Task Force on Compliance and Enforcement

Final Report

Volume 2
Task Force Report

Reprinted March 1978

United States Department of Energy

Economic Regulatory Administration

Washington DC 20461

DISCLAIMER

Task Force on Compliance and Enforcement

DOE/ERA-0006

Final Report

Volume 2
Task Force Report

Reprinted March 1978

Note: This publication was previously published by the Federal Energy Administration (FEA). Under the Energy Reorganization Act (P.L. 95-91), FEA's functions have been transferred to the U.S. Department of Energy.

United States
Department of Energy

FEDERAL ENERGY ADMINISTRATION
WASHINGTON, D.C. 20461

July 20, 1977

Honorable John F. O'Leary
Administrator
Federal Energy Administration
Washington, D.C. 20461

Dear Mr. O'Leary:

Pursuant to your directive of May 13, 1977, establishing the Federal Energy Administration Task Force on Compliance and Enforcement, I am pleased to submit for your consideration the Final Report of Task Force Findings and Recommendations and a separate report outlining my personal impressions and observations.

I trust that this Report and the suggested actions outlined therein will be of value to you in your continuing efforts to improve the quality and effectiveness of the FEA Regulatory Program.

Sincerely yours,

Stanley Sporkin
Chairman
Task Force on Compliance
and Enforcement

Enclosures

COMPLIANCE AND ENFORCEMENT
TASK FORCE

Stanley Sporkin
Chairman

Jerry Pfeffer
Executive Director

Paul L. Bloom
Deputy General Counsel, FEA

Avrom Landesman
Assistant General Counsel
for Compliance, FEA

Ralph Ferrara
Executive Assistant to the Chairman
Securities and Exchange Commission

Theodore H. Levine
Assistant Director, Division
of Enforcement, SEC

Gordon W. Harvey
Assistant Deputy Assistant
Administrator for Compliance, FEA

Robert Nordhaus
Assistant Administrator for
Regulatory Programs, FEA

Richard B. Herzog
Deputy Assistant Administrator
for Compliance, FEA

William Taylor
Regional Counsel, Region III, FEA

Shelley Kolbert
Special Assistant to the
Administrator, FEA

Barry White
Regional Director of Compliance,
Region VI, FEA

Robert A. Wolfe
Special Assistant to the
Assistant Administrator for
Regulatory Programs, FEA

ACKNOWLEDGEMENTS

The Task Force wishes to express its appreciation to the large number of individuals who made significant contributions to the work of the Task Force and the results reported herein. Extensive technical assistance was received from the staffs of the Office of Compliance, Assistant General Counsel for Compliance, and the Office of Private Grievances and Redress.

The Task Force also wishes to acknowledge the dedicated efforts of the many individuals from the Federal Energy Administration and Securities and Exchange Commission who provided extensive typing, clerical and administrative support.

Disclaimer

This report was prepared by a Task Force composed of individuals representing several Federal agencies. The results outlined herein do not necessarily state or reflect the views, opinions or policies of the Federal Energy Administration (now U.S. Department of Energy) or of the Federal Government.

TABLE OF CONTENTS

REPORT OF THE CHAIRMAN

FEA TASK FORCE ON

COMPLIANCE AND ENFORCEMENT

REPORT OF THE CHAIRMAN OF THE FEA TASK FORCE ON COMPLIANCE AND ENFORCEMENT

I. Overview

The Federal Energy Administration ("FEA") and its predecessor organizations only have been in existence for approximately four years, during which time a small band of truly capable and dedicated public servants have represented the agency with integrity and sought to make meaningful the principles upon which it was founded. That the Report of the Task Force which follows is highly critical of the Agency's organization and past performance in no way diminishes the quality of service they have rendered. It is, moreover, important to take into account the circumstances surrounding the Agency's creation, and the environment in which it has been required to function, in evaluating that criticism.

During its stormy four years of existence, the FEA has been repeatedly faced with the prospect of extinction, as the government vacillated on the question whether federal controls should be placed upon the allocation and pricing of our nation's energy resources. A former FEA Administrator, Frank Zarb, in his testimony before a Senate Committee aptly described the agency's plight in these words:

> One of the most trying circumstances that we have to live with and still impacts the program's effectiveness today is the entire subject of FEA's regulatory activity. It was conceived as only a temporary program. At first, it was due to expire on February 25, 1975, only 14 months after it began; now, it is due to expire on August 31, 1975, 20 months after it began.

