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~~EMD-81-45~~

REPORT BY THE

Comptroller General

OF THE UNITED STATES

Department Of Energy Needs To Resolve Billions In Alleged Oil Pricing Violations

As of January 1981, the Department of Energy (DOE) had alleged over $13 billion in oil pricing violations. However, only $4.2 billion of this total has been resolved primarily because of oil industry legal challenges to DOE's regulations. Even when DOE was able to negotiate settlements with oil companies, it was generally unable to ensure that restitution was made to injured parties.

Because petroleum pricing has been decontrolled and because most alleged violations have not been settled, DOE needs to pursue its enforcement efforts to bring these violations to a fair and orderly resolution.

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

B-202587

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

The Honorable John Conyers, Jr.
Chairman, Subcommittee on Crime
Committee on the Judiciary
House of Representatives

This report describes the problems encountered by the Department of Energy in enforcing the pricing regulations established under the Emergency Petroleum Allocation Act of 1973, with suggested improvements. It also describes the Department of Justice's role in civil litigation involving the enforcement of the pricing regulations. The report makes a recommendation to the Commissioner of the Internal Revenue Service to prevent problems from arising regarding those portions of the Department of Energy regulations and definitions that have been incorporated into the Internal Revenue Service regulations for enforcing the Crude Oil Windfall Profit Tax Act of 1980. Recommendations are also made to the Congress and the Office of Management and Budget concerning the staffing and funding needed by the Department of Energy to bring about the orderly resolution of violations and outstanding litigation.

This report was prepared as a result of your joint request dated October 29, 1979, and Chairman Dingell's subsequent request on June 11, 1980. As requested in Chairman Dingell's letter of June 11, 1980, we did not take the additional time needed to obtain agency comments on the matters discussed in this report.

As arranged with your offices, we plan no further distribution of this report prior to hearings held by the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, at which this report will be used. These hearings are now scheduled to be held on April 2, 1981.

Milton J. Socolar

Acting Comptroller General
of the United States

REPORT BY THE
COMPTROLLER GENERAL
OF THE UNITED STATES

DEPARTMENT OF ENERGY NEEDS TO RESOLVE BILLIONS IN ALLEGED OIL PRICING VIOLATIONS

D I G E S T

The Congress attempted to minimize the effects of rapidly increasing prices for imported oil by passing the Emergency Petroleum Allocation Act of 1973 (15 U.S.C. 751 et seq.). The act established petroleum pricing controls. The Department of Energy (DOE) seeks to identify violations, recover oil company overcharges, and obtain restitution for parties injured by the overcharges.

GAO reviewed DOE's enforcement of the petroleum pricing regulations from October 1977 through September 1980. This included DOE's audit efforts at the 35 major refiners and the crude oil resellers, and a sample of DOE's negotiated agreements (consent orders) to settle civil violations in all programs.

DOE has alleged billions of dollars of violations but has not been able to effectively enforce petroleum pricing regulations, primarily because of oil industry legal challenges. These challenges have caused lengthy delays and at times resulted in the voiding of DOE regulations. As of January 1981, DOE was unable to resolve almost 68 percent of the alleged violations of over $13 billion. Even when settlements have been reached, DOE has been unable to ensure that restitution has been made to parties that were injured by the overcharges. (See pp. 23 and 31.)

IMPROVED AUDIT COVERAGE HAS IDENTIFIED BILLIONS IN VIOLATIONS

In general, DOE made considerable improvements since 1977 in the audit coverage of major refiners and crude oil resellers.

As of October 1980, it had charged major refiners with regulation violations of about $10.8 billion, of which about $9.4 billion was still unresolved. But, because of (1) the complexities of major refiner audits; (2) the need to make extensive recalculations of costs and sales for each month since the violations occurred; and (3) the fact that not all violations result in overcharges to customers, DOE was unable to say precisely what effect these violations had on petroleum prices.

In GAO's opinion, DOE has no means available to more precisely identify the effect of major refiners' violations on prices, short of committing an unreasonable amount of additional time and resources to broaden the scope of individual audits, make required recalculations, and evaluate the effect of violations on individual customers.

DOE had also charged crude oil resellers with regulation violations in excess of $500 million, nearly one-fourth of the approximately $2.3 billion in alleged violations by companies other than the 35 major refiners. However, until September 1, 1980, DOE had not been able to make reseller pricing audits for many recent sales because it had failed to establish a permissible average markup as required by DOE regulation. Morever, although many notices of probable violations were over 1 year old as of December 1980, DOE had not acted aggressively to resolve them by taking the next step--issuing proposed remedial orders for adjudication by the Office of Hearings and Appeals, DOE's administrative court. (See ch. 2.)

FEW VIOLATIONS ARE RESOLVED

Because of the early problems in developing DOE's regulations and the enormous dollar values at stake, the oil companies have challenged DOE's regulations. There are at least 220 court cases involving the enforcement of DOE's pricing regulations. This has had a

negative effect on DOE's ability to resolve violations.

In many cases DOE has attempted to avoid the cost and time involved in litigating civil cases by negotiating settlements with companies. However, only 32 percent, or $4.2 billion, of the total alleged violations of over $13 billion was settled by January 1981.

Administrative and court litigation seems to be the inevitable outcome of most DOE/company disagreements. This quagmire could take years to resolve beyond January 28, 1981, the date petroleum pricing was decontrolled. Although DOE will have to engage in litigation to effectively resolve these disputes, negotiated settlements should continue to be utilized where it is deemed to be in the public interest.

DOE prepared a 5-year plan for phasing out the compliance programs after deregulation. However, the Office of Management and Budget (OMB) has proposed major reductions in DOE's personnel and funding requirements for fiscal year 1982 which would seriously impair the effectiveness of DOE's compliance program. GAO believes OMB should assist DOE in developing a plan for congressional consideration, to include DOE's personnel and funding needs for the orderly resolution of any violations and litigation outstanding when deregulation occurred. Such a plan should include resources for resolving outstanding audit findings and litigation and for monitoring companies' compliance with consent orders to settle violations. The Congress should act favorably on such a plan to be fair to the companies that did not violate DOE's regulations and to those companies that settled their violations with DOE. Without such action, GAO believes a bad precedent would be set for any future programs of this nature.

Because the Internal Revenue Service (IRS) has adopted DOE's crude oil production regulations and definitions, which are involved in litigation, to enforce the Crude Oil Windfall Profit

Tax Act of 1980 (P.L. 96-223, Apr. 2, 1980), the legal challenges discussed above could also have a profound effect on the tax program by causing delays in the enforcement process and possibly voiding the regulations themselves. (See ch. 3.)

DOE SETTLEMENTS COULD BE STRENGTHENED

DOE has generally been unable to obtain restitution for parties that have been injured through overcharges. The major obstacle to making restitution is DOE's inability to identify precisely who has been injured by overcharges, because in many instances the overcharges were passed through the marketing chain in subsequent sales. Recognizing these problems, DOE has begun to hold cash proceeds of consent orders in escrow accounts, with about $260 million already deposited as of October 1980.

GAO doubts that there are practical means to readily identify who has been injured by overcharges or the amounts of the injuries. DOE's Office of Special Counsel does not publicly differentiate the settlement provisions which have no restitutional value, such as those calling for companies to invest in additional oil exploration or in refinery modernization, and those that provide remedies for overcharges, such as refunds. Consequently, the restitutional value of the settlements is obscured.

In addition, DOE does not always include specific requirements in consent orders regarding documentation that companies must provide as evidence of their compliance. (See ch. 4.)

ENERGY/JUSTICE COOPERATION NEEDS IMPROVEMENT

The Department of Justice is vested with primary civil litigative authority for all Federal agencies unless legislation authorizes an agency to handle its own civil litigation. DOE and Justice have

consummated a memorandum of understanding as a guide to resolve questions about each department's authorities in specific civil litigative matters. Despite the memorandum's attempt to resolve disputes, the departments have not agreed on certain matters related to global consent orders: (1) the authority of Justice to concur in the settlement of civil litigation and (2) the propriety of certain nonlitigative provisions. (See ch. 5.)

GAO is also issuing a companion report which concentrates primarily on the Department of Justice's prosecution of potentially willful (criminal) violations of DOE's regulations.

RECOMMENDATIONS TO THE SECRETARY OF ENERGY

To begin to resolve crude oil reseller's violations, the Secretary of Energy should expedite DOE's efforts to issue proposed remedial orders. (See p. 20.)

To maximize the resolution of violations, the Secretary of Energy should pursue ongoing litigation and should continue to use administrative and court litigation, where appropriate. DOE should, however, negotiate settlements where it is deemed to be in the public interest. (See p. 39.)

To improve the settlement process, the Secretary of Energy should:

--Allow refunds to customers only when DOE can assure itself that such refunds will result in restitution to injured parties.

--Direct appropriate enforcement officials, when injured parties cannot be readily identified, to petition the Office of Hearings and Appeals to implement special refund procedures to identify and make refunds to parties who have suffered injuries because of overcharges. After applying this process, deposit any remaining escrow accounts' funds and the remaining cash proceeds of consent orders directly into the U.S. Treasury.

To strenghten the provisions of DOE consent orders, the Secretary of Energy should:

--Separately identify and publicly disclose restitutional and non-restitutional provisions in consent orders.

--include in consent orders specific requirements for the documentation a company must provide DOE as evidence of compliance. (See p. 52.)

To improve the DOE/Justice working relationship, the Secretary of Energy should work with the Attorney General to:

--Establish guidelines for Justice's review of settlement agreements which include companies withdrawal of civil suits against the Government.

--Develop appropriate language to resolve current Justice objections to non-litigative provisions in Office of Special Counsel global settlements for inclusion in pertinent future settlements. (See . 59.)

RECOMMENDATION TO THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

To establish an orderly means to phase out DOE's enforcement programs and to inform the Congress of these needs, the Director, OMB, should assist DOE in developing a plan to include DOE's personnel and funding needs for the orderly resolution of the violations and litigation outstanding when deregulation occurred. The Director should approve the plan and submit it for congressional consideration. (See p. 39)

RECOMMENDATION TO THE CONGRESS

To provide for an effective and orderly phase out of DOE's enforcement program, the Congress should approve the funding request assuming it is reasonable and appropriate for DOE to

carry out a plan for resolving the violations and litigation outstanding when deregulation occurred. (See p. 39.)

RECOMMENDATION TO THE COMMISSIONER, INTERNAL REVENUE SERVICE

To minimize perceived enforcement problems, the Commissioner, IRS, should conduct a study to determine the effect that successful legal challenges to DOE's regulations could have on IRS' ability to enforce the Windfall Profit Tax Act. The Commissioner, through the Secretary of the Treasury, should then issue IRS regulations that reflect the changes required by the study. (See p. 39.)

AGENCY COMMENTS

As requested by the former Chairman, Subcommittee on Energy and Power, House Committee on Interstate and Foreign Commerce (now Chairman, House Committee on Energy and Commerce), GAO did not obtain agency comments on this report.

Contents

ABBREVIATIONS

AMOCO	Standard Oil Company of Indiana
DOE	Department of Energy
GAO	General Accounting Office
IRS	Internal Revenue Service
OMB	Office of Management and Budget
OPEC	Organization of Petroleum Exporting Countries
SOHIO	Standard Oil Company of Ohio
SUNOCO	Sun Oil Company of Pennsylvania

CHAPTER 1

INTRODUCTION

The physical flow of crude oil through the refinery process to ultimate consumption is not complicated. A domestic producer or crude oil importer sells the oil to a refiner, possibly through a reseller. The refiner sells the refined products to a retailer, again possibly through a reseller. The retailer sells the refined products to the consumer.

The Government intervened in the market price structure for crude oil and refined petroleum products in 1970 to stem the growth of inflation in the economy in general. In 1973, it became necessary for the Government to take more specific action to regulate the price of crude oil and refined products and to ensure the fair allocation of petroleum supplies. In late 1973 and early 1974, the Organization of Petroleum Exporting Countries (OPEC) put an embargo on crude oil exports to the United States and then dramatically increased the price of its crude oil exports. Consequently, the Congress attempted to minimize adverse repercussions from these actions by passing the Emergency Petroleum Allocation Act of 1973 (15 U.S.C. 751 et seq.), which was primarily intended to

--prevent price gouging by domestic crude oil producers which 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 levels of the marketing chain.

The act required the President to establish (promulgate) regulations for its enforcement. Executive Order 11748 of December 4, 1973, created the Federal Energy Office, a forerunner of the Department of Energy (DOE), to enforce the price controls. DOE seeks to (1) identify violations of petroleum pricing regulations, (2) recover overcharges, and (3) obtain restitution for injured parties.

