



Recommendation 80-2

Enforcement of Petroleum Price Regulations

(Adopted June 5, 1980)

The Emergency Petroleum Allocation Act of 1973 provides the President with broad pricing and allocation authority over petroleum products. Pursuant to this authority, a succession of agencies—including the Federal Energy Office (FEO), the Federal Energy Administration (FEA), and, since the passage of the Department of Energy Organization Act of 1977 (DOE Act), the Department of Energy (DOE)—have promulgated and enforced regulations implementing this Act.

All of these agencies have provided for administrative adjudications of contested remedial orders alleging violation of petroleum pricing regulations and seeking refund of overcharges. Congress, however, has expressly excepted these enforcement proceedings from the adjudicatory provisions of the Administrative Procedure Act. As a consequence, remedial order proceedings in these agencies, particularly FEO and FEA, have been less formal than APA proceedings and subject to intense criticism for failing to provide for full evidentiary hearings as a matter of right as well as for failing adequately to separate prosecutorial and judicial functions of agency personnel.

In the DOE Act, Congress acted to correct these perceived procedural deficiencies in the adjudication of remedial orders. Where a remedial order is contested, section 503(c) of the Act provides an opportunity for an evidentiary hearing, including a right of cross-examination to the extent necessary for "full and true disclosure of the facts." Moreover, to guarantee a complete separation of prosecutorial and judicial functions, this hearing takes place at the Federal Energy Regulatory Commission (FERC), an independent agency within DOE not subject to the control of the Secretary of Energy.

The executive wing of DOE, however, has continued to provide for its own adjudicatory procedures when its "proposed" remedial orders are contested. All such cases are tried before the Office of Hearings and Appeals (OHA), an executive administrative unit that reports directly to the Secretary. Orders issued by OHA may then be contested at FERC pursuant to section 503(c). The net result of this approach is that two layers of administrative procedures now exist for the adjudication of remedial orders.



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Elimination of Administrative Duplication

Administrative duplication can largely be eliminated either by abolishing the executive adjudicatory procedures presently utilized by the Office of Hearings and Appeals, or by abolishing the statutorily required hearing procedures at FERC. For a variety of reasons, abolishing FERC review of executive remedial orders is the preferable alternative.

FERC has little or no expertise in oil pricing matters. Moreover, it is already charged with enormous day to day responsibilities, including the implementation and enforcement of the exceedingly complex Natural Gas Policy Act. More importantly, an administrative structure that entrusts an independent commission with the power to review orders issued by a separate executive agency risks encouraging substantial policy fragmentation between the reviewing commission and the executive agency charged with the primary responsibility for promulgating rules and establishing policy in the first instance. There can be little justification for an administrative structural arrangement that risks such fragmentation, especially since the adjudicatory procedures used by the Department of Energy represent a substantial improvement over the more informal procedures followed by its predecessors.

Improvement of Administrative Procedures

As a corollary to abolishing FERC review, certain changes should be made in DOE procedures to conform generally with the APA's requirements for formal adjudications. Considerable controversy has developed over procedural provisions dealing with the burden of proof, the right of a litigant to an evidentiary hearing for resolving a disputed issue of material fact, the application of the agency's discovery rules, and the agency's failure to use administrative law judges. Given the nature of enforcement cases in general and the complexity and often enormous amounts of money at stake in these proceedings, application of the adjudicatory provisions of the APA to DOE's remedial order proceedings would be appropriate. APA proceedings can significantly increase the overall perception of fairness of the process on the part of the litigants, and will not unduly hamper the efficiency of the agency. Moreover, to ensure that an independent decision-maker is involved at the crucial record formulation stage of these proceedings, administrative law judges should be used on a regular basis. Finally, given the particular importance of discovery in these proceedings, litigants should be afforded discovery rights which accord with the model provisions set forth in Recommendation 70-4.



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Simplification of Duplicative Judicial Review

Once the internal problems of administrative duplication and procedure are solved, there remains an overarching problem—duplication of judicial review. A final remedial order issued by DOE is appealable to a United States district court, the decision of which may be appealed to the Temporary Emergency Court of Appeals. An appellate standard of review is employed at both judicial levels. This approach unnecessarily provides two essentially identical levels of judicial review.

Recommendation

1. *Administrative duplication.* FERC review of remedial orders issued by the Department of Energy pursuant to section 503 of the Department of Energy Organization Act unnecessarily duplicates the adjudicatory proceedings currently provided within DOE, risks substantial policy fragmentation between FERC and DOE, and is unnecessary to attain adequate separation of prosecutorial and judicial functions. Congress should, therefore, amend section 503 of the DOE Act so as to abolish FERC review of executive remedial orders and to provide DOE with authority to issue final remedial orders after meeting the procedural requirements set forth below in Paragraph 2.

2. *Administrative procedures.* Congress should require that final remedial orders may be issued by DOE only after opportunity for a hearing on the record in accordance with sections 554, 556, and 557 of the Administrative Procedure Act. In applying these provisions of the APA, DOE should use administrative law judges, provide for an appeal of ALJ decisions to the Secretary, and apply agency discovery rules in accordance with Recommendation 70-4 of the Administrative Conference. In advance of congressional action, DOE should, to the extent permissible by law, voluntarily adopt procedures consonant with the above principles.

3. *Judicial review.* Appellate review of final remedial orders by United States district courts unnecessarily duplicates the appellate function of the Temporary Emergency Court of Appeals. Congress should amend the Department of Energy Organization Act to provide that final agency remedial orders are appealable, as a matter of right, directly to the Temporary Emergency Court of Appeals, or to whatever other appellate court Congress may designate.



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Citations:

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