> This fact has made it difficult for me and my predecessors to plan and execute an adequate staffing program. It has been hard to plan future requirements and attract fully qualified and dedicated people to an agency that offered very limited job security. We were able to staff most of our positions initially with employees from other agencies, principally the Internal Revenue Service, but they hold reemployment rights which some of them exercised either because they thought they saw the first sign of the program's demise or simply for personal reasons.

In the two years since Mr. Zarb's testimony before the Senate, the dialogue over the desirability of continuing economic regulation over segments of the energy industry has continued. Indeed, notwithstanding the most recent change in Administrations and the efforts underway to establish a new Department of Energy, those within the FEA continue to labor under the constant suggestion that their efforts today will be rendered meaningless by deregulation tomorrow. Accordingly, if the Administration and the Congress truly desire an effective and comprehensive energy and enforcement effort, policy objectives must be clearly established and a long term commitment must be made to accomplish them.

The effectiveness of any regulatory program depends in large part upon the enforcement effort which underlies it. Rules and regulations permitted to be transgressed without consequence will ultimately undermine public confidence—a matter of particular concern when it affects decisions involving our nation's precious energy resources. Those subject to FEA's jurisdiction must meticulously comply with the regulatory requirements if the energy program is to be successful and achieve its goals. A strong and vigorous

enforcement effort is essential if that degree of compliance is to be assured.

The FEA's enforcement program has historically been ineffective without either the commitment or direction to do the job that, in retrospect, was clearly required. With a lack of a single-minded sense of purpose and commitment from the highest levels of the Agency, the enforcement program has floundered and moved from crisis to crisis with few real successes. Under each Administration, and subjected to the oversight of one Congressional committee after another, the Agency's enforcement resources were re-programed time and again to satisfy a real or imagined crises-of-the-moment when it should have been comprehensively addressing the more fundamental problems in the industry it was required to regulate.

It was in recognition of these problems that in February 1977, the present Federal Energy Administrator commissioned a preliminary study which indicated that the difficulties with the enforcement and compliance program were in fact as great as suspected. Pursuant to the recommendation of that preliminary study, the Administrator established the Task Force with a mandate to conclude its work within 60 days and to provide him with findings and recommendations designed to achieve needed program improvements.

Overcharges to the consuming public, possibly amounting to several billions of dollars, have yet to be recovered. Nevertheless, given the magnitude of the violative conduct that has occurred, particularly

during the embargo period, it is somewhat understandable that certain fundamental problems eluded the Agency.

It is from this perspective the Task Force undertook an evaluation of the FEA's compliance program. Although the Task Force found in virtually every program area unresolved issues and the need for substantial enforcement actions, it appears that a disproportionate amount of the overcharges suffered by the consuming public may have inured to the benefit of the nation's major refiners. Until the Congress and the Administration act to create an enforcement and compliance program of sufficient dimension to cope with all of the unresolved issues—action which is clearly called for—the Agency will have to focus its limited resources upon the core problem. And, the core problem is that presented by the major refiners.

Unfortunately, to date, the FEA's efforts to secure compliance from our nation's major refiners have been a failure. During the early years of the refiner program, only one or two auditors were assigned to some of the major refiners with global operations and billions of dollars in corporate sales. Even today there are entirely inadequate audit resources and no lawyers assigned on a full time basis to any of the major refiners. Given the size of the problem, the limited work that has been done to date, and the enforcement problems that necessarily accompany any attempt to remedy aged violations, a major new undertaking is required. Without such a bold new initiative, the Task Force's best estimate is that it will not be until the mid-1980's that even the audit work on the major refiners can be

made current. Since the activities in question appear to have occurred largely during the embargo period, a time table extending into the mid-1980's is completely unacceptable.

As time passes it becomes more difficult to audit and detect old violations and to establish equitable programs to return monies to those who have been overcharged. Continued delay in the program can only assure that those who have not complied with our national energy laws will be able to retain the fruits of their violative conduct and that those who have been victimized will not receive remedial and compensatory relief. A gross injustice will have been perpetrated.

