to questions raised by OMB; and advises the sponsoring office of OMB's action.

## Objectives, Scope, and Methodology

On February 1, 1985, the Chairman, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, asked us to examine the development and implementation of ERA's rule amending the recordkeeping requirements of the oil industry. Because the objective of the amended regulations was to reduce the volume of records required to be retained, the Chairman was concerned that the regulations might allow records to be destroyed that could be needed for ERA's enforcement program. Based on the Chairman's request and subsequent meetings with his office, we examined whether (1) in issuing the final rule, DOE might have risked the loss of records needed to resolve alleged violations and (2) the June 30, 1985, cut-off date for record retention was realistic and adequately ensured the retention of records needed for enforcement activities. As agreed with the Chairman, we did not determine whether any firms had actually disposed of needed records.

We were also asked by the Chairman, on the basis of material OMB made available on DOE's recordkeeping rule, to review specific correspondence between an oil producer and the Vice President of the United States and the Secretary of Energy. We were asked to determine (1) to what extent that correspondence may have influenced the recordkeeping rulemaking process, and (2) whether this correspondence should have been made a part of DOE's and OMB's public files on this rulemaking process. In addition, we were asked to obtain information on DOE's enforcement actions against the oil producer for oil pricing violations and on the oil producer's political campaign contributions.

We conducted our review at DOE headquarters in Washington, D.C., where all of the organizations having a role in developing and issuing the recordkeeping rule are located.

To determine whether, in issuing the January 1985 revised oil industry recordkeeping rule, DOE risked the loss of records needed to resolve alleged violations, we reviewed the applicable legislation, regulations, and executive orders and discussed the issue with the DOE, ERA, EIA, and OMB officials responsible for developing, reviewing, approving, and/or issuing the amended rule. We discussed the procedures used in this process and the adequacy of the time available to implement the procedures. We also discussed (1) the roles and responsibilities of each DOE organization involved, i.e., ERA, EIA, and OGC, (2) how the rulemaking process was coordinated among these organizations, and (3) how the process was coordinated with OMB.

We reviewed ERA's procedures for both identifying and notifying the firms in each of the categories of the rule. ERA used forms and listings provided by its and OGC's program units to identify the firms. After discussing with the appropriate officials within each of the program units the steps followed in developing and preparing the recordkeeping information on the forms, we decided that our analysis of the process would start with the forms submitted by the program units. According to an ERA official, we were provided all of the forms submitted by the program units. The official could not, however, separate the forms by program unit because the forms had been consolidated and he could not remember from which units they came. Also, some of the program units had not maintained copies of the forms and listings provided. Consequently, we could not verify that we had been given all of the forms prepared by the program units.

We reviewed the forms and listings that were provided to us by ERA officials and tracked them to the resultant notification letters sent to the oil firms to determine whether ERA had (1) mailed letters to all the firms identified and (2) documented its basis for both the letters mailed and the specific records required to be retained. In tracking these forms and listings, we focused on the third-party firms because these firms and records were the most difficult to identify, and notifying the firms was of primary importance because they would not be aware of their status unless they were notified by ERA.

For the third-party category, we reviewed 1,206 forms supporting the January 1985 mailing of 424 letters. We tracked each letter to its supporting form to determine if all the firms had been notified. We also compared the form contents with the letter contents to determine the accuracy of the records requested to be retained. To verify that each of the letters mailed was received by the firm, we examined the file for a copy of the receipt for certified mail and a signed return receipt for each letter. If the file did not contain a signed return receipt, we discussed these with the appropriate ERA officials to confirm that the firms were not notified.

To determine whether ERA's June 30, 1985, cut-off date for recordkeeping adequately ensured the retention of the records needed for ERA's enforcement program, we analyzed the contents of the rule. We focused on ERA's justification for the cut-off date, obtaining information on ERA's rationale and the documentation used as a basis for setting this date. We

compared ERA's January 1985 and May and June 1985 mailings of letters to those firms affected by the cut-off date. The purpose of this comparison was to determine the effect of including this specific date in the rule.

We reviewed the May and June 1985 mailings to determine whether they were received by the firms before the cut-off date. We compared the January 1985 mailing with the May and June 1985 mailings to determine if all firms notified in the first mailing were also notified the second time. To make this determination, we compared each of the mailing lists and also examined the file for the May and June 1985 mailings to verify that each of the letters was received by the firms by determining whether a receipt for certified mail and a signed return receipt existed for each letter. Likewise, as in the first mailing, if we did not find a signed return receipt in the file, we determined, after discussions with the appropriate ERA officials, that the firms did not receive notification.

To follow up on the issues concerning the correspondence between an oil producer and the Vice President of the United States and the Secretary of Energy, we talked with OMB and DOE officials to clarify statements contained in the correspondence. In addition, we talked with the oil producer to solicit his views on the accuracy of the information obtained during our review. Generally, our review was limited to the information provided in the correspondence and information obtained from the files of the Federal Election Commission and DOE's Office of Hearings and Appeals.