HISTORY OF PETROLEUM PRICING LAWS AND REGULATIONS

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 pursuant to the Economic Stabilization Act of 1970, as amended (12 U.S.C. 1904, note). In December 1973, the Federal Energy Office came into existence and was delegated authority 1/ to enforce the pricing regulations. The Federal Energy Office adopted the Cost of Living Council's pricing rules for petroleum products. The Federal Energy Office later transferred the pricing regulations to the Federal Energy Administration 2/ along with all authority vested in the President by the Emergency Petroleum Allocation Act of 1973. Then, most recently, 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 redelegated to DOE, effective October 1, 1977. 3/

DOE and its predecessor agencies (hereafter referred to as DOE) have been authorized to investigate and deal with pricing violations since August 19, 1973. These legislative and executive actions brought the price of domestic crude oil and petroleum products under Federal control. DOE deregulated most of the petroleum products over a period of time, with full deregulation scheduled for September 30, 1981. On January 28, 1981, the President signed Executive Order 12287, decontrolling motor gasoline, propane, natural gas liquids, and the remaining portion of crude oil still regulated by the Emergency Petroleum Allocation Act of 1973.

ORGANIZATION AND RESOURCES
TO ENFORCE REGULATIONS

The Secretary of Energy redelegated to the Administrator, Economic Regulatory Administration, the authority and responsibility to establish regulations limiting the price of crude oil and refined petroleum products. As head of the Economic Regulatory Administration's Office of Enforcement, the Assistant Administrator for Enforcement is responsible for enforcing the pricing regulations. Effective December 1977, the Administrator, Economic Regulatory

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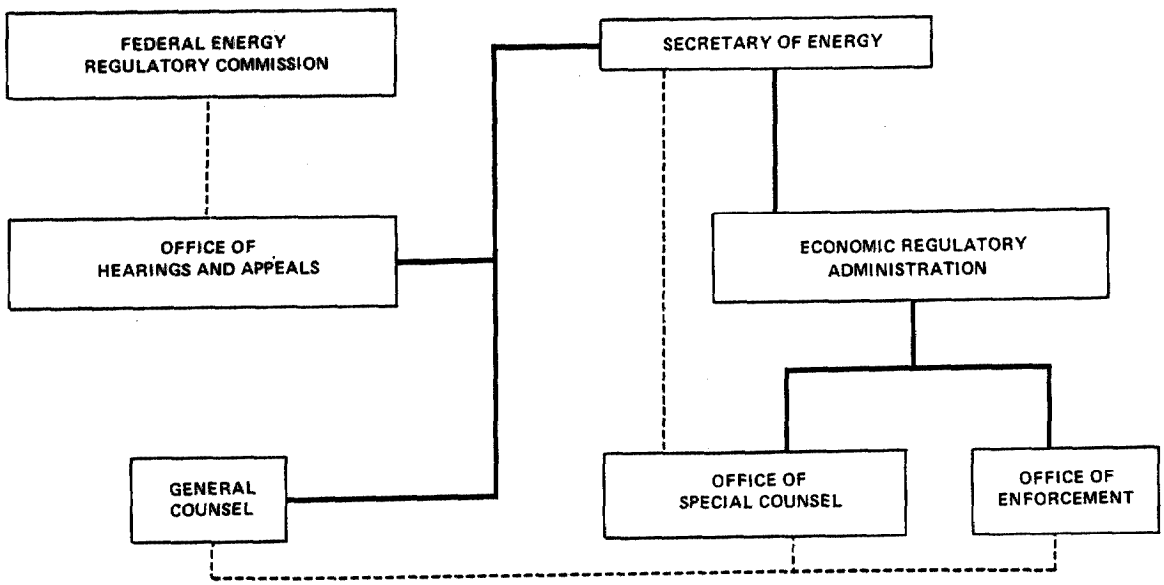
1/Cost of Living Council Order No. 47, dated December 26, 1973.

2/Executive Order No. 11790 (39 F.R. 23185, June 27, 1974).

3/Executive Order No. 12009.

Administration, transferred enforcement responsibility for the 35 major refiners to DOE's Office of Special Counsel. DOE's Office of Hearings and Appeals administratively adjudicates audit cases brought to it by the Office of Enforcement and the Office of Special Counsel against oil companies. DOE's Office of General Counsel represents the Office of Enforcement at hearings before the Office of Hearings and Appeals, whereas the Office of Special Counsel represents itself. Decisions by the Office of Hearings and Appeals are subject to review by the Federal Energy Regulatory Commission.

The following chart depicts the organizational structure for enforcing the petroleum price regulations.



The Office of Special Counsel has field offices in Dallas, Philadelphia, and San Francisco which audit the major refiners. The Office of Enforcement has district offices in 6 cities: Atlanta, Dallas, Denver, Kansas City, Philadelphia, and San Francisco. Each district office has audit groups and sub offices in other cities. These offices conduct audits and investigations at all companies except the major refiners and the crude oil resellers. The Office of Enforcement has established audit groups in Dallas, Houston, and Tulsa to audit the crude oil resellers.

The following table shows the DOE staff assigned to the Office of Enforcement, the Office of Special Counsel, the Office of Hearings and Appeals, and the Office of the General Counsel in support of the regulatory program, for the periods ending September 30 of the years 1978, 1979, and 1980.

Staff on Board in 1978, 1979, and 1980

	1978	1979	1980
Office of Enforcement (note a)	699	773	743
Office of Special Counsel	583	587	587
Office of Hearings and Appeals (authorized positions only, including non-enforcement activities)	83	166	211
Office of the General Counsel (note b)	89	116	117
Total	1,454	1,642	1,658

a/During this period the actual on-board strength varied widely from a low of 576 in July 1979 to a high of 795 in October 1979.

b/Does not include any regulatory litigation staff. DOE estimates that as of September 30, 1980, a workload equivalent of 22 attorneys in regulatory litigation were involved in pricing cases.

DOE spent approximately $79 million in fiscal year 1980 to enforce the regulations, which represented about 1 percent of DOE's total expenditures.

DOE ADMINISTRATIVE PROCESS FOR ENFORCEMENT

When audits by the Office of Enforcement or the Office of Special Counsel find potential civil violations of the pricing regulations, DOE may issue an administrative order, institute legal action in a court of law (15 U.S.C. 754 (a)(1)), or negotiate a settlement with the company when it is in the public interest to do so. If a settlement is achieved, a consent order is written to specify the actions DOE and the company agree on to settle the alleged violations. When a settlement is not achieved, DOE normally issues a notice of probable violation against the company. The notice specifies the alleged violations and the dollar amount.

The company is allowed to respond in writing to DOE within 30 days regarding the allegations, usually before a conference is held to discuss the issues. If DOE still considers the company to be in violation, the company is issued a proposed remedial order. The proposed remedial order specifies the alleged violations and recommends remedial actions. The company may file a statement of objections with the Office of Hearings and Appeals, which describes its position regarding DOE's allegations.

If the Office of Hearings and Appeals concludes that a violation exists, it issues a final remedial order to the company, which can appeal the order to the Federal Energy Regulatory Commission (42 U.S.C. 7193) and to the district courts of the United States (42 U.S.C. 7192 (b)). The company can appeal further to the Temporary Emergency Court of Appeals. A case will not proceed beyond the Office of Hearings and Appeals unless the company or an interested third party appeals the decision.

PRIOR REPORTS ON PETROLEUM PRICING REGULATIONS

Many reports have been issued on DOE's enforcement of the petroleum pricing regulations. The Federal Energy Administration's Task Force on Compliance and Enforcement took a comprehensive look at DOE's organization and past performance to identify problem areas that kept DOE from effectively enforcing its regulations. The July 1977 task force report (commonly called the "Sporkin Report") made several recommendations for improving the program. We have also issued several reports on various aspects of DOE's program.

Sporkin Report

In general, the Task Force identified organizational problems, unresolved regulatory issues, and lack of intensive audit effort on the operations of the largest oil companies. Among other things, the Sporkin Report recommended that DOE

--provide high priority for auditing major refiners and crude oil resellers,

--develop a system for expediting issue clarification and interpretation,

--require companies to pay refunds of overcharges directly into the United States Treasury when the persons injured by the overcharges cannot be identified by reasonable measures, and

--establish a unit in headquarters to investigate willful (criminal) violations and to train field personnel to handle these cases.

DOE acted on most of the recommendations. We discuss the status and continuing problems in these areas in this report.

GAO reports

We have issued eight reports discussing various reasons why DOE has been unable to effectively enforce its petroleum pricing regulations. On May 29, 1979, we issued a report "Improvements Needed in the Enforcement of Crude Oil Reseller Price Controls" (EMD-79-57), which stated that DOE needs to strengthen its enforcement procedures and practices covering crude oil resellers' compliance with crude oil price controls. We reported that DOE had not adequately involved the Department of Justice in handling criminal cases, and that unresolved regulatory issues continued to impede DOE's enforcement of its price regulations.

The other reports, most of which predate the Sporkin Report, are more limited in scope than the Sporkin Report or our 1979 crude oil reseller report discussed above. (See app. I for a list of these reports.)

OBJECTIVES, SCOPE, AND METHODOLOGY

We made this review based upon requests from the former Chairman, Subcommittee on Energy and Power, House Committee on Interstate and Foreign Commerce (now the Chairman, House Committee on Energy and Commerce), and the Chairman, Subcommitte on Crime, House Committee on the Judiciary. In order to issue a more timely report, we and the committees' representatives agreed to reduce the scope of the requests. As agreed, the primary objectives of our audit work were to determine:

--The adequacy and timeliness of the audits to enforce DOE's pricing regulations.

--DOE's effectiveness in resolving alleged violations by obtaining refunds of overcharges for identifiable, harmed parties.

--The propriety of DOE's settlement agreements.

--DOE's effectiveness in enforcing its settlement agreements.

We also followed up on DOE's and Justice's actions on the recommendations in our report "Improvements Needed in the Enforcement of Crude Oil Reseller Price Controls."

We agreed that we would (1) limit the scope of our review to DOE's audits of the 35 major refiners and the crude oil resellers and (2) review consent orders in all programs based on a judgment sample. Generally, we included DOE operations from October 1, 1977, when DOE was established, to September 30, 1980.

Our audit work for this report was conducted at DOE's headquarters in Washington, D.C. and DOE's offices in Dallas. The Dallas offices provided major coverage of DOE's crude oil reseller audits and the major refiners--the primary interests in the requests. We reviewed applicable legislation, policies, procedures, regulations, documents, correspondence, audit reports, statistical reports, and the memorandum of understanding between DOE and Justice. We interviewed DOE officials in headquarters and in Dallas for the Office of Enforcement, Office of Special Counsel, Office of Hearings and Appeals, and the Office

of the General Counsel. We also interviewed Department of Justice headquarter's officials in the Civil Division.

In keeping with the primary objectives of our audit work, we did not review oil companies' records, interview company officials, or evaluate the technical work of DOE's individual company audits. Also, we did not review DOE's program for enforcing the allocation regulations or the entitlements program.

Also based upon Chairmen Dingell's and Conyers' request, we are issuing a companion report which concentrates primarily on the Department of Justice's prosecution of potentially willful (criminal) violations of DOE's regulations.

Based on a request from the Subcommittee on Energy and Power, the Comptroller General also issued an October 10, 1980, opinion on the legality of DOE's plans to distribute $25 million it holds under the terms of a consent order with Getty Oil Company.

TRANSITION IMPLICATIONS

This report identifies matters which have implications beyond the date petroleum pricing was decontrolled. First, many legal cases and alleged violations were not settled on January 28, 1981, the date of deregulation. The question arises, "What will be DOE's policy and approach to bring these matters to a timely and reasonable conclusion?" Second, DOE's crude oil production regulations are being challenged in court in several suits. Because these regulations will be used by the Internal Revenue Service (IRS) to enforce the Crude Oil Windfall Profit Tax Act of 1980 (P.L. 96-223, Apr. 2, 1980) the question arises, "How will the results of these suits impact on IRS' enforcement of the tax act?"

These matters need the attention of the Congress; the Secretary of Energy; the Attorney General; the Director, Office of Management and Budget (OMB); and the Commissioner, IRS, and they are discussed in more detail in chapter 3.

CHAPTER 2

AUDIT COVERAGE HAS IMPROVED, BUT LACK OF TIMELY ACTION HAS REDUCED PROGRAM EFFECTIVENESS

DOE has made considerable improvement in audit coverage of major refiners and crude oil resellers since October 1977. As of October 1980, the Office of Special Counsel had charged major refiners with regulatory violations of about $10.8 billion, of which about $9.4 billion was still outstanding. But DOE was unable to say precisely what effect these violations had on petroleum prices.

DOE's Office of Enforcement had identified violations totaling over $2.3 billion as of October 1980, of which about $500 million was attributed to crude oil resellers' violations. Although many of the notices of probable violations for crude oil resellers were over 1 year old as of December 1, 1980, DOE had not taken the next administrative step necessary to obtain restitution--issuing proposed remedial orders. Moreover, DOE had not been able to make pricing audits of crude oil resellers which made their first sales after December 1, 1977, as prescribed by 10 CFR 212.183, because DOE had failed to establish the regulations required to do so until September 1, 1980.

In our opinion, DOE has no means available to more precisely identify the effect of major refiners' violations on prices, short of committing an unreasonable amount of additional time and resources to broaden the scope of such audits. However, for resellers' audits, DOE should act aggressively to issue proposed remedial orders.