The major refiner problem should be addressed by a program, developed within three to four months, that will thereafter bring audits and case resolution concerning transactions through calendar year 1976 to completion within eighteen months to two years. If this goal is to be accomplished, the priorities of the Agency will have to be drastically reorganized, and full support from the highested levels of the Department of Energy will be an absolute necessity. FEA's enforcement program will need to be divided into three basic components--major refiners, the unresolved audits and cases in each of the other regulatory programs, and current problems. The Agency will need to redeploy its limited resources to address the non-refiner aspects of the reorganized enforcement program. It needs to resolve a backlog in critical program areas, including willful violations by major independent crude producers and resellers, and other matters involving substantial overcharges, and it must be able to

effectively respond if enforcement problems emerge in connection with future energy shortages or other crises.

With respect to the major refiner program, an overall audit/enforcement strategy will have to be designed which employs teams composed of lawyers, auditors and system analysts who are specially trained to examine each level of a major refiner's operations. If the program is to be successfully concluded within the suggested 18-24 month period, the historic audit strategy of the agency—which begins at the production/import level and continues downstream through the refiner to the reseller/retailer—will have to be reordered. A new strategy which seeks simultaneously to examine each operating level of a major refiner will have to be devised.

The most effective way of accomplishing this mission, and of insulating those engaged in it from being diverted by new crises is to place them under the direction of a specially appointed high level official with a national reputation as a tough enforcer and litigator who is possessed of high integrity and outstanding management skills. Not unlike the concept of a Special Prosecutor, the official selected to direct this major refiner program should report directly to a high level within the new Department of Energy and have complete responsibility for marshalling and organizing the Agency's resources, structuring and implementing the audit program, and handling the ensuing enforcement actions, including any litigation commenced in connection therewith.

The Agency should be prepared to commit a substantial number of its best personnel to the program and should organize its remaining resources to render priority interpretative and administrative services to this special group. Beyond this commitment of internal resources

and personnel, the official selected to direct the major refiner effort should seek, during its initial planing stages, assistance from other agencies of the government and the private sector in developing the appropriate audit strategy to carry out the program. Because of the time pressures under which this special effort will be operating, it is extremely important that the audit strategy adopted be the correct one and that it be utilized only after it has been tested and its effectiveness assured.

To be successful the major refiner program will also need the cooperation and assistance of the Congress and other agencies of government. If the effort requires special legislation to require the violators to disgorge unlawful gains they may have obtained, the Congress should promptly respond. To facilitate effective prosecution by those most familiar with the cases developed, the Department of Justice should deputize the attorneys assigned to this effort as Special Assistant United States Attorneys providing them direct access to the courts to prosecute and defend all ensuing civil actions. Similarly the Civil Service Commission and the Office of Management and Budget should, where appropriate, relieve the special group of the rigors of federal employment and budget policies and procedures so that highly qualified persons can be expeditiously brought to bear on the task. In short, the effort which seeks to recover billions of dollars for the consuming public, must receive the complete support of our government if it is to succeed.

This special effort will most certainly be expedited if the major refiners voluntarily agree to cooperate fully with the

mission to be undertaken. Each should be given the fullest opportunity to demonstrate that it has acted as a good corporate citizen and has neither overcharged nor overreached the consuming public. Coming forward voluntarily will significantly serve to remedy the massive gap in credibility that has developed.

If, on the other hand, the major refiners prove recalcitrant or uncooperative at any stage, the full resources of the government should be brought to bear to assure that the program will proceed in a timely and effective manner. I believe that there is no realistic way of addressing the enormous problems that have been presented by the major refiners outside of organizing and effecting this recommended program. Accordingly, if this set of recommendations or an alternative strategy with the same effect is not adopted, I suggest that the Administrator seriously consider closing further inquiries into the activities of the major refiners during the embargo period.

The resources of the Agency, which are not needed to continue the major refiner program, must be re-organized to deal more effectively with other existing as well as emerging problem areas. The Task Force is very encouraged with the attitude and desire of the compliance staff and its current leadership. However, much more than the will to do a better job is needed. The FEA must develop new techniques and a organizational structure to deal with its current caseload and dispose of its long pending non-refiner cases and audits.