We discussed our findings with agency program officials and included their comments where appropriate. However, in accordance with the requester's wishes, we did not obtain the views of responsible officials on our conclusions and recommendations, nor did we request official agency comments on a draft of this report. Other than these exceptions, our review was performed in accordance with generally accepted government auditing standards, from February 1985 through February 1986.

# DOE's Haste in Issuing the Recordkeeping Rule Could Have Resulted in the Premature Disposal of Records

In developing the amended recordkeeping rule, ERA did not notify 19 third-party firms of their recordkeeping requirements. Therefore, these firms may have disposed of—or could still dispose of—records needed for ERA enforcement actions, without violating the regulations. In addition, in 80 (about 19 percent) of the letters notifying third-party firms of the records to be retained, we found that the letters could not be verified to supporting documents. For 56 of these letters, there was no supporting documentation. For the remaining 24 letters, the supporting documentation required either more or fewer records to be retained than cited in the letter.

These discrepancies and the failure to notify the 19 firms resulted from DOE's haste in issuing the rule. DOE's Office of General Counsel (OGC) and ERA officials mistakenly believed that the amended rule had to be issued by January 31, 1985, or they would lose their right to require the oil industry to preserve and maintain those records needed for future enforcement and settlement activities. In its haste to meet that deadline, DOE did not adequately document its actions to determine which records should be retained and did not coordinate with the program units to verify that the notifications to the oil firms were complete and accurate.

## DOE Unnecessarily Rushed to Issue the Amended Rule

DOE's OGC officials believed that, based on their interpretation of the OMB regulations, the requirements of the recordkeeping rule would expire January 31, 1985. Because ERA did not request the necessary information from the various program units until November 21, 1984, ERA only had about 2 months to obtain and incorporate this information. Therefore, according to ERA officials, they had to rush to complete this process and did not have time to adequately document the process or obtain feedback from the program units on the use of their information.

As discussed in chapter 1, OMB was involved with DOE's recordkeeping rule because of its responsibilities under the Paperwork Reduction Act to review and approve the recordkeeping requirements imposed on the public. Between the January 1981 decontrol of the price of petroleum products and July 1984, DOE had on five occasions requested OMB to extend the all-encompassing recordkeeping regulation so as to assure that oil firms retained the records ERA needed to successfully complete its enforcement program. In three of the five requests, DOE asked for a 3-year extension.[1] OMB only granted extensions for 6 months to a year

[1]The remaining two extensions requested by DOE were for short periods (3 and 6 months) to extend the time needed to work on the recordkeeping rule proposals.

because, in its opinion, DOE had not fully justified why it still needed the all-encompassing regulation, rather than one that recognized that, with the decontrol of petroleum products, fewer records would be required to be retained. As a result of the extension OMB granted in July 1984, the rule's expiration date became January 31, 1985.

When DOE requested a 3-year extension of its existing recordkeeping regulation in May 1982, OMB approved a 1-year extension with the condition that DOE narrow its recordkeeping requirements to those necessary for completing its enforcement and settlement activities. In an attempt to satisfy OMB by narrowing the scope of its all-encompassing recordkeeping regulation on the oil industry, DOE published the first notice of proposed rulemaking to amend its regulation in the January 4, 1983, Federal Register. However, on December 14, 1983, DOE decided to withdraw its January notice because ERA believed that it needed to retain the existing recordkeeping requirement to protect third-party information essential to the successful and reasonably expeditious conclusion of the enforcement program for both the criminal investigations conducted by the Justice Department and civil litigation proceedings.

In the spring of 1984, according to ERA's Assistant to the Special Counsel for Legal Matters, ERA believed enforcement and settlement record needs could be easily identified. Therefore, ERA began working on another amendment to reduce its recordkeeping requirements, and in November 1984 DOE submitted the proposed amended rule to OMB for review under the provisions of the Paperwork Reduction Act. In submitting the proposed rule, DOE requested, and OMB approved, the recordkeeping requirement in the rule for a 3-year period through December 1987. According to OMB's Assistant to the Branch Chief, Office of Information and Regulatory Policy, OMB's approval of the recordkeeping requirement in the proposed rule for a 3-year term automatically extended the existing, all-encompassing recordkeeping requirement until December 31, 1987, or finalization of the proposed rule, whichever came first. Therefore, DOE had until December 1987 to make its proposed recordkeeping rule final while retaining authority to enforce existing requirements. The Director of EIA's Forms Clearance and Burden Control Division agreed with OMB's interpretation.

However, based on DOE's OGC interpretation of the OMB regulations on the subject, both OGC and ERA officials believed that they had to issue the amended rule by January 31, 1985 (2-1/2 months later) or risk the chance that oil firms would not retain their records beyond that date. The proposed rule would eliminate the recordkeeping requirement for

all firms except those with records that are essential to the timely and orderly completion of the oil pricing enforcement program. The intent of the proposed amendment was to reduce unnecessary and costly recordkeeping burdens for those firms that were no longer involved in ERA's enforcement program.

According to the Director of EIA's Forms Clearance and Burden Control Division, the subject of the expiration date had never come up in discussions with the other DOE officials. Therefore, EIA was not aware that OGC and ERA officials believed the deadline to be January 31, 1985. OMB's Assistant to the Branch Chief, Office of Information and Regulatory Policy, said that OMB had not been asked about the expiration date nor been requested to extend the approval of the existing recordkeeping requirement. If it had, he said, he would have told them that there was no need for an extension.