MAJOR REFINER AUDITS ARE NEARLY COMPLETE, BUT THE IMPACT OF VIOLATIONS IS UNKNOWN

As a result of the Sporkin Report recommendation to intensify compliance efforts for the major refiners, DOE established and staffed the Office of Special Counsel to audit the 35 major refiners. Through intense audit efforts, Special Counsel has substantially completed its audits of the major refiners for the period 1973 through 1979. However, because of the complexity of the audits and the fact that not all violations result in overcharges to customers, Special Counsel is unable to show the full impact of the alleged violations on prices charged by the companies.

DOE major refiner audits identify billions in violations

Special Counsel's major refiner audits are comprehensive reviews of the companies' integrated activities in crude oil production, natural gas liquids processing, refinery operations, and crude oil reseller operations (discussed on p. 14). Each of these areas has its own operational peculiarities and each required its own set of regulations.

Special Counsel established completion goals for major refiner audits--December 1979 for the 15 largest refiners and December 1980 for the remaining 20. As of October 1980, with one exception, it had completed audits of company activities for the period 1973 through 1976 and had substantially completed the audits for the period 1977 through 1979. As a result of these audits, Special Counsel has compiled about 200 charges against the companies, alleging about $10.8 billion in violations, of which about $9.4 billion remained outstanding. This included audited violations and projected violations based on audit findings.

For illustrative purposes, the following sections provide oversimplified explanations of how the regulations enforce the intent of the pricing controls and of the key factors the Office of Special Counsel considers when making audits.

Crude oil production

Although the crude oil production regulations changed over time, in general, crude oil price controls had been instituted by freezing prices at the base rates actually experienced in May 1973, prior to OPEC's actions which initially disrupted the crude oil market. Then too, the regulations placed domestically produced crude oil in categories, each with its own legal selling price. These regulations also changed over time, but initially they categorized oil as:

--Old oil: the quantity produced from a property during the same month in 1972. This quantity was called the base production control level.

--New oil: the quantity produced from a property in excess of the quantity produced during the same month in 1972.

--Stripper oil: oil produced from a property at a rate of less than 10 barrels per well per day.

DOE changed the categories of production to "upper" and "lower" tier crude oil, but the intent to put limits on selling prices remains the same. The following chart shows the bases for barrel prices of crude oil in September 1980.

Bases for Crude Oil Prices
as of September 1980
(per barrel)

Type of crude oil	Bases
Lower tier	May 15, 1973, posted price plus $2.87 for cost inflation
Upper tier	September 30, 1975, posted price plus $1.98 for cost inflation
Stripper	Unregulated

Thus, in making crude oil production audits, Special Counsel had to consider and analyze

--companies' producing properties, to determine if the production was properly classified and

--sales, to determine if the proper selling prices were used.

Special Counsel generally reviewed a sufficient number of producing properties to account for 70 percent of a company's total sales for the period audited.

When Special Counsel found production misclassified, the use of improper selling prices, or both, it charged the company with a violation in the amount that total actual sales prices exceeded total legal sales prices. As of September 30, 1980, Special Counsel had about $2.8 billion in unresolved crude oil production violations.

Natural gas liquids processing

Natural gas must be processed before it can be marketed. During the process, liquids such as propane, butane,

and natural gasoline are extracted from the natural gas. The propane and butane may be sold as fuel to end users or as raw materials (feedstocks) to petrochemical companies. Natural gasoline may be used by the company as a blending stock in the production of gasoline.

Regulations specifically applicable to natural gas liquids processors were promulgated by 10 CFR 212, subpart K and became effective January 1, 1975. DOE officials stated that natural gas liquids had been within the scope of the petroleum price control program since the Cost of Living Council promulgated its Phase IV price controls for the petroleum industry in August 1973.

Special Counsel audits reviewed the companies accumulations of increased costs for periods back to 1973 and the pass through of these costs to refinery operations. The audits were designed to cover about 70 percent of the total natural gas liquids produced during the period under review. Over $800 million in violations of natural gas liquids regulations were still outstanding on September 30, 1980.

Refiner operations

The regulations required refiners to establish their maximum legal selling prices by computing the weighted average selling prices as of May 15, 1973, for each controlled product sold to each class of customer (wholesalers, retailers, bulk end-users, etc.). They further required the refiners to establish their May 1973 costs of production such as crude oil costs, costs of purchased products, labor, plant utilities, etc. Then, any cost increases above the May 1973 costs could legally be added to the selling prices in subsequent sales after such increases are allocated among products based on what is called the V-factor, discussed more fully on page 25.

If a refiner, because of market conditions, did not recover through sales all of the legal costs in a particular month, the refiner could "bank" any unrecouped costs for recovery in subsequent months. However, if the refiner discriminated in its prices among customers in a class of customers, it was required to compute recoveries from all sales. Recoveries were computed as though the refiner had received from all customers the highest increment above May 1973 levels it received from any customers. This is referred to as the equal application rule (discussed on p. 27).

Thus, Special Counsel's audits must consider whether the companies properly computed and applied

--May 15, 1973, selling prices,

--May 1973 costs,

--increased production costs,

--prices within each class of customers, and

--cost recoveries.

Special Counsel again reviewed about 70 percent of the transaction costs for the period audited. Special Counsel then charged the companies with violations when it found that they overstated legal selling prices, May 1973 base costs, and increased production costs or understated cost recoveries. As of September 30, 1980, Special Counsel had outstanding violations of about $5.6 billion in refiners' operations.

Full impact of violations is unknown

Although Special Counsel has shown that major refiners have violated DOE regulations, it is unable to determine the full impact of these violations on petroleum prices. Major refiners' operations are generally integrated operations from crude oil production and natural gas liquids processing operations to the refinery operations. Therefore, crude oil production and natural gas liquids processing costs flow into the refinery operation. These costs are pooled with the refiners production costs, such as the costs of imported crude oil, labor, transportation, etc., to justify the refiner's legal selling prices.

While DOE's audits of cost elements are able to identify potential cost overcharges (cost overstatements), the audits do not go far enough to establish the impact these potential cost overstatements have had on selling prices. The primary cause for the uncertainty is that a substantial portion of the alleged violations pertain to the validity of cost elements the companies used to compute legal selling prices. These costs, accumulated on a monthly basis since November 1973, are used in a complex formula to establish selling prices. If a company overstated a cost element in a particular month, the remedial action required would be to recompute that month's report with a proper cost adjustment. Then, whether an overcharge

occurred due to the overstated cost element would depend on whether the inflated cost was added to a bank of unrecouped costs or was passed through to customers in higher prices. If the inflated costs were banked, the correct remedial action would be to reduce the bank by the amount of the overstated costs.

If the inflated cost was passed through to customers in higher prices, the violation could result in an actual overcharge, which would cause injury to customers at some point in the market chain. The proper remedial action then would be to require the company to disgorge the overcharges and make restitution to the customers that absorbed the illegal overcharge. If, however, the company had a legitimate bank of unrecouped costs in excess of the overstated costs, there would be no overcharge since the company could offset the overstated costs with legal banked costs. In such cases, the proper remedy would be a bank reduction.

To identify precisely what effect the violations had on prices, Special Counsel would have to require a company to recalculate its costs and sales for each month since the violation occurred. Through these recalculations, the company could determine the violation's effect on prices, on banks, or on both. But even more extensive audits would be required to identify which customers were overcharged and which customers among them were actually injured.

Despite the receipt of notices of probable violation, the companies have not agreed to make these recalculations because they either disagree that they have violated the regulations or they do not believe such recalculations would be in their best interest. Therefore, Special Counsel would have to process proposed remedial orders for administrative adjudication by the Office of Hearings and Appeals to force the companies to do so. Rather than agree to recalculate costs for a period of time, many companies have challenged DOE's regulations or have negotiated settlements with DOE.

RESELLER AUDIT COVERAGE HAS IMPROVED, BUT VIOLATIONS HAVE NOT BEEN RESOLVED

In our May 29, 1979, report entitled "Improvements Needed in the Enforcement of Crude Oil Reseller Price Controls," we stated that DOE needed to expand its coverage and strenghthen its enforcement procedures and practices. Since that review, DOE has expanded its coverage of crude oil resellers and improved its timeliness

in completing audits. DOE has alleged crude oil reseller violations in excess of $500 million, nearly one-fourth of the $2.3 billion in alleged violations identified in all of the programs reviewed by DOE's Office of Enforcement as of September 30, 1980. 1/ However, DOE has not taken the prescribed administrative steps to resolve the violations.

Priority and status of reseller program

The Office of Enforcement has given crude oil reseller audits its second highest priority, next only to investigation of possible criminal violations. The Office of Special Counsel has also included the review of crude oil reseller activities in the scope of its major refiner audits. Overall, DOE has identified more than 400 crude oil resellers since its crude oil reseller audits began as opposed to only about 40 prior to the inception of petroleum pricing controls. The Office of Special Counsel has concluded that only 6 of the 35 major refiners are crude oil resellers, and Special Counsel expects to charge 2 of the 6 with violations.

DOE's crude oil reseller regulations required companies to certify oil's classification in the first sale and each subsequent resale. The certification was supposed to accompany the oil in each sale. For example, if a producer sold 1,000 barrels of lower tier crude oil, the producer was required to provide the buyer with a certification that the oil was lower tier oil, and the certification was supposed to accompany the crude oil in each subsequent resale.

After January 1, 1978, the regulations required a reseller to price crude oil based on cost, plus a permissable average markup. For resellers that made their first sale prior to December 1, 1977, the permissable average markup was essentially the average margin experienced in sales for a specified period. The permissable average markup for resellers that made their first sales after December 1, 1977, was a markup to be determined by DOE. As of September 1, 1980, the companies were allowed a $0.20 margin. To resell crude oil at a profit, the regulations also required a

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1/DOE officials stated that as of December 31, 1980, Enforcement had increased total alleged violations to about $3 billion and crude oil reseller violations to $675 million.

crude oil reseller to provide a service or function that had traditionally or historically been provided by crude oil resellers.

The Office of Enforcement had opened about 197 audits as of September 1980. The following chart shows the disposition of these audits.

Status of Crude Oil Reseller Audits
as of September 1980

Open cases		
On-going civil audits	74	
In special investigations for possible referral to Department of Justice	48	
Total open cases		122
Closed cases		
Referred to Justice for criminal prosecution	27	
With violations	7	
Without violations	18	
Companies were not crude oil resellers	4	
Consolidated with other audits or reopened with expanded scope	11	
Targeted for later review	8	
Total closed cases		75
Total		197

As of September 1980, Enforcement had processed charges on 36 companies, alleging $401.4 million in violations. Enforcement also had drafted but not yet issued charges against an additional 24 companies for violations of $107.6 million.

Types of violations disclosed

The Office of Enforcement identified violations in three key areas.

--Miscertifying crude oil sold.

--Failing to provide historical and traditional services.

--Not properly pricing crude oil sold by resellers that made their first sale prior to December 1, 1977. Enforcement had been unable to identify pricing violations by crude oil resellers that made their first sale after December 1, 1977, because DOE had not complied with 10 CFR 212.182 and 212.183, which required DOE to establish a permissable average markup. DOE issued the permissable average markup on September 1, 1980, nearly 3 years later.

Miscertifying the crude oil sold

Enforcement has found that the financial rewards for crude oil resellers are high for miscertifying sales, especially when reselling lower and upper tier crude oil certified as stripper crude oil. This practice is referred to as "flipping." The following chart illustrates the differentials between lower tier, upper tier, and stripper crude oil prices as of September 1980, using national weighted average costs per barrel.

Cost Differentials for Crude Oil
as of September 1980
(per barrel)

Classification	National weighted average cost	Differential with stripper cost
Lower tier	$7.37	$24.55
Upper tier (excluding Alaskan North Slope)	15.21	16.71
Stripper	31.92	-

Enforcement has also found cases where companies are miscertifying individual crude oil resales but are balancing their total purchases and sales by volumes and classifications

over a period of time, generally 1 month. The companies referred to this process as "pooling." DOE has also found companies that miscertify individual resales but never balance purchases and sales. However, DOE regards any miscertification as an illegal act.

Failure to provide a historical and traditional service

Enforcement found numerous cases where companies had been inserted into the market chain between the crude oil producer and the refiner. In these cases, the crude oil reseller bought and sold crude oil at a profit but allegedly performed no historical or traditional service such as gathering, transporting, handling, or storing crude oil. DOE calls this practice "layering." Many of these companies had no inventory to carry over from month to month. In many cases there were several companies buying from and selling to each other in what is referred to as a "daisy chain."

Improperly pricing crude oil sold

Enforcement found cases where crude oil resellers had priced crude oil sales higher than their permissible average markup. As stated above, Enforcement was unable to make pricing audits of crude oil resellers that made their first sale after December 1, 1977, as prescribed by 10 CFR 212.183, until September 1, 1980.

Actions are needed to resolve violations

As stated above, Enforcement has issued notices of probable violation against 36 companies for crude oil reseller regulation violations. Fourteen of these notices were over 1 year old as of December 1, 1980. Yet, Enforcement had not taken the next step--issuing proposed remedial orders to the companies. Enforcement had some proposed remedial orders in draft form, but unless Enforcement issues them, or files suit against the companies, there is no means available to resolve the potential violations without the companies' cooperation.