The enforcement program will be greatly enhanced by the implementation of a self-reporting system. Exclusive use of the on-site audit, while

workable in some instances, has not been a universally effective enforcement tool. Thus, one of the Task Force's principal recommendations is that a new enforcement strategy be implemented by the Agency. That strategy embodies the approach of placing an appropriate degree of responsibility on those subject to the regulations to gather and report information to the Agency in a manner which subjects their compliance to verification. If it proves workable, the self-reporting concept can be extremely important in structuring a manageable and effective enforcement program for the future.

I also believe that a more efficient compliance system can be established by consolidating the compliance operations of certain Regional Offices—for example, the compliance operations of the Boston, New York and Philadelphia Regional Offices. Moreover, as presently organized, the Regional Offices are operating inefficiently and there is a notable lack of coordination between the legal and audit staffs and their respective overseers in the National Office.

Currently, the FEA has little or no capacity to handle the flagrant or willful violations of its regulations. The Agency has virtually no attorneys who are involved in the day-to-day investigation of violative conduct and its fraud investigators are few in number. Steps must be immediately taken to develop a more effective investigatory and litigative capability within the Agency. At a minimum, qualified investigative attorneys and accountants should be hired to operate out of the National Compliance Office. Once an investigative and litigative expertise is developed there, trained personnel should be assigned

throughout the system. As a critical part of this undertaking, the Agency's audit and legal functions as they relate to the Compliance program, which are now separate, must be merged in the Office of Compliance.

I believe that all the necessary safeguards to insure the internal integrity of the compliance program must be developed. During its study, the Task Force learned of instances where even the most basic conflict of interest principles were not adhered to—a practice that cannot be permitted. The National Office must acquire effective control over the compliance program and it must be ever vigilant in its review of the compliance work being performed in the field.

Major Findings and Conclusions

The Task Force, during the brief period of its operation, has examined the compliance program at both the National and Regional Office levels. The problems found exist at both levels and span a broad range from a lack of program management and competence to an absence, in some few instances, of basic integrity.

The FEA's enforcement program has always lacked basic direction and focus. While it is understandable that a program conceived in crises would be plagued with basic faults, over time necessary corrective action should have been taken. That action has not yet been taken and the time for excuses and recriminations has come to an end. In order to determine exactly what new measures are called for, it is essential to review certain basic findings and conclusions.

(1) The Goals and Objectives of the Enforcement Program have neither been Adequately Articulated nor Effectively Executed

When Congress enacted a system for the economic regulation of those engaged in energy related activities, the natural assumption of the consuming public was that the expression of national policy embodied in the new legislation would be rigorously enforced. The public legitimately expected that violative conduct, particularly by industry leaders, would be detected by vigorous and competent investigative work and that appropriate remedial and compensatory action would be taken. Unfortunately, these public expectations have been largely unfullfilled even though our nation's consumers—particularly during the crisis of the 1973-1974 oil embargo-may have been victimized. Unfortunately, while industry giants may have been engaging in substantial violations of our national energy laws, FEA enforcement objectives have, for the most part, not been directed toward bringing the full brunt of the federal government's resources to bear on the violators.

Enforcement program objectives and priorities need to be re-organized to focus the Agency's limited resources on targets presenting the maximum opportunity to remedy the wrongs that have been done, deter further violative conduct and compensate those who have been overreached. The principal thrust of that program reorientation must focus upon the major refiners. It is they, not the corner service station operators, who are the natural targets of an enforcement program designed to assure compliance with the efficient allocation and pricing of our nation's petroleum products. Very little has been done to monitor the activities of the major refiners and too little has been accomplished

in recovering amounts overcharged. That not a single audit has been completed of a major refiner, particularly for the embargo period, is in large part attributable to the fact that the Agency until recently had assigned only a limited number of auditors to examine their critical operations. Even today there are no more than 14 auditors, and no attorneys, assigned to the examination of any of the major refiners.