In our discussions with OGC officials, they said they were unaware of the December 31, 1987, deadline. Until we informed them of OMB's and EIA's view, they were convinced that the deadline had always been January 31, 1985. After our explanation, the OGC officials said they recognized that there was a basis for OMB's position and believed that OMB's interpretation of the regulation was reasonable. Both OGC and ERA officials said that because of the January 31, 1985, deadline, they rushed to issue the rule. The ERA officials told us that, had they known there was no rush, they would have taken more time to document the process and to ensure that all firms were properly classified. As a result of rushing, ERA did not prepare a master listing of firms by category and update it on the basis of the revisions received from the program units. Consequently, ERA did not have a control document supporting the categorization of the various firms. In addition, ERA did not take the time to confirm the final categorizations of firms with the program units to ensure their accuracy and completeness.

In a March 8, 1985, letter to the Chairman, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, the ERA Administrator said that it was his understanding that OMB would not grant any further extensions beyond January 31, 1985. We discussed this issue with OMB officials, who said that OMB had never denied or considered denying a DOE request for another extension of its recordkeeping requirement. Also, the Director of EIA's Forms Clearance and Burden Control Division, responsible for coordinating with OMB, said that OMB never refused to grant DOE an extension. He stated further that had he been aware of the time constraints imposed by the January 31, 1985,

date, he would have informed DOE officials that the expiration date had been extended to December 31, 1987.

## Records Needed for Enforcement Actions May Not Have Been Retained

Because DOE rushed to issue the amended rule, it did not maintain adequate documentation supporting the development of the rule and did not obtain feedback from the program units on the final categorization of the oil firms. Consequently, 19 third-party firms were not notified of their status, and for 80 (about 19 percent) of the notification letters sent to the third parties, there was either no supporting documentation or the letters required more or fewer records to be retained than the supporting documents indicated were needed. As a result, some companies may have already disposed of, or could dispose of, records that ERA may need for its enforcement actions.

To determine the firms in the various categories of the rule (the November 16, 1984, proposed rule did not identify firms by category), ERA requested information from the various program units within ERA and OGC, which had responsibility for certain cases under litigation. In a memorandum dated November 21, 1984, ERA requested each of these units to provide such data by December 12, 1984, using preprinted forms for the firms in the audit and third-party categories and listings for the firms in the other categories.

After receiving these forms and listings, ERA analyzed them to identify those firms that (1) had more than one form and/or (2) were in more than one category. The purpose of this analysis was to avoid duplicate or what ERA considered to be unnecessary letters. For example, if a firm were a third party to more than one firm, ERA could include this information in one letter. Also, ERA decided that third-party firms that were also in the litigation category did not need a notification letter because the rule required firms in the litigation category to retain all of their petroleum product records for the period of price controls.

On the basis of its analysis and conversations with the program units, ERA added and deleted firms from categories and changed the type of records to be retained. Before doing this, however, ERA did not establish a system that would enable it to track the information provided back to the program units that developed it. Rather, the Director of ERA's Office of Litigation Support, responsible for finalizing the proper categorization of firms for the rule, added or deleted forms and told us that he

could not track the data back to the originating program unit. This official also told us that the forms remaining after his additions and deletions were used as the source documents in typing the letters to the third-party firms, notifying them of their status and the records they were to retain. In turn, the letters were used to prepare the listing of third-party firms contained in the final rule.

In response to our question of why he did not create a system to monitor the input received from the various program units, ERA's Litigation Support Director told us that he did not have sufficient time to do this, given all the other actions that had to be taken to issue the rule. He also told us, as did the personnel in the various program units, that he did not obtain their feedback on the final composition of the various categories. Therefore, these program personnel did not have the opportunity to review and comment on the accuracy of the final categorization of the oil firms.

Because ERA did not have a tracking system, we used the third-party forms provided to us by the ERA official to determine whether all firms listed received letters. As shown in table 2.1, the ERA official provided 1,206 of these forms, of which we were able to trace 936 to notification letters.

**Table 2.1: Results of Tracing Third-Party Forms**

| | Number | Percentage |
|---|---|---|
| **Forms reviewed** | | |
| Traced to letters | 936 | 77.6 |
| Untraceable | 270[a] | 22.4 |
| **Total** | **1,206[a]** | **100.0** |
| **Firms untraceable to letters** | | |
| In January rule | 1 | 1.0 |
| In litigation | 87 | 81.0 |
| No addresses | 12[b] | 11.0 |
| Other | 7[b] | 7.0 |
| **Total** | **107[a]** | **100.0** |

[a]The various program units prepared 1,206 separate forms for 487 third-party firms. The 270 untraceable forms were related to 107 firms.

[b]Firms were not listed in the final amended rule.

Source: Information from ERA.