These delays have allowed companies to continue their alleged violative conduct. In one case, Enforcement charged a company with miscertification, which resulted in "pooling." At the time of the audit, the company was taking in a profit of about $30,000 per month from its reseller operations. During a followup review to investigage possible willful

(criminal) violations, DOE found the company had increased its profits tenfold to about $300,000 per month.

DOE had the authority to issue cease and desist orders (10 CFR 205.199D) to stop continuing violations, but it had issued only one as of December 1, 1980. In this one case, Enforcement ordered the company to stop immediately from certifying to customers any volumes of regulatory categories of crude oil which differ from the volumes of regulatory categories at which the crude oil was certified when purchased by the company. The company petitioned the Office of Hearings and Appeals and it upheld the order. However, the Federal Energy Regulatory Commission overturned the order on January 15, 1981, contending that the order did not meet the standards for irreparable harm. Even if the order had been sustained, DOE would still have to process a proposed remedial order to recover any illegal profits from the miscertification, because the cease and desist order did not provide for remedial action for the alleged violations.

Because of the sensitive nature of the crude oil reseller program and the likelihood that DOE's findings of violations would be closely scrutinized in vigorous litigation, DOE decided to proceed with caution in its enforcement efforts by issuing notices of probable violations against numerous firms prior to issuing proposed remedial orders.

DOE has negotiated consent orders with 10 crude oil resellers. As a result, DOE has received about $32.9 million in refunds and collected about $4.7 million in civil penalties. However, all but two of these consent orders are associated with the Department of Justice's criminal prosecutions rather than strictly DOE's enforcement activities. These two consent orders resulted in refunds of about $1.1 million, but no civil penalties were collected.

CONCLUSIONS

DOE has increased its audit coverage of major refiners and crude oil resellers since 1977. As of October 1980, the Office of Special Counsel had nearly completed the audits of the 35 major refiners through 1979 and had identified regulation violations of about $10.8 billion. Also, the Office of Enforcement had identified crude oil reseller violations in excess of $500 million.

Major problems still remain in both audit areas. For one, the Office of Special Counsel is unable to say precisely what effect major refiners' violations have had on petroleum prices because Special Counsel is unable to readily determine whether overstated costs were passed through to customers. Because an extensive amount of recalculations would be required, DOE would not be able to determine the precise effect of violations on prices without an unreasonable amount of additional time and resources. In our opinion, such an effort would be impractical.

Secondly, the Office of Enforcement's lack of timely actions has reduced program effectiveness. DOE auditors had been unable to make pricing audits of crude oil resellers that made their first sale after December 1, 1977, as prescribed by 10 CFR 212.183, because DOE did not issue the required regulations until September 1, 1980, almost 3 years later. And the Office of Enforcement had not processed proposed remedial orders on charges against crude oil resellers, even though many of the charges were over 1 year old. We believe DOE should expedite its efforts to issue proposed remedial orders for alleged violations by crude oil resellers.

RECOMMENDATION TO THE SECRETARY OF ENERGY

To begin to resolve crude oil reseller's violations, the Secretary of Energy should expedite DOE's efforts to issue proposed remedial orders.

CHAPTER 3

CHALLENGES TO REGULATIONS HAVE LIMITED DOE'S ABILITY TO RESOLVE VIOLATIONS

DOE developed its regulations to enforce petroleum pricing controls under difficult circumstances. The rule-makers initially had limited time available and short-term objectives. As a result, some regulations were incomplete and not immediately applicable to actual conditions and circumstances.

DOE has acted to make these regulations complete and comprehensive. However, with the enormous dollar values at stake, oil companies have chosen to challenge DOE. As a result, there are at least 220 court cases 1/ regarding the enforcement of DOE pricing regulations. DOE has attempted to avoid the cost and time involved in litigating cases in court and DOE's Office of Hearings and Appeals by negotiating settlements with companies. But as of September 30, 1980, when we concluded our field audit work, only 12 percent, or $1.6 billion of the total alleged violations of about $13.1 billion has been settled. Since that time, however, DOE reported that an additional $2.6 billion in settlements have been negotiated. (See pp. 32 and 44.)

Because some of DOE's regulations have been successfully challenged, DOE's ability to settle the alleged violations has been reduced. Litigation seems to be the unavoidable outcome of most DOE/company disagreements. This quagmire could take years to resolve. Thus, in order to obtain adequate enforcement pricing regulation, DOE will have to pursue present litigation and, at times, be a party in future court cases. The Office of Management and Budget should assist DOE in developing a plan for the orderly resolution of the violations and litigation outstanding on January 28, 1981, the date petroleum pricing was decontrolled. We believe the Congress should allow DOE the personnel and funding to resolve outstanding violations and litigation in an orderly manner even after

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

deregulation, in fairness to the companies that did not violate pricing regulations and to those companies that agreed to settle their violations. Without such action, we believe a bad precedent would be set for any future programs of this nature.

Because IRS has adopted DOE's crude oil production regulations and definitions to enforce the Windfall Profit Tax Act of 1980, the companies' challenges to DOE's regulations could also have a profound effect on the tax program. We believe the Commissioner, IRS, should conduct a study to determine the effect that successful legal challenges to DOE's regulations could have on IRS's ability to enforce the Windfall Profit Tax Act. The Commissioner through the Secretary of the Treasury should then issue IRS regulations that reflect the changes required by its study.

DOE'S REGULATIONS WERE DEVELOPED UNDER DIFFICULT CIRCUMSTANCES

The original regulations were written hastily to control domestic inflation and to ensure fair allocation of limited supplies of crude oil. The regulatory program was initially conceived as a temporary program with short-term objectives and the agency personnel initially assigned to develop and administer the program had limited experience in the oil industry. With little planning, a team of IRS auditors was hastily assembled to audit the various components of the petroleum industry. As the Government vacillated over the continuing need for a regulatory program, crude oil market conditions changed from one of shortage to one of surplus in about mid-1975. And, the market has changed since then. The original program, which was intended to achieve price controls with minimal disruption to normal business practices, evolved into a comprehensive regulatory program over prices and allocations of crude oil and petroleum products.

Since some of the early regulations did not provide sufficient coverage for a comprehensive regulatory program, DOE had to develop additional guidelines as audits identified previously unforeseen conditions. DOE determined that any confusion or ambiguity over the regulations could be rectified if companies acted in good faith to obtain clarifications. As part of the regulatory process, DOE designed administrative procedures for resolving questions about the regulations and for alleviating any undue hardships resulting from their application. The Office of the

General Counsel was responsible for issuing rulings and interpretations, while the Office of Hearings and Appeals was responsible for issuing exceptions. The following chart defines each of these actions and illustrates the volume of activity in each area since the inception of the program through October 1980.

Action	Definition	Volume
Office of the General Counsel:		
Rulings	External guidance for universal application of DOE's regulations. These rulings were made at DOE initiative based on receipts of a substantial number of inquiries about a particular situation.	68
Interpretations	External guidance for application of DOE regulations to a specific set of facts. These interpretations were generally made in response to a company request.	297
Office of Hearings and Appeals:		
Exceptions	Relief to an individual company because application of a regulation resulted in a serious hardship or gross inequity.	a/ 28,693

a/Total exceptions from January 1974 through December 1980.

While oil companies used these processes to obtain clarification and administrative relief, they also used the administrative and judicial process to challenge DOE. DOE officials stated that with the enormous dollar values inherent in these cases at stake, companies have been challenging DOE in these different areas whenever they disagree, regardless of the time it takes to resolve the issues.

OIL COMPANIES ARE CHALLENGING ALL MAJOR AUDIT ISSUES, WITH SOME SUCCESS

The Sporkin Report stated that DOE's lack of trained personnel, commitment and direction, and secure regulatory

future as well as the oil industry's criticism of the quality of DOE's regulations, resulted in a general lack of industry respect for the agency, the professionalism and competency of its staff, and the adequacy of its regulations. While DOE has acted to correct deficiencies and clarify its regulations, these early problems have had a continuing negative effect on DOE's ability to enforce the Emergency Petroleum Allocation Act.

Companies have challenged DOE at the earliest stages of the administrative process; they appealed DOE's final actions; and they attempted to get the regulations overturned by asserting that:

--Regulators provided contradictory and confusing guidance regarding the application and interpretation of the regulations.

--Regulations were arbitrary and capricious and subject to more than one reasonable interpretation.

--Regulations were not issued (promulgated) properly.

--Regulations should not be retroactively applied when no prior clarification of their meaning existed.

These challenges, some of which have been successful, have resulted in lengthy delays and at times resulted in the reversal of DOE actions and voiding of DOE regulations. Nevertheless, DOE should pursue on-going litigation and should continue to use administrative and court litigation when it is the most appropriate approach for resolving other violations. The following section illustrates the types of challenges presented by the companies and the potential impact of the issues involved.

Challenges in court and in the Office of Hearings and Appeals are extensive

The companies have challenged DOE's regulations through litigation in civil courts and in DOE's Office of Hearings and Appeals. There are at least 220 court cases involving various types of challenges to DOE's pricing regulations. We analyzed 138 of these suits. From this analysis, we developed the following chart which illustrates the extent of DOE's efforts to apply its regulations through rulings and responses to companies' requests for interpretations. It also shows the high volume and pervasiveness of the judicial challenges presented by the companies to DOE's regulations.

Issue area	Number of rulings	Number of interpretations	Number of current civil court cases identified	Promulgation challenges (note a)	Contemporaneous construction (note b)
Crude oil producers	9	40	75	d/Yes	Yes
Natural gas liquids processors	2	19	c/31	e/Yes	Yes
Refiners	5	28	26	f/Yes	Yes
Crude oil resellers	0	1	6	N/A	N/A

a/Civil suits concerning the propriety of DOE's issuance of the regulations and rulings.

b/A court may examine actual agency practices to determine whether an official interpretation of a regulation is correct.

c/Nine cases involve suits by both DOE and the companies.

d/Companies are challenging several rulings that support the regulations.

e/Ruling 1975-6 regarding retroactive application of Subpart K has been challenged on improper promulgation. Ruling 1975-18 on computation of increased costs has also been challenged on improper promulgation.

f/The equal application rule has been challenged on improper promulgation.

In addition to the judicial challenges, DOE has been inundated by company information requests under the Freedom if Information Act (5 U.S.C. 552), which also contributed to the delay in DOE's enforcement action. The following sections discuss examples of the types of administrative and court cases in which challenges were made against DOE's regulations, and the issues involved.

V-Factor

In one case, Mobel Oil Corporation v. DOE, 610 F. 2d 796 (TECA 1979), the court held that the Federal Energy Office invalidly promulgated an April 1974 amendment to the refiner price regulations. This provided that prices charged for those products remaining under price controls

could bear, as a class, only a volumetrically proportionate share of increased crude oil costs. This rule, first set forth in the so-called "V-Factor" of the refiners' price formulas, was continued in later regulations to implement amendments to the Emergency Petroleum Allocation Act and otherwise improve the regulatory structure. The phased decontrol of most refined petroleum products from 1976 to 1979 was predicated on the continued application of the V-factor or its counterpart, the R-factor, also based on volumetric apportionment. The rule became more important as these additional products were deregulated because, without such a rule, companies would have been permitted to allocate more and more increased crude oil costs to a dwindling volume of regulated products. This would drastically increase the amount of costs which could be passed through to customers in prices of regulated products or held in banks for later passthrough if then-existing market conditions would not allow immediate price increases.

Mobil claimed that it was unable to pass through $75 million of costs in its sales of petroleum coke, a deregulated product, during 1974 and 1975 and, as a result of the V-factor, could neither recover nor bank such costs in prices for regulated products. After DOE denied two requests for exception relief, Mobil filed an action challenging the validity of the V-factor as well as these exception denials.

The district court ruled that the Federal Energy Office had not promulgated the V-factor properly in April 1974 and declared it invalid. The Temporary Emergency Court of Appeals agreed that the April 30, 1974, amendment had been promulgated improperly, but remanded for further findings with respect to the scope of judgment. After the Supreme Court refused to hear DOE's appeal of the lower court's decision, the district court entered an amended judgment on remand and DOE has appealed. That appeal, now pending before the Temporary Emergency Court of Appeals, concerns the effect of the invalidation of the April 1974 amendment on the crude oil cost pass-through regulations promulgated in later years.

On January 16, 1981, DOE concluded rulemaking proceedings and reinstituted the V-factor retroactively to April 1974. DOE officials estimated, however, that without this rulemaking, refiners might be able to reallocate as much as $50 billion in additional costs to regulated products. This would have significantly increased the legal selling prices of those products,

depending upon the outcome of the current Mobil appeal and perhaps even additional litigation to clarify the original decision. This would in effect nullify the alleged violations.