Unfortunately, even where multiple auditors have been assigned, little has been and is being accomplished—audit programs are inadequate, recalcitrant subjects delay the provision of needed audit information, and insufficient recourse is made to computerized data. The best estimates the Task Force was able to receive from the Agency are that, under existing programs and priorities, the major refiner audits—let alone the legal pursuit of violations uncovered—for the period 1973 to the present will not be completed until the mid 1980's. It is the Task Force's conclusion that unless immediate and drastic changes are made in the goals and objectives of the Agency's enforcement program, the public's expectations may never be fullfilled and those who have violated the law will be permitted to retain the fruits of their misconduct.

(2) The Enforcement Program has Not Received the Necessary Attention and Resources to be Effective

Since the inception of the Cost of Living Counsel's ("CLC") regulatory program for petroleum products, the CLC and its successors, including the FEA, have failed to devote the necessary attention and resources to the enforcement program needed to carry out the purposes of the statutes and regulations they were charged with administering. Not

only has law enforcement been denied the prominence within the Agency that is needed to insure the efficacy of the system, but also those charged with the ultimate administration of the enforcement program possessed neither the experience nor the desire to undertake the job that was called for.

Inexperienced non-career appointees were routinely placed in charge of Regional Offices having the principal responsibility for carrying out the Agency's nationwide program. Some of these persons did not possess the requisite competence to administer an enforcement program, and at least one former regional official appears to have engaged in personal conduct that is highly questionable. To be successful a law enforcement program must be marked with integrity and its basic policy and tone established by committed and competent leadership. Lacking these basic characteristics, an enforcement program is is doomed.

(3) Organizational Problems have Plagued FEA's Enforcement Program since its Inception

In reaction to the oil embargo, a hastily contrived enforcement program was established by the CLC to insure a minimal level of compliance with the petroleum pricing and allocation regulations that had been adopted. Audits of the various components of the petroleum industry were begun with little planning, by a team of Internal Revenue Service auditors hastily assembled to administer the program. It is very difficult to assess the adequacy of these early audits since, in many instances, virtually no supporting documentation was prepared. Subsequent examinations of some previously audited firms uncovered substantial violations.

Nonetheless, no systematic program was ever been established on the national level to review closed cases.

Over the years, while some organizational improvements were implemented to relieve the chaotic conditions under which the enforcement program was initiated, the entire program was never really placed on a firm organizational basis. Rather than seeking to complete pre-planned objectives or devising imaginative program responses to emerging problem areas, the Agency instead responded to the crisis pressures it was continuously subjected to by the industry, the public and the Congress. There appears to be little evidence of national initiatives to learn the critical problems in the industry and organize the resources of the Agency to deal effectively with them.

Under the enforcement program as it now exists, virtually all of the auditing and enforcement activities take place at the Agency's ten regional offices. The administration of the program at the regional level has been diffused and placed under three different offices—that of the Regional Administrator, Regional Counsel, and the Regional Director of Compliance. Since the powers of these three offices often overlap, it has been virtually impossible to assess responsibility for program results. One of the major reasons why the compliance effort has not been successful, is the fact that while the National Compliance Office has had the responsibility for the compliance program, it has not had the concomitant authority to discharge its functions.

In some cases, personality clashes among the individuals occupying the three regional positions have caused already strained relationships to deteriorate further. In some of the Agency's regional offices,

organizational problems as well as personal relationships among senior regional personnel have severely handicapped enforcement activities.

Organizational problems have been further aggravated by an inappropriate definition of the role of counsel in the enforcement process. Rather than entering an enforcement matter at an early stage, counsel often first sees results of an audit after a Notice of Probable Violation has been drafted. Attorneys generally perceive their role as that of impartial evaluators of the legal sufficiency of the case.

No realistic time limits are set for counsel's review or, where deadlines have been established, they often cannot be met. On those occasions where counsel feels pressed because a matter has lingered too long in his office, files are often returned to the auditors with a request that supplemental information be supplied. While this temporarily relieves counsel of responsibility for the matter, and the Agency's case tracking records show prompt turnaround times, effective law enforcement is no longer the objective. Auditors too have learned the game well—when the additional information requested is obtained, the case is once again sent to counsel who may, in turn, return it to the auditors for yet another round of review. This exercise in administrative "ping pong" ultimately paralyzes not only the enforcement process but also those who are charged with its administration.