We were unable to trace 270 forms (107 firms) to notification letters. Most of these firms (87) were also in the litigation category, which, under the provisions of the recordkeeping rule, meant that they had to

retain all their records until further notice from ERA. Therefore, ERA decided not to send these firms letters. Also, although one firm was not sent a letter, it had been identified as a third party and was so listed in the rule. Consequently, it was required to retain all its records until further notice from ERA.

For the other 19 firms that were not sent letters (12 with no addresses and 7 for which neither we nor ERA could determine their status), there was the potential that records ERA might need for enforcement actions were not retained. Because the listing in the rule was prepared from the third-party notification letters, these 19 firms were not included in the listing and therefore were not notified of their status as third parties. Therefore, the firms could have disposed of their records. ERA's Director of Litigation Support told us that he was unable to determine the addresses of the 12 firms and did not know, nor could we determine, why the other 7 firms were not sent letters. Although ERA officials did attempt to locate other firms through the use of private investigators, these 19 firms were not considered during this investigation because they were not identified as third-party firms in the recordkeeping regulation.[2]

In addition to tracing the third-party forms, we also compared the contents of the notification letters sent to the 424 third-party firms with the contents of the forms submitted by the program units to determine if they contained the same information on records to be retained. (See table 2.2.)

[2]Private investigators were hired to locate those firms listed in the rule that did not receive letters because of erroneous addresses.

**Table 2.2: Comparison of Third-Party Letters With Forms**

| | | Number | | Percentage |
|---|---|---|---|---|
| **Letters mailed** | | | | |
| Contents agreed with forms | | 344 | | 81 |
| Contents not supported by forms | | | | |
| Letters with no forms | 56 | | 13 | |
| Letters with some contents not supported | 9 | | 2 | |
| Letters requiring fewer records to be retained | 15 | | 4 | |
| **Subtotal** | | **80** | | **19** |
| **Total** | | **424[a]** | | **100** |

[a]These letters were mailed to a total of 380 firms because some firms were mailed more than one letter.

Source: Information from ERA.

As shown in table 2.2, we determined that 80 letters were not supported by forms. Of these, 56 did not have forms supporting their contents. Therefore, there was no documentation to determine whether the contents of these letters were complete and accurate. Also, some of the contents of nine of the 80 letters were not supported by the forms. For example, the letters required records to be retained that were not listed in the forms. The remaining 15 letters required the firms to retain fewer records than those identified in the supporting forms. For example, in the notification letter for one firm, some of the records cited on the third party form to be retained for future use by ERA were not cited in the notification letter. Therefore, the firm was instructed to retain fewer records than ERA program officials cited as necessary for use in completion of its enforcement proceedings. ERA officials told us that some letters were prepared at the last minute, without a form being prepared. Also, other letters were revised on the basis of updated information without the related forms being revised. The ERA officials said that the support for these letters was telephone conversations with the program units and/or listings of the names of firms for which the same types of records were to be retained. However, the information received from the telephone calls was not documented, nor were copies of the listings retained.

## Conclusions

As a result of rushing, ERA did not prepare or retain adequate documentation and did not obtain feedback from the program units on the accuracy of the final categorization of the firms, nor did it have a system for

tracking the information provided back to the program units that developed it. The only documentation ERA maintained was the forms submitted by the program units. ERA did not have any documentation supporting the forms that were added and deleted in determining the proper categorizing of the firms.

In our analysis we identified 19 third-party firms that were not notified of their status even though the program units had identified them as having records that might be needed for ERA's enforcement program. In addition, we found that 80 third-party letters were either not supported by the forms prepared by the program units or required more or fewer records to be retained than those identfied in the forms. ERA officials were unable to provide us with any documented explanation for these discrepancies, but indicated that some of the discrepancies might have occurred because of changes made as a result of telephone discussions with the program units.

On the basis of our findings, we believe that ERA does not have adequate assurance that all records necessary for carrying out its enforcement program were retained pursuant to the amended recordkeeping rule. Because the 19 firms were never identified as third parties in the recordkeeping regulations, ERA officials made no attempt to locate them and notify them of their recordkeeping requirements. We believe that ERA should use the data developed during our analysis to determine whether it should contact firms to notify them to retain those records still needed for ERA's enforcement program.

## Recommendation to the Secretary of Energy

To ensure that the records still needed for ERA's enforcement program are being retained by the oil firms, we recommend that the Secretary of Energy direct the Administrator, ERA, to determine which of the 19 third-party firms that did not receive notification letters still need to retain records, and appropriately notify those firms. Also, the ERA Administrator should determine whether the 80 letters to the third-party firms whose letters were not adequately supported by ERA's documentation were accurate. If the letters were not accurate, the firms should be notified of the correct recordkeeping requirements.