Equal application

The equal application rule, which encouraged a refiner to maintain customary price differentials among its various classes of purchasers of a particular product, was one of the significant issues developed in DOE's audit program for refiners. DOE promulgated the rule on September 5, 1974, without providing a prior notice and comment period. DOE stated that the prior regulatory scheme was ambiguous because, although the pre-existing equal application rule applied when refiners were selling at their base prices, refiners were not required to charge their base prices. DOE said it could not advertise the ambiguity by giving notice in the Federal Register because of the risk that refiners would then seek to exploit the ambiguity to the injury of their purchasers, especially independent marketers, during the rulemaking proceedings.

About 5 years later, a number of companies challenged the validity of the promulgation of the equal application rule, arguing that DOE could not show sufficient justification to waive the prior notice and comment period. For example, DOE alleged violations of about $444 million against the Amerada Hess Corporation as a result of this rule. Amerada Hess Corporation then filed suit against DOE on March 29, 1980, in the United States District Court for Delaware, stating that DOE failed to comply with the procedural requirements of the Administrative Procedures Act in promulgating the equal application rule. 1/ Similar actions by other refiners are pending in three different District Courts. Extensive discovery has been taken by the refiners. If the courts uphold the companies' positions to void the equal application rule for the period of regulation due to improper promulgation, DOE will lose about $1.3 billion in audit findings of alleged overcharges.

1/Amerada Hess withdrew this suit as part of the negotiated settlement of alleged violations with DOE on January 6, 1981.

Furthermore, effective November 1, 1980, over the objections of its enforcement officials, DOE deleted the equal application rule from its regulations, stating that adequate supplies and impending deregulation eliminated the prospective need for the rule.

Sequence of cost recovery

Another case, involving the Standard Oil Company of Ohio and 14 other major refiners, Standard Oil Company of Ohio v. DOE, 596 F.2d 1029 (TECA 1978), represented a completely new approach for challenging DOE regulations according to a DOE official.

DOE asserted that Standard had not properly followed the regulation in recovering its product costs (cost of crude oil, etc.) and non-product costs (labor, maintenance, utilities, etc.). DOE maintained that a company had to recover all increased product costs before it could recover any increased non-product costs even though the regulations admittedly were silent on the point. DOE alleged violations of about $1.3 billion because some refiners had recovered non-product costs before product costs.

The district court permitted the companies to inquire into DOE's internal consideration of the regulations (contemporaneous construction) in order to afford the companies an opportunity to rebut DOE's assertion that it always had interpreted the regulations to require non-product costs to be recovered last. Standard was able to show that DOE's assertion was unsupported and that there was confusion within DOE as to the requirements of the regulations. The district court ruled against DOE, and this ruling was upheld on appeal to the Temporary Emergency Court of Appeals, which rejected DOE's argument that, even though no regulation required that costs be recovered in any particular sequence, the regulatory scheme taken as a whole did so.

Subpart K for natural gas liquids

Subpart K (10 CFR 212.161 et seq.) effective January 1, 1975, provided regulations for computing increased product and non-product costs for crude oil refiners and for computing maximum lawful selling prices for independent gas processors. By Ruling 1975-6 and a class exception issued in the summer of 1975, the Federal Energy Administration permitted both refiners and gas processors to apply the Subpart K cost calculation provisions retroactively to the August 1973 promulgation of the current price controls. In DOE's view, these

Subpart K provisions were more favorable to the industry than the rules in effect prior to January 1975.

In a complaint filed in July 1975 in the United States District Court for the Northern District of Texas, Exxon Corporation challenged the basic validity of Subpart K pricing regulations as arbitrary and capricious and also attacked the Class Exception and Ruling 1975-6, claiming that prior notice and comment were required for these two provisions, which were claimed to be retroactive, substantive changes in the rules. For the period prior to January 1, 1975, the companies assert that the then existing regulations, properly interpreted, permitted substantially higher prices than DOE's interpretation would permit and that if DOE's interpretation of the regulations is correct, those regulations were arbitrary and capricious. Exxon was later joined by several other oil companies, and all complaints have now been consolidated for trial.

Property determination

The term "property" was a basic term in the crude oil production regulation and the cornerstone of the regulatory program controlling the first sale price of crude oil and producer income. DOE initially defined property as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." While DOE rulemakers thought this definition would provide a common and easily understood basis for classifying production, the companies in some circumstances applied it in differing ways.

After a number of requests for clarification on specific points, DOE issued three rulings on property, including Ruling 1975-15. DOE, moreover, stated in Ruling 1977-1 and Ruling 1977-2 that it was willing to apply a more flexible approach to "property" treatment when a producer could demonstrate a bona fide reason for a departure from the general rule, and had consistently and historically followed the separate property treatment.

Companies nevertheless have responded to DOE enforcement actions by challenging DOE's property regulations as vague and arbitrary. For example, in enforcement proceedings pending before the Office of Hearings and Appeals, seven major refiners are challenging DOE's application of property regulations to control crude oil prices in proposed remedial orders issued May 1, 1979, totaling $1.7 billion. The

companies assert to the Office of Hearings and Appeals that DOE's property definitions and other segments of the regulations were vague, ambiguous, and confusing, and were abrupt reversals of positions taken since the inception of the regulations. The companies are using exhaustive discovery in an attempt to show that there was confusion within DOE as to the real meaning of "property" since the time the property regulations were promulgated.

In another example, DOE sued Exxon Company, U.S.A. in 1978 in the District Court of the District of Columbia, challenging the way Exxon had applied the property definition. In this case DOE contends that by classifying a particular production field as hundreds of separate properties rather than a single property, Exxon exceeded the maximum legal selling price in total by about $685 million. DOE maintains that Exxon treated the field differently from the way it traditionally and historically classified production from its other fields. The company disputes DOE's position and has sought extensive discovery to support its own allegation that the flexibility the agency showed in later rulings was the result of confusion within DOE. Exxon has also made several attempts to have the case dismissed or transferred to a different court. The court case had not been resolved as of March 25, 1981.

Challenges to notices of probable violations could also be extensive

As stated in chapter 1, DOE usually culminates an audit by issuing a notice of probable violation if it finds the company has violated regulations. The notice of probable violation states what the alleged violations are, the period of the alleged violations, and the amount of the alleged violations. The company is given 30 days to file a response prior to DOE's issuing a proposed remedial order to the Office of Hearings and Appeals.

DOE has issued notices of probable violations to several companies and they have responded to DOE on the allegations. In one of these cases, DOE alleges the company violated crude oil reseller regulations by

--buying and selling crude oil at a profit without performing any service or other function traditionally and historically associated with the resale of crude oil (layering) and

--improperly certifying crude oil purchased and sold by the company.

In response to the notice of probable violation, the company contested DOE's application of the word "service" and questioned the relevance of pre-1973 traditional and historical functions since market conditions had changed dramatically since 1973. The company also asserted that DOE's notice of probable violation constituted retroactive rulemaking because it defined "layering" for the first time. The company said because this was retroactive rulemaking, the notice and comment procedures applied. The company also alleged that since the regulations did not require tracking of certificates of a particular volume of crude oil from the time of acquisition to the time of sale, it had not violated DOE regulations. The company stated there had been no miscertification since it sold only volumes of each tier of crude equal to the volumes it purchased at each tier. To illustrate, under the company's interpretation, if a firm purchased only 1,000 barrels of stripper oil and 1,000 barrels of old oil, and it sold only 1,000 barrels of stripper and 1,000 barrels of old oil--not 2,000 barrels of stripper oil--the firm did not violate the regulations.

DOE has received similar responses from other companies charged with similar allegations. DOE has not issued proposed remedial orders on any of these cases. However, when DOE does issue them, it is quite likely these same defenses will be used by the companies, and again, the resulting litigation will probably be very time consuming.

NEGOTIATED SETTLEMENTS CAN EXPEDITE THE RESOLUTION OF VIOLATIONS

DOE officials decided that DOE will negotiate a settlement of alleged violations when the public interest will be better served through compromise than through DOE's insistence on the fullest remedy that it could expect through litigation. A primary factor in making this determination is the time and expense involved in case litigation in court, before DOE's Office of Hearings and Appeals, and before the Federal Energy Regulatory Commission. In effect, DOE will consider negotiating settlements to all violation cases except that the Office of Special Counsel will not negotiate when a company (1) is suspected of willful (criminal) violations, (2) has failed to cooperate in the audit, or (3) has misrepresented facts to DOE.

In the Office of Enforcement, field office personnel negotiate the settlement terms. The District Office Settlement Advisory Council, composed of the district manager or deputy, the chief enforcement counsel, and the cognizant audit director review settlement proposals and advise the district manager. The district manager gives final approval to negotiated settlements. In the Office of Special Counsel, headquarters officials have negotiated settlement terms, while the Special Counsel gives final approval.

As of September 30, 1980, DOE had executed consent orders and remedial orders for about $1.6 billion (12 percent) of the total alleged company violations of about $13.1 billion. The following chart shows the status of violations disclosed by the Office of Special Counsel (35 major refiners) and the Office of Enforcement (all others) as of September 30, 1980.

Status of Compliance Efforts
as of September 30, 1980

	Office of Special Counsel		Office of Enforcement (note a)		Total	
	(billions)	(percent)	(billions)	(percent)	(billions)	(percent)
Unresolved violations	$ 9.4	87	$2.1	91	$11.5	88
Settlements achieved	b/ 1.4	13	.2	9	1.6	12
Total	$10.8	100	$2.3	100	$13.1	100

a/DOE officials told us that as of December 31, 1980, the unresolved violations amounted to $2.5 billion and the settlements achieved amounted to $0.5 billion.

b/This data includes the five global consent orders with Getty Oil Company, Phillips Petroleum Company, Cities Services Company, Standard Oil Company (Indiana) (AMOCO), and Kerr-McGee Corporation. It does not include the more recent Sun Oil Company (SUNOCO) settlement or the nine settlements discussed on page 41.

To a great extent, DOE's ability to resolve alleged violations depends on its success at resolving litigation or on the companies' desires to avoid lengthy and costly

litigation by arriving at a compromise agreement with DOE. Without such compromises, litigation is probably inevitable.

The adjudication of energy issues is time consuming and complex. As indicated in chapter 1, the Office of Hearings and Appeals' decisions can be appealed to the Federal Energy Regulatory Commission. The Commission's decisions can in turn be appealed to the Federal district court and then to the Temporary Emergency Court of Appeals.

The DOE Special Counsel stated in recent congressional testimony 1/ that it is clear that litigation of these issues will be lengthy and time consuming. The Special Counsel stated that in some cases, there are extraordinarily large dollar amounts associated with these issues, making it cost effective for a refiner to retain experienced legal representation for the 3 to 5 years that one can expect to litigate such issues.

We found this to be particularly true in the Mobil Oil Company suit over the V-factor rule, previously discussed. Mobil filed the suit on July 26, 1976. The suit is still unresolved as of February 1981, over 4 years later.

The following chart ages, as of October 1980, the 138 active civil court cases included in our analysis.

Year cases filed	Number of active cases	Age of active cases
1973	1	Over 7 years
1974	0	6-7 years
1975	4	5-6 years
1976	7	4-5 years
1977	12	3-4 years
1978	48	2-3 years
1979/1980	66	2 years or less
Total	138	

Most of these cases were still active when petroleum prices were decontrolled.

1/Hearings before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, dated October 14, 1980.

DOE'S REGULATIONS HAVE IMPLICATIONS BEYOND THE DATE OF DEREGULATION

Petroleum pricing was decontrolled on January 28, 1981. However, the regulatory program will have impact well beyond the date of deregulation because many alleged violations were not settled by January 28, 1981. In addition, the results of and delays caused by litigation on DOE's domestic crude oil production regulations could negatively affect enforcement of the Crude Oil Windfall Profit Tax Act of 1980, because IRS has adopted these regulations for enforcing the tax act.

DOE needs a plan to phase out its enforcement program

DOE officials expect many of the challenges discussed above to be active for several years after the date of deregulation. Besides these cases, many other cases with charges against companies, which have not been challenged, will also remain unresolved for some time.

DOE had prepared a transition plan to phase out its enforcement staff over a 5-year period after fiscal year 1981. The plan was prepared to provide input to OMB for DOE's fiscal year 1982 budget. The plan assumed the Office of Special Counsel would complete its audits during fiscal year 1982, but would continue litigation through fiscal year 1985. In some instances, Special Counsel could conceivably continue its activities into subsequent fiscal years. The plan also assumed that the Office of Enforcement would complete its audits during fiscal year 1983, but litigation and special investigations of potential willful violations, discussed in our companion report, would continue through fiscal year 1986. The Office of Enforcement expected to open some new crude oil reseller audits after September 30, 1981. But audits in other program areas would be opened only on an exception basis--when there was a specific indication that significant violations existed which were not formerly audited.

The plan did not specifically identify a requirement for staff to monitor compliance with consent orders, although DOE officials stated this function would be one of DOE's responsibilities in the 5-year plan. However, OMB has proposed cutting the combined personnel budget for the Office of Special Counsel and Office of Enforcement in fiscal year 1982 from $46 million to $12 million. This would reduce the planned enforcement staff from 886 to approximately 235. As of March 7, 1981, the DOE compliance

staff totaled 1,366, and the fiscal year 1981 budget was about $67 million.