# ERA's June 30, 1985, Cut-Off Date May Have Resulted in Loss of Needed Records

The amended recordkeeping rule stated that certain firms would not have to retain their records beyond June 30, 1985, unless otherwise notified by ERA. ERA established this specific deadline because it (1) believed that it had to make the rule less burdensome on the oil industry and (2) estimated that its enforcement program's need for such records would be minimal beyond that date. However, in establishing this date, ERA relied on subjective judgments rather than preparing a work load analysis to support its belief that the June 30, 1985, cut-off date was reasonable. ERA's estimate proved to be unrealistic, and ERA sent letters in May and June 1985 to 841 firms informing them to continue to retain their records until otherwise notified by ERA. In addition, due to undeliverable letters and letters delivered after June 30, 1985, 129 of the 841 firms could have disposed of— or in some cases still could dispose of— their records, even though the records may be needed by ERA for enforcement actions. Because ERA set an unrealistic cut-off date, it risked the possible loss of records needed for its enforcement actions. In addition, ERA incurred the additional costs of preparing and mailing the 841 letters.

## June 30, 1985, Cut-Off Date Proved to Be Unrealistic

Because ERA's amended recordkeeping rule stated that certain firms did not need to retain their records beyond June 30, 1985, unless otherwise notified, ERA had to mail letters to 841 of these firms in May and June 1985 notifying them to retain their records until further notice. ERA selected the June 30, 1985, date as the cut-off beyond which firms in four categories (under audit, newly discovered crude oil, third party, and restitutionary payments completed) would not be required to retain their records unless otherwise notified by ERA. ERA had two reasons for selecting a cut-off date. First, a specific cut-off date would be evidence of ERA's intention to reduce the paperwork burden on the industry, in accordance with the objective of the Paperwork Reduction Act, as opposed to an open-ended requirement for the industry to retain records until further notice. Second, ERA estimated that its enforcement program would be substantially completed by this date, thus obviating the need for most records to be retained beyond that date. In fact, in the introduction to the final amended rule, ERA said that it expected few extensions beyond June 30, 1985.

As shown in table 3.1, however, ERA's estimate proved to be unrealistic because ERA had to mail a second round of letters notifying firms that they would have to retain their records until further notice.

**Table 3.1: Comparison of First and Second Mailings by Category of Firms**

| | Number of firms mailed letters | | | |
|---|---|---|---|---|
| | | Second Mailing | | |
| | First mailing | Follow-up to first mailing | Added since[a] first mailing | Total |
| Third parties | 380 | 380 | 4 | 384 |
| Under audit | 98 | 61 | 50 | 111 |
| Newly discovered crude oil | 147 | 121 | 1 | 122 |
| **Subtotal** | **625** | **562** | **55** | **617** |
| Restitutionary payments completed as of 11/30/84 | •[b] | 224 | • | 224 |
| **Total** | **625[b]** | **786** | **55** | **841** |

[a]This column represents those firms to which the June 30, 1985, cut-off date became applicable after the January 1985 issuance of the final amended rule.

[b]Although these firms did not receive letters in the first mailing, there were 258 of them when the final amended rule was issued. Therefore, a total of 883 firms (625 + 258) had the June 30, 1985, cut-off date when the final amended rule was issued.

Source: Information from ERA.

As stated in footnote b to table 3.1, ERA identified a total of 883 firms as having a cut-off date of June 30, 1985. Of these firms, 625 were sent letters in the January 1985 first mailing notifying them of the specific records to be retained. About 5 months later, ERA determined that 786 (89 percent) of the 883 firms had to be notified that their records were needed beyond June 30, 1985. Consequently, in May and June 1985, ERA instructed the 786 firms, plus an additional 55 firms that later became subject to this cutoff, to retain their records until further notice.

According to ERA's Assistant to the Special Counsel for Legal Matters, ERA did not conduct a work load analysis to support its belief that the June 30, 1985, cut-off date was reasonable. Rather, ERA officials relied on their judgment, primarily on the basis of their review of work load estimates for the firms in the audit and newly discovered categories. These estimates, however, did not address the third-party and restitutionary-payments categories, which also had the June 30, 1985, cut-off date. ERA's Assistant to the Special Counsel for Legal Matters informed us that he was not certain what information was used for applying the June 30, 1985, date to these two categories.

In a March 8, 1985, letter to the Chairman, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, the ERA Administrator responded to the Chairman's request for an analysis or documentation supporting the June 30, 1985, cut-off date. The letter stated, with reference to the audit category, that "while there is no

magic in the June 30th date, ERA believes that by that date it will have substantially completed the audit-related work involving these firms and, therefore, expects there to be few extensions of this period."

On the basis of the cost provided for the first mailing, we calculated that it cost $1,630 to mail the May and June 1985 letters. However, this cost was just a small part of the overall cost of preparing, processing, and mailing the letters. The principal cost was the salaries of the personnel responsible for determining which firms were to receive letters and preparing the letters. ERA did not have an estimate of these costs.

## Undeliverable and Late Letters May Result in Loss of Records Needed for Enforcement

In addition to the need for a second round of letters, another consequence of the June 30, 1985, cut-off date was that firms could have disposed of records that ERA determined might be needed for its enforcement program. As the rule was worded, ERA had to individually notify each firm to which the June 30, 1985, date applied if it wanted the firm to retain records beyond that date. ERA attempted to do this in its May and June 1985 mailings of 841 letters. As shown in table 3.2, however, 129 of these letters were not delivered to the firms by June 30, 1985.