We believe that such a drastic cut might seriously impair DOE's ability to enforce the compliance program and we question whether these cuts are based on a workload analysis that adequately considered the orderly resolution of the outstanding violations and litigation. Such a large fiscal year 1982 budget cut could also have adverse effects on DOE's enforcement program in fiscal year 1981 depending on how DOE decides to reduce its staff levels.

Many questions need to be answered by DOE to determine just how the budget cuts will impact on DOE's efforts to effectively deal with the many unresolved violations. For example:

--Will sufficient funds be available during fiscal years 1981 and 1982 to pay for accrued annual leave and severance pay for personnel terminated by DOE?

--How would these funding requirements affect DOE's ability in the latter part of 1981 and in 1982 to be effective in resolving outstanding litigation and violations in a fair and orderly manner?

Pricing regulations' litigation can affect enforcement of the Crude Oil Windfall Profit Tax Act

Even though petroleum pricing has been decontrolled, the Crude Oil Windfall Profit Tax Act of 1980 incorporates DOE's regulations for domestic crude oil production for enforcing the act. Therefore, the resolution of the ongoing litigation over DOE regulations will have impact beyond the petroleum price control program.

In an undated paper prepared for a conference on the Crude Oil Windfall Profit Tax Act of 1980, 1/ (P.L. 96-223) a partner in the Fulbright & Jaworski law firm stated:

> "* * * In particular, fundamental DOE concepts such as 'property,' 'stripper well,' and 'crude oil' will continue to have a large bearing on the determination of windfall profit tax liability long after the DOE price regulations have expired.
>
> "One usually could assume that the cornerstones of a regulatory scheme such as that governing first sale prices of domestic crude oil would be settled early in the implementation of the regulations. That is not the case with the DOE regulations. Instead, the basic definitions upon which the crude oil price regulations are built still are being litigated before the agency and in the federal court."

The paper further stated that the outcome of pending cases concerning the DOE concept of property may affect the determination of windfall profit tax liability. The paper cited the Exxon case and the case involving the seven major refiners, both previously discussed, as examples where important property decisions are being litigated. In the case involving the seven major refiners, the paper stated it appears that final resolution of the substantive issues most likely will come many years in the future.

Under section 4997 (b) of the 1954 Internal Revenue Code, as amended, added by the Windfall Profit Tax Act, the Secretary of the Treasury may make changes in the application of DOE energy regulations in enforcing the act. If the Secretary decides that a particular DOE regulation is not appropriate, he may issue a regulation, which will apply in lieu of the DOE regulation, in enforcing the act. These regulations would be issued as Treasury documents and would be jointly signed by the Assistant Secretary of the Treasury for Tax Policy and the Commissioner, IRS.

In a June 3, 1980, letter to the Commissioner, an oil company which had previously been audited by DOE specifically addressed the need to revise DOE's regulations. The company stated that several important consequences of the Windfall Profit Tax Act turn upon the precise meaning of the terms

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1/"Fundamental but Disputed Concepts Under the DOE Crude Oil Pricing Regulations."

used in DOE's energy regulations. It stated that the terms "stripper well property," "newly discovered oil," and "property" as used in the Windfall Profit Tax Act are defined in DOE's regulations. The company stated, however, that under the energy regulations, the meanings of these terms are embroiled in controversy and litigation and are far from the precise meanings that a taxpayer needs to conduct its business in compliance with a tax statute. The company recommended that the Commissioner of IRS issue precise definitions for these terms and any other terms defined in DOE's energy regulations where the application of a definition by DOE has been less than precise and consistent.

The definition of "stripper well," for example, is fundamental to the petroleum pricing program and to the windfall profit tax because its application sets the basis for the price a producer could charge for crude oil and the taxable income a producer must recognize on crude oil sales. As of January 16, 1981, IRS had not specifically addressed the definitions incorporated in the Windfall Profit Tax Act from DOE's regulations or the problems these definitions might present in enforcing the act. IRS officials told us they recognize that the DOE regulations will cause some enforcement problems; however, initial efforts were concentrated on implementing administrative procedures. The review of DOE regulations and definitions will begin after IRS' administrative regulations are finalized.

CONCLUSIONS

Oil companies are challenging some major issues in DOE's regulations, and these challenges are having a negative effect on DOE's ability to resolve audit findings. DOE has attempted to reduce the amount of litigation needed to resolve company challenges by negotiating settlements to company violations. However, this approach has resolved only about 12 percent of the alleged violations as of October 1980. Since that time, however, DOE reported that an additional $2.6 billion in settlements have been negotiated. Since the stakes involved in these cases are so high--sometimes in the billions of dollars--litigation seems to be the inevitable outcome of most DOE/company disagreements.

Based on past experience with delays in settling issues, there is no reason to believe that future challenges will take any less time to resolve. Then too, oil companies could become even less willing to settle their alleged violations now that deregulation has occurred and

as long as the future existence of DOE's enforcement program remains uncertain.

DOE will have to engage in administrative and court litigation to resolve pricing regulations disagreements. DOE should, however, negotiate settlements where it is deemed to be in the public interest. We believe that OMB should assist DOE in developing a plan for the orderly resolution of the violations and litigation outstanding on January 28, 1981. We also believe the Director should approve and submit the plan for congressional consideration. We believe such a plan should specifically consider and provide for DOE's personnel and funding needs to

--complete audits in process,

--continue to litigate ongoing and impending cases,

--continue to negotiate settlements for unresolved violations, and

--monitor companies' compliance with consent orders.

We believe DOE should consider establishing an earlier cut-off date beyond which it would not open new audits, possibly June 30, 1981. We believe DOE should open new audits only at the rate that it concludes ongoing audits and then only when it has compelling reasons to do so.

We believe the Congress should act favorably on such a plan to resolve DOE's outstanding workload at the time of deregulation, in order to provide consistent and equitable treatment to all companies audited by DOE, and to be fair to the companies that did not violate DOE's regulations and to the companies that settled their violations with DOE. Without such actions, we believe a bad precedent would be set for any future programs of this nature.

We also believe that the problems of lengthy delays in litigation and the voiding of some regulations that DOE has experienced in enforcing the crude oil production regulations will carry over to the IRS' enforcement of the Windfall Profit Tax Act because these regulations are incorporated into the act.

We believe the Commissioner, IRS, should determine what impact the legal challenges to DOE's regulations and definitions could have on IRS' ability to enforce the Windfall Profit Tax Act, and then take appropriate action.

RECOMMENDATION TO THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

To establish an orderly means to phase out DOE's enforcement programs and to inform the Congress of these needs, the Director, OMB, should assist DOE in developing a plan to include DOE's personnel and funding needs for the orderly resolution of the violations and litigation outstanding when deregulation occurred. The Director should approve the plan and submit it for congressional consideration.

RECOMMENDATION TO THE CONGRESS

To provide for an effective and orderly phaseout of DOE's enforcement program, the Congress should approve the funding request, assuming it is reasonable and appropriate, for DOE to carry out a plan for resolving the violations and litigation outstanding when deregulation occurred.

RECOMMENDATION TO THE SECRETARY OF ENERGY

To maximize the resolution of violations, the Secretary of Energy should pursue ongoing litigation and should continue to use administrative and court litigation, where appropriate. DOE should, however, negotiate settlements where it is deemed to be in the public interest.

RECOMMENDATION TO THE COMMISSIONER, INTERNAL REVENUE SERVICE

To minimize perceived enforcement problems, the Commissioner, IRS, should conduct a study to determine the effect that successful legal challenges to DOE's regulations could have on IRS' ability to enforce the Windfall Profit Tax Act. The Commissioner, through the Secretary of the Treasury, should then issue IRS regulations that reflect the changes required by its study.

CHAPTER 4

DOE SETTLEMENTS SHOULD BE STRENGTHENED

Although DOE has negotiated about $4.2 billion in value to settle some alleged violations with companies, and has recovered moneys in many of these settlements, DOE generally has not been able to obtain restitution for parties that have been injured through overcharges. The major obstacle to making restitution is DOE's inability to identify precisely who has been injured by overcharges because in many instances, the overcharges were passed through the marketing chain in subsequent sales. In earlier attempts to make direct refunds to overcharged parties, DOE generally had no assurance that the refunds were, in turn, passed on to injured parties.

Recognizing these problems, DOE has begun to hold cash proceeds of consent orders in escrow accounts. However, DOE has yet to utilize Subpart V procedures for disbursing the escrow account funds, which has delayed the disposition of the approximately $260 million deposited as of October 1980.

It is not clear that there are practical means to identify who has been injured by overcharges or the amounts of the injuries. If DOE cannot readily ascertain the victims of violations, the Secretary should direct the appropriate enforcement official to petition the Office of Hearings and Appeals to implement special refund procedures to identify and make refunds to parties who have suffered injuries because of overcharges. After applying this process any remaining refunds should be deposited in the United States Treasury.

We also believe the Office of Special Counsel should strengthen consent orders by identifying separately and publicly disclosing (explaining) those settlement provisions which have no restitutional value, such as the investment provisions, as opposed to those that provide remedies for overcharges, such as refunds. In this way DOE will not obscure the restitutional value of the settlement and will not set poor precedents for future negotiations. In addition, we believe DOE should further strengthen its consent orders by specifically including a statement on what documentary evidence the companies must provide to demonstrate their compliance with the consent orders.

SETTLEMENTS GENERALLY DO NOT RESULT IN RESTITUTION

As stated in chapter 2, not all violations resulted in injuries to customers. Similarly, not all settlements result in restitution. If a wholesaler was able to pass a refiner's overcharge through to retailers in the form of higher prices, and in turn, the retailers passed the overcharges on to retail customers, only the retail customers were actually injured by the refiner's overcharge. Thus, only the retail customers deserve to be reimbursed for the overcharge--to obtain restitution. Through its settlement process, DOE attempts to get the refiner, for example, to disgorge the revenue from the overcharge and, ultimately, to make restitution to those customers that have been injured by the overcharges.

Restitution could be made through the following settlement provisions:

--Refunds from the companies to customers.

--Company price rollbacks for a period of time in the total amount of past overcharges.

--Reduction in company banks of unrecouped costs to forego future price increases.

If the victims of violations cannot be readily ascertained, DOE's regulations (Subpart V) establish special procedures for getting refunds to injured persons in order to remedy the effects of a violation of DOE's regulations. Under these regulations, a DOE enforcement officer files a petition with DOE's Office of Hearings and Appeals indicating that the officer has been unable to identify the victims of overcharges or the amounts these victims are entitled to receive. After considering the matter and soliciting comments from the public, the Office of Hearings and Appeals issues a decision and order setting forth the manner in which individuals may apply for refunds and in which the refunds will be distributed. After all refunds have been made, the remainder of the refunds is to be deposited in the United States Treasury.

DOE has generally been unable to make restitution because it has not been able to identify who the injured parties were or the amounts of the injuries. And the Office of Hearings and Appeals has only recently issued its first distribution plan (Vickers Energy Corporation) for comment.

Also, some Office of Special Counsel settlements have not always provided means to make restitution. For example, about 41 percent of the $1.2 billion, or $510 million, included in the first five comprehensive (global) settlements of all issues with five major refiners as of September 30, 1980, was for companies' investments in exploration and refinery capacity, which provided no moneys for making restitution.

For the period of October 1, 1977, through September 30, 1980, these provisions, as well as others, were included in 1,002 consent orders and 80 remedial orders, with a settlement value totaling more than $1.6 billion. The following chart summarizes DOE's settlements through September 30, 1980.

Summary of DOE Recoveries
Through September 30, 1980

Office of Special Counsel	Refund to customer	Price rollback	Bank reduction	Investment commitment	Escrow account payments	Other	Total
Global Settlements	$116,636,626	$20,000,000	$503,000,000	$510,000,000	$ 96,000,000	-0-	$1,245,636,626
Other Settlements	25,540,370	1,195,032	60,296,724	-0-	53,240,000	-0-	140,272,126
OSC Total	142,176,996	21,195,032	563,296,724	510,000,000	149,240,000	-0-	1,385,908,752
Office of Enforcement							
Consent Orders	61,658,187	32,904,843	25,771,865	-0-	107,312,855	2,172,486	229,820,236
Remedial Orders	2,756,837	1,135,077	-0-	-0-	3,438,751	-0-	7,330,665
OE Total	64,415,024	34,039,920	25,771,865	-0-	110,751,606	2,172,486	237,150,901
TOTAL	$206,592,020	$55,234,952	$589,068,589	$510,000,000	$259,991,606	$2,172,486	$1,623,059,653
Percentages	12.7	3.4	36.3	31.4	16.0	0.2	100

As of January 20, 1981, the Office of Special Counsel had negotiated nine additional global settlements. The following chart illustrates the results of those settlements.