**Table 3.2: Analysis of Second Round of Letters**

| | Category | | | | |
|---|---|---|---|---|---|
| | Restitutionary payments complete | Third parties | Under audit | Newly discovered | Total |
| Delivered before June 30, 1985 | 186 | 296 | 86 | 109 | 677 |
| Undeliverable | 28 | 26[a] | 13 | 8 | 75 |
| Delivered after 6/30/85 | 10 | 27 | 12 | 5 | 54 |
| **Subtotal** | **38** | **53[a]** | **25** | **13** | **129[a]** |
| **Total letters mailed** | **224** | **384** | **111** | **122** | **841** |

[a]Does not include 35 firms that were listed in the rule as third parties, but had not received any other notification of their status. Therefore, pursuant to the rule, these 35 firms had to retain all their petroleum pricing and allocation records for the period of price controls until otherwise notified by ERA.

Source: Information from ERA.

Of the 841 firms sent letters, 129 could have disposed of their records because their letters were not delivered before the cut-off date. Of the 129, 75 were returned to ERA as undeliverable and 54 were not delivered until after June 30, 1985. Therefore, these 129 companies may have disposed of—or in some cases, still could dispose of—their records. Those

firms receiving notification letters after June 30, 1985, that had not disposed of their records would, once notified, still be required to retain them in accordance with the recordkeeping regulation.

We followed up with ERA officials to determine if they were aware of the situation with respect to the 75 undeliverable notification letters and what actions they planned to take to locate and notify these firms. We found that ERA had hired private investigators at a cost of about $7,000 to search for and locate firms for which ERA had undelivered letters after the first and second mailings. Our review of the information provided to us by ERA officials indicated that only 10 of the 75 firms we identified as having undelivered letters after the second mailing were considered during the private investigators' search. The investigators were not able to locate the 10 firms. The reasons given by ERA for not including the remaining 65 firms in the investigators' search were (1) ERA did not receive some of the return receipts indicating that the letters were undeliverable until after the June 30, 1985, date; (2) in some cases, neither the letter nor the return receipt had been returned to ERA; and (3) in some cases, the undeliverable letters were returned just before June 30, 1985. Because the 65 firms were not included in the private investigators' search, we believe that ERA should make further efforts to locate these firms if it is determined that their records are needed to resolve enforcement cases, regardless of the June 30, 1985, cut-off date.

## Conclusions

In structuring the amended recordkeeping rule, ERA included a provision that certain firms would not have to retain their records beyond June 30, 1985, unless otherwise notified by ERA. This date, however, proved to be unrealistic, and in May and June 1985 ERA had to instruct 786 of the 883 firms to which this cut-off date applied when the rule was issued in January 1985 that they were to retain their records until further notice. ERA also had to send similar instructions to an additional 55 firms to which this cut-off date became applicable after the rule was issued.

In addition to the time and expense of preparing and mailing 841 follow-up letters, the June 30, 1985, cut-off date also might have resulted in 129 firms disposing of records that ERA had determined might be needed for its enforcement program. Seventy-five of these firms did not receive a May or June 1985 letter and 54 received their letters after June 30, 1985. Therefore, these firms could have disposed of, or—in some cases— could still dispose of their records.

At the request of ERA's special counsel, we provided ERA, in February 1986, the categorization of firms developed during our analyses, which listed those firms that could have disposed of their records. ERA told us that, on the basis of a sample review of our listings, our categorizations generally appeared to be correct. However, ERA did not follow up with the program units to determine whether the records of these firms were still needed, nor did they have any future plans to follow up with these firms to determine whether they retained their records.

ERA did attempt to locate those firms with undeliverable letters after the first and second mailings, by hiring private investigators. However, only 10 of the 75 firms we identified were included in the private investigators' search. In this regard, ERA officials told us that, in many cases, they did not become aware of some of the undeliverable letters until just before or after the June 30, 1985, cut-off date. ERA's position is that firms are not required by the regulation to retain records after June 30, 1985. ERA, therefore, believed it would not be worthwhile to attempt to locate those firms because they could not possibly be notified of their recordkeeping requirements until after the cut-off date. However, as stated earlier, those firms receiving notification letters after June 30, 1985, that had not disposed of their records would, once notified, still be required to retain them in accordance with the recordkeeping regulation. We believe, therefore, that if these firms have records needed for resolving enforcement actions, ERA should make further efforts to locate and notify them accordingly.

## Recommendation to the Secretary of Energy

To help ensure that all relevant records are being retained by the oil firms, we recommend that the Secretary of Energy direct the Administrator, ERA, to determine which of the firms that were not notified of their recordkeeping status still need to retain their records, and resume efforts to locate and inform the firms accordingly.

# Oil Producer's Correspondence Concerning Recordkeeping Requirements

Among the documents provided to us by OMB in response to a request from the Subcommittee Chairman for information concerning DOE's recordkeeping requirements for the oil industry were several pieces of correspondence between an oil producer and executive branch officials, including the Vice President of the United States and the Secretary of Energy. This correspondence dealt with the oil producer's efforts to have DOE significantly reduce the oil industry's recordkeeping burden. The Chairman's office asked us to determine (1) to what extent this correspondence may have influenced the recordkeeping rulemaking process, and (2) whether the correspondence should have been in the public file on the recordkeeping rule. The Chairman also asked us to obtain information on DOE's enforcement actions against the oil producer for oil pricing violations and on the oil producer's political campaign contributions.