Provisions	Amounts (millions)
Refund to customer	$131.4
Price rollback	16.7
Bank reduction	1,742.0
Investment commitment	500.0
Payment to U.S. Treasury	29.8
Total	$2,419.9

However, in our opinion, none of these settlement provisions has been totally adequate since DOE has not always been able to ensure that they actually result in restitution to injured parties. Following are some examples to illustrate the problems DOE has experienced in trying to make restitution. We believe these problems demonstrate the need for DOE to use the Subpart V procedures to make disbursements from the escrow accounts and to deposit any remaining funds in the United States Treasury. We believe direct deposits to the Treasury can be considered as a form of restitution to the public in general.

Refund attempts prove inappropriate

DOE has attempted to refund moneys to the customers of companies who allegedly violated regulations. These refunds were made under different circumstances, but the results were generally the same--DOE was not always able to ensure that the refunds actually resulted in restitution to injured parties. A key limiting factor to making restitution is that DOE has generally had difficulty in identifying precisely who had been injured by overcharges or the amounts of the injuries.

Direct refunds and price rollbacks

DOE officials stated that when customers were identifiable, DOE initially required the companies to refund overcharges to them. The preceeding chart shows that as of September 30, 1980, about $206 million had been refunded. However, DOE was often unable to ensure that the customers getting the refunds were actually injured--that they absorbed the original overcharges and did not pass them through to their own customers--or that the customers

getting refunds passed the refunds to their customers that were injured. Some refunds might have resulted in enriching parties that were not injured. In order to know this, DOE would have had to audit all sales transactions at each level in the market chain, obviously an impractical task.

Although DOE has negotiated nearly $56 million in price rollbacks which could be directed at specific customers or at a general customer group, again DOE cannot assure itself that the customers getting the price rollbacks are actually injured parties unless it audits their operations, or unless the rollbacks are made at the retail level or to end-users as specified in the Office of Enforcement's policy guidance for rollbacks. Also, after deregulation, price rollbacks probably are not appropriate remedial measures because DOE probably would not be able to establish a base price for sales.

Proposed ancillary refund orders

In April 1978, DOE and an oil company entered into a consent order to settle alleged violations of DOE regulations. One of the requirements of the consent order was that the company make refunds of $2.4 million to six of its customers who were overcharged. The company complied with the consent order by submitting direct refunds to each of the customers. In December 1978, DOE issued a proposed ancillary order to each of the customers, to ensure that refunds they received were correctly passed down the marketing chain to the ultimate consumer or deposited into the United States Treasury if specific customers could not be identified.

All six companies filed a Notice of Objection to the orders. The Office of Hearings and Appeals then issued two Decision and Orders relating to these ancillary orders on April 27 and June 11, 1979. The Decision and Orders stated that the procedural regulations did not contemplate the issuance of a proposed ancillary order by the District Office. They provided only for a final order. Consequently, the Office of Hearings and Appeals ordered the proposed ancillary orders remanded to the Office of Enforcement's Southwest District for further consideration in view of the principles discussed. Since being remanded to the Southwest District, DOE has taken no further action because of the potential for litigation on any DOE orders, and the six companies have not been required to pass refunds to their customers. DOE officials told us this unsuccessful attempt at making refunds through the marketing chain was one reason for establishing the escrow account discussed on page 47.

Participation agreement

A consent order, representing a global settlement between DOE and Kerr-McGee Corporation, contained a $46 million participation agreement as one of the stipulations for settlement. The participation agreement stated that companies receiving a refund due to the consent order would be required to pass on the refund through the marketing chain until the refund finally reached the ultimate consumer, the injured party. The participation agreement allowed first-tier customers to retain a portion of the money refunded to them. Secondary and tertiary customers could also retain another portion. The ultimate consumers were allowed to retain 100 percent of the money refunded to them.

The conditions set forth in the various participation agreements attempted to ensure that approximately 55 percent of refunds paid under the consent order would be passed to the ultimate consumers if they could be identified. In our opinion, this approach had the same drawback as those discussed above--DOE had no assurance that the recipients of refunds had previously been injured by Kerr-McGee's pricing violations.

DOE's plan for distributing Getty Oil Company consent order proceeds illegal

DOE holds $25 million collected from Getty Oil Company in an escrow account under the terms of a consent order dated December 3, 1979. The consent order resulted from charges by DOE that Getty had violated DOE regulations during the period August 19, 1973, through December 31, 1978. DOE announced that it planned to distribute to the benefit of low income residents $21 million of the Getty funds in 20 States in which Getty sells heating oil. The remaining $4 million was to be distributed through the Department of Defense to lower pay grade members of the armed services who reside off base in States where Getty does business.

The Comptroller General of the United States has concluded in an opinion (B-200170, October 10, 1980) that the DOE plan for distribution of the Getty funds is unauthorized and DOE cannot lawfully implement it because DOE's planned distribution was not being made to people who were likely to have been victims of Getty's alleged overcharges, and because DOE had failed to follow its own regulations. The Comptroller General stated that under Subpart V of DOE's regulations (10 CFR 205), DOE must use the procedures

it has adopted for distributing refunds to injured consumers in instances where victims of violations cannot be readily ascertained. Any agreement DOE may have made with Getty to waive the Subpart V procedure is unlawful and unenforceable.

Use of escrow accounts has been unworkable due to a lack of distribution strategy

When DOE set up its escrow account pursuant to United States Treasury regulations to accumulate and hold moneys when victims of violations could not be readily identified, it did not follow through by establishing a strategy for its disbursement. As of October 1980, DOE had about $260 million in its escrow accounts, and none of these funds had ever been disbursed to provide restitution to injured parties. The Office of Hearings and Appeals has accepted jurisdiction on petitions for distribution of some of the deposits, but it has yet to issue its decisions for final distribution of these funds.

DOE has produced an issue paper discussing options that it has for providing "indirect restitution" through the use of escrow funds to consumers of petroleum products. These options range from making expenditures for energy-related projects to depositing all receipts in the United States Treasury. Each is briefly explained below:

Option 1. A private, non-profit corporation would be established to administer the distribution of the refunds based on approved requests from groups and individuals to fund energy-related projects.

Option 2. The Office of Hearings and Appeals would provide notice that overcharge funds are available for distribution and would solicit proposals and comments, including specific projects or general suggestions, from the public as to the appropriate use of the funds. The Office of Hearings and Appeals would issue a formal written determination specifying the manner in which the overcharges should be distributed and the basis for that conclusion.

Option 3. Same as option 2 except that in addition the Office of Hearings and Appeals would appoint an advisory committee to assist in the evaluation of proposals and comments from the public.

Option 4. All funds collected by DOE would be deposited into the United States Treasury.

The first three options do not completely satisfy the requirement of making restitution, as defined in the Comptroller General's October 10, 1980, opinion, because these approaches do not require DOE to link the prospective recipients of restitution to the companies' alleged violations. We believe the fourth option is valid, assuming DOE has tried to apply the provisions of Subpart V and failed to distribute all the funds.

Some settlement items do not provide cash for restitution

DOE has been involved in negotiating settlements over violation amounts with oil companies since March 1979. But, not all settlement items negotiated have provided means for making restitution to injured parties. Investment items and, at times, bank adjustments fall into this category.

Investment items have no restitution value

As of September 30, 1980, DOE had negotiated five comprehensive (global) settlements with five major oil companies. The total settlement amounted to about $1.2 billion. About 59 percent ($735 million) of that amount is for items which could result in benefits to the general public as well as in restitution to injured parties, while the remainder, about 41 percent ($510 million), represents a company commitment to invest in exploration and refinery capacity that provides no moneys for making restitution to injured parties.

Investment commitments made by the companies include such items as new, expanded, or accelerated projects regarding domestic United States oil and gas exploratory drilling, developmental drilling, geological and geophysical activity, and enhanced recovery. Other investment commitments have required design, engineering, construction, and activation of improved technologies at a refinery on a schedule intended to have the new facility in operation by mid-1983.

The Special Counsel told us the investment items are not intended to have any restitutional value, but rather are meant to accelerate the companies' development plans in accordance with overall United States energy policies.

Even so, in October 1980, 20 plaintiffs, including 5 consumer groups, 8 special interest groups, 4 unions, 2 individuals, and a lobbyist group filed a suit against DOE in the United States District Court for the District of

Columbia alleging, among other things, that DOE lacks authority to enter into consent orders on other than injunctive or restitutionary terms or to enter into restitutionary settlements in which the value involved is less then the amount of overcharges.

Bank adjustments have uncertain impact on prices

DOE's regulations allowed companies to "bank" unrecouped costs that, because of market conditions, could not be passed through to customers. The companies held these costs until market conditions allowed them to pass higher costs through to customers. Since the banks existed, DOE decided that the banks must be considered during settlement negotiations for alleged violations. In fact, bank reductions represent about 42 percent ($503 million) of the total $1.2 billion obtained in the first five global consent orders.

We are not critical per se of the policy for considering bank adjustments during settlement negotiations, since in some cases, violations would have resulted merely in an increase in the companies' banks and not in higher prices to customers. However, we believe it is important to point out that downward bank adjustments as a result of negotiated settlements did not necessarily have any effect on future prices and did not necessarily represent restitution to injured parties. For example, one company had almost $200 million in unrecouped costs allocated to gasoline in the month it settled with DOE. After making the negotiated bank reduction, the bank dipped to about $140 million. However, over a period of several months, into the summer of 1980, gasoline supplies became very plentiful. As a result of the market competition in gasoline prices, the company once again was unable to pass all of its costs through to customers, and the bank climbed to over $400 million. Obviously, the bank adjustment had no effect on prices since the plentiful gasoline market never allowed the company to pass banked costs through anyway. Under these conditions, bank adjustments are meaningless. Now that prices have been deregulated, all future bank adjustments would be meaningless.

DOE NEEDS TO BETTER ENFORCE COMPLIANCE WITH CONSENT ORDERS

The Office of Enforcement has placed little emphasis on ensuring that companies abide by the provisions of con-

sent orders. The Office of Special Counsel, on the other hand, had implemented a compliance monitoring system for the global consent agreements, but the agreements were too recent for a full compliance evaluation.

We followed up on 32 consent orders and 6 remedial orders to determine if the Office of Enforcement had confirmed that the companies had complied with the terms of the orders. Some consent orders stated what evidence DOE required regarding compliance. In general, we found that Enforcement was not using a systematic approach to verify compliance with consent orders, but we found no problems with the remedial orders reviewed.

The Office of Enforcement had evidence that payments had been made, as agreed, to the DOE escrow account since the checks were made out to DOE. However, in other cases Enforcement simply accepted the companies' statements that they had made refunds to customers, without obtaining hard evidence in the form of canceled checks and copies of sales invoices that show credits applied to the customer purchases. In one case, the Office of Enforcement's Southwest District obtained a consent order in 1977 for over $1 million to be refunded by the company to its customers through price reductions. Southwest District Office personnel said they had no knowledge if the company had made refunds. They had to query headquarters to identify the current status of the company's compliance.

The Southwest District made its own study in August 1980. Enforcement officials looked at 91 cases to determine if the case files contained adequate evidence that the companies had complied with the consent order terms. The study showed that only 36 percent of the cases reviewed had adequate documentation in the case file. Complete study results follow.

	Number of cases	Percent of total
Adequate documentation in case file	33	36
Documentation in case file needs additional verification	32	35
Case file lacks documentation of action	26	29
Total	91	100

These are the same kinds of findings the DOE Inspector General had in a similar review in the Office of Enforcement's Northeast District Office in February 1980. For example, the Inspector General reported that of 18 violation cases reviewed, 6 cases with total overcharges of about $1 million were settled in part on the alleged basis that rollbacks and refunds of about $900,000 had been made prior to the settlement dates. The Inspector General reported that the DOE files contained little or no acceptable evidence that the refunds and rollbacks were properly made.

In making the Southwest District study, District officials considered copies of canceled checks, invoice copies showing withheld payments, or working papers from a proper audit as adequate evidence of an action. They stated that company letters indicating that actions have been taken, copies of uncanceled checks, and unverified schedules of payments were not adequate evidence.

An Office of Enforcement official advised us in February 1981 that DOE has implemented a standard compliance monitoring system in all district offices and that past problems have been corrected. The official stated that these improvements were made as a result of the DOE Inspector General's findings, discussed above.

CONCLUSIONS

DOE has negotiated numerous consent orders to make restitution to injured parties, but DOE does not know how much restitution has actually occurred. In our opinion, it is doubtful that DOE will be able to develop practical means for it or the companies to identify injured parties or the amounts of the injuries. Even so, we believe DOE should take several actions to improve its settlement process and to strengthen the provisions of its consent orders.

Overall, we believe DOE should allow refunds to customers only when it can assure itself that such refunds will result in restitution to injured parties. The Secretary should have appropriate DOE enforcement officials petition the Office of Hearings and Appeals under Subpart V regulations to implement special refund procedures to identify and make refunds to parties who have suffered injuries because of overcharges. After this process is followed, any remaining funds should be deposited in the U. S. Treasury.

We also believe DOE should strengthen consent orders by separately identifying and publicly disclosing those settlement provisions which have no potential restitutional

value, such as the investment provisions, as opposed to those that provide potential remedies for overcharges, such as refunds. In this way, DOE will not obscure the restitutional value of the settlement and will not set a poor precedent for future negotiations.