Our review was generally limited to the information provided in the correspondence and the information obtained from the files of the Federal Election Commission and in DOE's Office of Hearings and Appeals. However, we did follow up on certain issues with OMB and DOE officials to clarify statements contained in the correspondence, and talked with the oil producer to solicit his views on the accuracy of the information obtained during our review.

In summary, we could not determine to what extent the oil producer's correspondence influenced the rulemaking process. Also, in our opinion, because the correspondence was not in direct response to a specific, ongoing DOE rulemaking or DOE request for OMB approval of the recordkeeping requirement, the correspondence is not required to be a part of either agency's public files on the recordkeeping rule.

## Correspondence About Recordkeeping Requirements

Two months after DOE withdrew its first proposal to reduce its recordkeeping requirements, an oil producer wrote to senior officials of the executive branch expressing a strong desire to alleviate the recordkeeping burden on the oil industry. In his letters of February 22, 1984, to the Vice President of the United States and the Secretary of Energy, this oil producer referred to his previous meetings with these officials, during which he mentioned his concern about the recordkeeping burden imposed by DOE on the oil industry. In his letters the producer expressed concern that OMB continued to extend DOE's recordkeeping requirements for the oil industry. (As previously stated in chapter 2, DOE obtained five extensions between 1981 and 1984.) The letters stated that the recordkeeping requirements should no longer be extended because

- requiring DOE to comply with the provisions of the Paperwork Reduction Act would be supported by the 15,000 independent oil producers who support the President and
- the possibility existed that, if the records were retained indefinitely, a future administration might conduct punitive audits of the oil industry.

On March 14, 1984, the ERA Administrator responded for the Secretary to the oil producer's February 1984 letter. The Administrator's letter explained that in order to protect the government's position in litigation, it was necessary to preserve information which, if destroyed, could jeopardize certain enforcement activities. The letter also stated that the recordkeeping requirement was a burden on the oil industry and advised the oil producer that ERA was exploring ways to provide relief from the recordkeeping requirements to as many firms as possible, while still protecting the government's legal requirements.

In a letter dated March 15, 1984, the Vice President responded to the oil producer's letter. He informed the producer that, because OMB was continuing its review of DOE's recordkeeping requirements, his letter had been forwarded to OMB for further consideration. As stated in chapter 2, in the spring of 1984, DOE began working on another proposal to decrease the recordkeeping requirements on the oil industry. At that time, OMB's approval of DOE's all-inclusive recordkeeping requirement was scheduled to expire in July 1984.

On March 20, 1984, the oil producer again wrote to the Secretary of Energy, stating that, although he and the officials of the Independent Petroleum Association of America (IPAA) were not critical of the ERA Administrator's emphasis on protecting the government's position in future litigation, they were concerned that the Administrator might make a last minute, successful appeal to OMB, as DOE had in the past, to extend the all-inclusive recordkeeping requirement. The producer's letter also stated that, if this were to occur, his industry would be facing the possibility that a future administration might conduct punitive audits. In the letter, the oil producer requested a meeting with the Secretary of Energy and the IPAA to decide what action would be taken to resolve the issue concerning DOE's need to extend the all-inclusive recordkeeping requirement.

On April 25, 1984, OMB wrote to the oil producer, telling him that although OMB intended to take a very hard look at what DOE would propose as recordkeeping requirements beyond July 1984, the oil producer's recent discussions with DOE might well result in a satisfactory

resolution of the issue. According to OMB's desk officer, Office of Information and Regulatory Policy, the basis for OMB's statement was its understanding, based on consultation with the ERA Administrator, that DOE had decided not to seek extension of the all-inclusive recordkeeping requirements cited by the oil producer.

On May 24, 1984, the Secretary responded to the oil producer's March 20, 1984, letter. He told the oil producer that DOE's recordkeeping requirements were being reviewed with the goal of eliminating the retention of records that were not required for proper completion of the remaining EPAA enforcement work.

In a June 1, 1984, letter, the oil producer told the Secretary of Energy that he was greatly encouraged by the assurances provided him by the then DOE general counsel and that the general counsel did not believe that DOE would extend the recordkeeping requirement for the oil industry beyond the July 1984 expiration except for the isolated record: necessary for the specific cases that DOE had on its agenda. The oil producer's letter also said that the then general counsel had assured him that if any change in this plan developed, he and the IPAA would be notified and a meeting arranged to discuss the issues prior to a final decision. In follow-up discussions with the former general counsel, he told u that he did inform the oil producer by telephone that it was his understanding that the all-inclusive recordkeeping requirement would not be extended beyond July 1984. He said he further explained to the produce that he believed the amended requirement would only apply to firms whose records were needed for future ERA enforcement activities. He told us, however, that a meeting with the producer was never held, either before or after the final rulemaking decision to extend the all-inclusive recordkeeping requirement beyond July 1984.