Furthermore, we believe DOE should put emphasis on enforcing the provisions of consent orders, including the period after deregulation occurred, as discussed in chapter 3. And, in our opinion, DOE should put the primary burden on the companies to demonstrate their compliance, by indicating in the consent orders the types of evidence companies must provide DOE regarding compliance.

RECOMMENDATIONS TO THE SECRETARY OF ENERGY

To improve the settlement process, the Secretary of Energy should:

--Allow refunds to customers only when DOE can assure itself that such refunds will result in restitution to injured parties.

--Direct the appropriate enforcement officials, when injured parties cannot be readily identified, to petition the Office of Hearings and Appeals to implement special refund procedures to identify and make refunds to parties who have suffered injuries because of overcharges. After applying this process, deposit any remaining escrow accounts' funds and the remaining cash proceeds of consent orders directly into the United States Treasury.

To strengthen the provisions of DOE consent orders, the Secretary of Energy should:

--Separately identify and publicly disclose restitutional and non-restitutional provisions in consent orders.

--Include in consent orders specific requirements for the documentation a company must provide DOE as evidence of compliance.

CHAPTER 5

DOE/JUSTICE COOPERATION ON CIVIL LITIGATION HAS IMPROVED, BUT SOME "TURF" BATTLES CONTINUE

Justice has primary responsibility for civil litigation for all Federal executive agencies unless legislation authorizes agency to handle its own civil litigation. The Department of Energy Organization Act of 1977 (P.L. 95-91; 91 Stat. 565) (DOE Act), provides that the Attorney General shall supervise litigation involving DOE, except litigation involving the Federal Energy Regulatory Commission. DOE and Justice entered into a memorandum of understanding in 1978 to resolve questions about each department's authority in specific civil litigation matters. Despite the memorandum's attempt to resolve disputes, the departments have not agreed on certain matters related to global consent orders: (1) the authority of Justice to concur in the settlement of civil litigation and (2) the propriety of certain nonlitigative provisions.

THE MEMORANDUM OF UNDERSTANDING IS COMPREHENSIVE

The conference report (S. Rept. 95-367, H. Rept. 95-539) accompanying the DOE Act contemplated that DOE and Justice would enter into a memorandum of understanding to provide for the division of responsibility and for management authority over civil litigation arising from the Secretary of Energy's administration of energy regulatory programs.

Shortly after the passage of the DOE Act, DOE and Justice officials conducted a series of meetings to work out the terms for a memorandum of understanding, and on April 20, 1978, they finalized the memorandum. The memorandum of understanding is intended to set out the division in litigative responsibility between departments for civil regulatory cases arising out of the Emergency Petroleum Allocation Act of 1973. It is designed to implement, not abridge, the statutory authority of the Attorney

General to supervise litigation involving DOE. DOE has primary litigative responsibility in a substantial number of civil cases. But, the Attorney General still has the final authority to determine the Government's litigative position in each case.

Justice can retain primary litigative responsibility in civil cases whenever Justice determines that it would be able to more effectively represent the Government. Under the procedure set out in the memorandum, DOE provides Justice with copies of petitions or complaints proposed to be filed by the Government or which have been filed against the Government. If Justice wishes to retain primary litigative responsibility, it will furnish DOE the reasons in writing. This communication is required within 45 days if DOE initiates the litigation and in 15 days if DOE is being sued. If DOE disagrees with Justice's decision on which agency should have primary litigation responsibility, DOE may present its views to the Associate Attorney General, who makes the final decision. If Justice does not determine to retain primary litigative responsibility within these specified time periods, DOE will have this responsibility.

Regardless of which agency has primary litigative responsibility, the attorneys of both agencies are required to cooperate and collaborate in preparing and presenting the case. The memorandum requires Justice to notify and allow DOE to participate in all litigative settlement negotiations. Both DOE and Justice must concur in the settlement of any litigation.

Despite their mutual agreement on the terms of the memorandum of understanding, DOE and Justice initially had problems in implementing it. In February 1979, the then Assistant Attorney General for the Civil Division asserted that the memorandum of understanding should be rescinded. She stated that the delegation of primary litigative authority to or the sharing of primary litigative authority with DOE inhibited the Justice Department from carrying out the Attorney General's statutory authority, which encompass the supervision of all Government litigation. This contributed to significant problems between the agencies in litigating early cases under the memorandum of understanding. However, statements by current and former DOE and Justice officals indicate that these problems have generally been resolved.

DOE HAS SETTLED CIVIL LITIGATIVE CLAIMS WITH COMPANIES WITHOUT JUSTICE'S PRIOR CONCURRENCE

As stated above, the memorandum of understanding states that both DOE and Justice must concur in any litigation settlement. As of December 15, 1980, DOE's Office of Special Counsel had negotiated, with DOE General Counsel concurrence, global consent orders with Getty Oil Company, Phillips Petroleum Company, Cities Service Company, AMOCO, Kerr-McGee Corporation, and SUNOCO. Five of these consent orders included agreements on active litigation by DOE, against DOE, or both. Only the Kerr-McGee order involved no litigation. However, DOE did not get prior concurrence from Justice on four of the five consent orders--Getty Oil, Phillips, Cities Service, and AMOCO. As of late December 1980, Justice had concurred on all four global settlements.

Only a later global settlement with SUNOCO,involving litigation, received Justice's prior concurrence. This resulted from the DOE General Counsel's--Justice's official point of contact with DOE--meeting with the Associate Attorney General to discuss the problems the agencies were experiencing with interagency cooperation. As a result of this meeting, Justice was provided a draft of the SUNOCO settlement. A DOE offical stated that the signing of the settlement was postponed until DOE received Justice's concurrence, which took 5 months.

Office of Special Counsel officials contend that DOE has a client/attorney relationship with Justice, and DOE should be allowed to withdraw its own suits against companies as part of negotiated settlements. They insist further that if as a by-product of the negotiations leading to the global settlements, a company drops its suit against DOE, Justice should not have the right of concurrence. An Office of Special Counsel official offered two reasons for its position. First, Justice has no authority to review the settlement of administrative matters which formed the core of global settlements. Second, even if Justice wanted to, it could not legally prevent a refiner from withdrawing its suit.

On the other hand, Justice officials argue that if DOE is permitted to settle suits against DOE without Justice's approval, it would be circumventing the Attorney General's authority as the chief litigative officer for the Government. Justice officials say that Rule 41 of the Rules of

Civil Procedure requires that in order to withdraw a civil action against the government, all parties appearing in the case must sign a stipulation for dismissal. The purpose of this rule is to prevent companies or individuals from withdrawing a suit in one district because there may be a similar case in another district which has a better chance of being won. A Justice official said that even if Justice is not specifically named as a party in a suit, since the Attorney General is the Government's chief litigative officer, Justice would also have to approve the stipulation for dismissal.

In spite of the agreement between DOE and Justice in the SUNOCO case, the problem continues. DOE negotiated nine global consent orders in January 1981. Two of the nine consent orders involved the settlement of litigation brought against DOE by the companies. However, Justice's concurrence was not sought in either of these settlements.

DOE HAS NOT CONSIDERED JUSTICE'S COMMENTS

As of December 31, 1980, Justice had approved all of the global consent orders involving litigation which DOE had concluded to that date. However, in four of the cases (Phillips, AMOCO, Cities Service, and SUNOCO) Justice issued a disclaimer regarding several nonlitigative provisions common to the four settlements. Although such administrative provisions do not require the Department of Justice's approval, the Associate Attorney General stated the he and the Attorney General question whether these provisions are in furtherance of the public interest.

The specific provisions opposed and Justice's objections are stated below essentially as they were included in the consent orders and in Justice's letters to DOE.

Provision 1

The consent orders state that even if a company violated DOE's regulations, it might be difficult to prove an individual purchaser was injured. The difficulty stems from the discretion a company has to allocate increased costs, utilize bank costs, and determine prices.

Justice's objection

Justice stated that this language appears to be a gratuitous expression of the Special Counsel for

Compliance's legal opinion, in advance, on issues that could arise in litigation against the companies by purchasers of their products who allege that they were impermissibly overcharged. To the extent it may be seen to give the companies an arguable defense in such litigation, it goes well beyond the bounds of settling the issues between the companies and DOE.

Provision 2

The consent orders state DOE is authorized to seek enforcement upon the discovery of new evidence, material to the settlement, if such violations were willfully and deliberately concealed. Similarly, DOE reserves the right to seek judicial remedies "* * * for any fraudulent misrepresentation of a material fact made by the companies during the course of the audit or during the course of the negotiations that preceded this Consent Order."

Justice's objection

Justice stated that using the terms "willfully" and "fraudulent" may be taken to mean that, even if the companies (1) made a misrepresentation during the course of negotiations that DOE relied upon in entering into the proposed Consent Order or (2) negligently concealed a regulatory violation, an enforcement action would nevertheless be precluded unless DOE could establish that the companies intended to deceive when they made the misrepresentation or concealed the violation. Given the fact that DOE is largely relying on information provided by the companies in entering into the proposed Consent Order, this provision in its present form appears to be unnecessarily stringent.

Provision 3

The consent orders state that the companies are relieved of "their obligation" to comply with the recordkeeping requirements of 10 CFR 210.92 for the period covered by the consent orders. This provision requires the company to keep sufficient records to demonstrate that the prices charged or the amounts sold are in compliance with DOE's regulations.

Justice's objection

Justice stated that this provision may deprive purchasers of the ability in other litigation to demonstrate overcharges.

Provision 4

The consent orders state that DOE must treat as confidential all financial and commercial information provided by the companies pursuant to the proposed Consent Order. 1/

Justice's objection

Justice stated that this provision could impede DOE's ability to provide such information to the Federal Trade Commission, Congress, and any other federal agency with enforcement responsibilities against the companies.

DOE officials stated that these provisions come under DOE's administrative authority for enforcing the petroleum pricing regulations. They stated that since these provisions are administrative and not litigative, Justice has no authority in the matter. An Office of Special Counsel official told us, however, that DOE has resolved the differences over the four provisions with Justice. He said that in the nine global consent orders negotiated in January 1981 DOE had worked out acceptable language with Justice for these four provisions prior to the signing of the nine consent orders. A Justice official told us that no such agreement had been worked out with Justice.

The States of Minnesota and New York had also expressed their concern about individual provisions of DOE's global settlement with AMOCO. The States' Attorneys General have filed suit in the Federal District Court for the District of Minnesota, in part, to enjoin DOE and AMOCO from exercising provisions of the consent order to destroy records and refuse to disclose other information relating to AMOCO's compliance with applicable petroleum price regulations. As of February 1981, the judge was determining whether the case should be heard on its merits.

CONCLUSIONS

In order to clarify each agencies' responsibilities for civil litigation under the Emergency Petroleum

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1/The SUNOCO'S consent order exempted the provision of information to the Department of Justice.

Allocation Act of 1973, DOE and Justice entered into a memorandum of understanding. However, despite the memorandum, a number of areas involving civil litigation are still in dispute. One area of dispute between DOE and Justice involves Justice's right to concurrence on civil suits against the Government, which are withdrawn as a result of a negotiated settlement. We believe the Secretary of Energy and the Attorney General should resolve this issue and, if necessary, amend the memorandum of understanding.

Another area of dispute between the agencies involves Justice's disclaimers on four non-litigative provisions common to four of the Office of Special Counsel's global settlements. Since the agencies disagree on whether these areas have been satisfactorily settled, the Secretary of Energy and the Attorney General should direct the departments' officials to resolve the differences and finalize the resolution in writing.

RECOMMENDATIONS TO THE SECRETARY OF ENERGY

To improve the DOE/Justice working relationship, the Secretary of Energy should work with the Attorney General to:

--Establish guidelines for Justice's review of settlement agreements which include companies withdrawal of civil suits against the Government.

--Develop appropriate language to resolve current Justice objections to non-litigative provisions in Office of Special Counsel global settlements for inclusion in pertinent future settlements.

GAO REPORTS ON DOE'S AND FEA's ENFORCEMENT OF PETROLEUM PRICE CONTROLS

Report Title	Date issued
Gasoline Allocation: A Chaotic Program in Need of Overhaul (EMD-80-34)	Apr. 23, 1980
Improvements Needed in the Enforcement of Crude Oil Reseller Price Controls (EMD-79-57)	May 29,1977
Letter report regarding FEA's Compliance Program in the New England Area (EMD-77-71)	Nov. 7, 1981
Transportation Charges for Imported Crude Oil--An Assessment of Company Practices and Government Regulations (EMD-76-105)	Oct. 27, 1981
Federal Energy Administration's Efforts to Audit Domestic Crude Oil Producers (OSP-76-4)	Oct. 2, 1975
Problems of Independent Refiners and Gasoline Retailers (OSP-75-11)	Apr. 4, 1975
Problems in the Federal Energy Administration's Compliance and Enforcement Effort (B-178205)	Dec. 6, 1974
Problems in the Federal Energy Office's Implementation of Emergency Petroleum Allocation Programs at Regional and State Levels (B-178205)	July 23, 1974

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