## Correspondence Not Included in Rulemaking Public File

All of the above-mentioned correspondence was provided by OMB from its Regulatory Branch's correspondence file or was contained in DOE's chronological files in the Office of the DOE Secretariat. The correspondence was neither in OMB's public file on the control number for DOE's recordkeeping rule nor in DOE's public file on this rule. The prime legisla tive directives for handling the ERA proposed recordkeeping rule, the Paperwork Reduction Act and Administrative Procedures Act, do not have specific provisions that direct the agencies as to the type of correspondence or documents to be maintained in the public files. However, in the case of OMB, the Paperwork Reduction Act implies that those documents that are actually used in the decision making process to respond

to an agency's request for approval and/or extension of its recordkeeping requirement should be maintained in the public file. In the case of ERA, the Administrative Procedures Act implies that those documents that directly comment on a specific proposed rule and/or are used as a basis for revising the rules' provision(s) should be maintained in the public file. According to DOE and OMB officials, the reason the correspondence was not in either of these public files was that it did not specifically refer to a formal DOE rulemaking or to OMB's control number on such a rulemaking. In fact, in the first half of 1984, when the correspondence was received, no formal proceedings were in progress. In this regard, the oil producer did not publicly comment on either of the two DOE proposed rulemakings calling for reduced recordkeeping requirements, or on DOE's request for OMB control number approval. The public comment period ran from January 4, 1983, to February 3, 1983, for the January 1983 proposed rulemaking and from November 16, 1984, to December 17, 1984, for the November 1984 proposed rulemaking.

## Information on Oil Producer

In addition to the above discussion, the Subcommittee Chairman requested information on the oil producer's involvement in overcharges and his campaign contributions. This information is presented below.

The oil producer was cited by DOE in May 1979 for selling crude oil at prices exceeding the maximum price allowed by the regulations. DOE contended that the producer should refund about $51,000, plus interest. The producer maintained, however, that he was only the operator of the property from which the crude oil was produced and that he owned less than 16 percent of the production. Therefore, he believed that each owner should be responsible for the overcharges applicable to his share of the crude oil.

DOE disagreed and contended that he was responsible for any pricing violations on the crude oil produced from that property. The oil producer appealed his case to both the Office of Hearings and Appeals and the Federal Energy Regulatory Commission, both of which decided in favor of DOE. As a result, in June 1983, he paid $93,000, comprised of the $51,000 plus about $42,000 in interest, to settle the pricing violation.

With regard to campaign contributions made by the oil producer and his spouse, the following information was obtained from the public records of the Federal Election Commission.

**Table 4.1: Campaign Contributions**

| | Campaign Years | | |
|---|---|---|---|
| | **1979&1980** | **1981&1982** | **1983&1984** |
| National Republican Congressional Committee | $ 500 | $ 5,500 | $ 7,500 |
| Republican Senate/House Dinner | 2,000 | 5,000 | 1,800 |
| National Republican Senatorial Committee | • | 22,500 | 10,000 |
| Republican National Committee | 22,200 | 40,000 | 30,000 |
| New Jersey GOP[a] Campaign - 1980 | 5,000 | • | • |
| Pennsylvania GOP congressmen | 10,000 | • | • |
| President's Dinner Committee | • | • | 3,000 |
| Reagan/Bush Campaign | 750 | • | 1,500 |
| Other Contributions to Republican Party functions | 11,500 | 6,500 | 15,000 |
| **Total** | **$51,950** | **$79,500** | **$68,800** |

[a]GOP: Grand Old Party.

Source: Federal Election Commission.

During our discussions with the oil producer, he indicated agreement with the factual information developed during our review. He pointed out, however, with regard to his involvement in price overcharges, that he believed he had done nothing wrong. He said that he had written DOE before selling the oil and described the circumstances of the proposed sale. He said that DOE told him that the actions he proposed to take were apparently in compliance with DOE regulations. He said that because of these efforts, he believed that he had gone beyond what would normally be expected of a prudent operator to do what was right under these circumstances, and that his consent to refund the oil overcharge did not mean that he agreed with DOE's decision that he had violated the regulations. We noted in the public files of the Office of Hearings and Appeals a 1977 letter from the oil producer to DOE that briefly summarized what the oil producer told us.

## Conclusions

On the basis of our review of the correspondence and follow-up inquiries, we could not determine to what extent, if any, the producer influenced DOE's rulemaking process.

However, it is clear that the oil producer attempted to persuade DOE to reduce its recordkeeping requirements on the oil industry, especially the independent oil producers. Also, the oil producer's letters indicated that the responses he received from DOE and OMB—particularly the June 1, 1984, letter that summarized the telephone discussion with the then DOE

general counsel—led the producer to believe that his efforts to reduce the ERA recordkeeping requirements had been successful. However, in our opinion, there appears to be nothing illegal or improper about the oil producer opposing what he considered to be excessive recordkeeping requirements imposed by DOE on the oil industry.

Also, in our opinion, the oil producer's correspondence was not required to be included in ERA's and OMB's public file on the recordkeeping rule because the correspondence was not in response to a specific DOE proposed rulemaking or a DOE request for an OMB control number.

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