To make the enforcement program effective, counsel must abandon its detached role and be afforded an opportunity to participate in the creative pride associated with developing and presenting a case. This can be best accomplished by having attorneys play integral roles in the development of individual enforcement actions at their incipient stages.

I strongly urge that qualified investigative and litigative attorneys, hired under Schedule A appointing authority of the Civil Service Commission, be immediately assigned to, and placed under the supervision of, the Compliance Office at the National and Regional levels. General Counsel and its counterpart in the Regions should continue to serve as the legal adviser to the Administrator on the enforcement program and have a full opportunity to review all enforcement actions on a timely basis on behalf of the Administrator.

(4) The Compliance Program has not been Managed Effectively

Related to the organizational problems detailed above, the Task Force has found a pressing need for the adoption of proven managerial techniques. The Agency certainly has an impressive array of computerized programs and policy planning units. But, it is virtually impossible to fix accountability for a particular matter at any given point in time. One Regional Office analogized submitting a matter for home office review to "dropping it down a deep black hole" where the status of the matter, or even the person in the home office to whom it had been assigned, remain obscured for months. Another office noted that repeated telephone calls to headquarters failed to surface the status of pending cases. Under these circumstances, it is not difficult for me to understand why case after case lingered for extended periods without resolution.

Obviously, for any enforcement program to be effective, it must be properly managed. Each matter must be susceptible to strict accountability at each stage of its development. Where delays occur, the system must be able to flag where the breakdown is located, its cause and the persons responsible.

Where management is ineffective for whatever reason it becomes relatively easy to defeat the system. The case backlog that has developed, the inability of both staff personnel and the public to obtain agency interpretations, and the lack of national review of major compliance activities is largely the result of the Agency's inadequate management.

(5) The Agency Lacks Vital Resources

It is quite clear that even with an effective organization structure and proper managerial techniques, an enforcement program cannot be effective without adequate numbers of competent personnel. Additional personnel are required in all phases of the Agency's work. More skilled auditors, qualified attorneys, experienced investigators and systems analysts are vitally needed. But sheer numbers are not enough—that was the problem with importing overnight into the program several hundred Internal Revenue Service auditors four years ago. The Agency must seek quality personnel possessed of the requisite skills to administer a complex legislative scheme which regulates an industry with the wherewithal to employ the finest legal, management and auditing talent to oppose its directives. Presently, most of the Agency's lawyers are not sufficiently skilled to investigate complex cases. It has too few auditors and qualified investigators adequately to handle its pending workload.

(6) Need for a Stronger Role of the National Office of Compliance in Enforcement Activities

Until recently the FEA's enforcement program has been principally administered by the Agency's Regional Offices. The National Compliance Office has done little more than attempt to respond to inquiries and provide minimal direction. The National Office should, however, establish the necessary enforcement goals, provide techniques and

strategy for their achievement and, above all, provide the necessary oversight for the program to assure its effective and efficient operation. With an internal system of controls that closely track the progress of pending actions and problem cases, and through periodic inspections and personal visitations to the Agency's field operations, the Administrator can fix the responsibility for the conduct of the Agency's enforcement program with the National Compliance Director — it will no longer be acceptable for participants in the program to explain their non-performance by citing backlogs and inattention.

Equally critical to the overall success of the Agency's enforcement program is the development of the resources and expertise within the National Office of Compliance to perform audit and investigatory work involving issues of national importance or matters which are beyond the resources or interest of any one region. Thus, the Agency needs to establish a division within National Compliance, composed of lawyers, accountants, financial and systems analysts, accountants and investigators. The Division could then organize its resources into teams to respond to problem areas of particular interest to the National Office. In addition to reacting to problems on an individual case basis, this National Unit could also assume responsibility for such problems of national concern as transfer pricing and disappearing old oil.

(7) The Agency should Enforce a Rigid Code of Ethics

Although the Task Force was neither formed to seek out instances of internal wrongdoing, nor sought to do so, several matters involving questionable staff conduct have come to the Task Force's attention. When the Task Force visited one Regional Office, it learned of certain

highly questionable activities by the former Regional Administrator. An employee in the Office informed us that when this Administrator was in charge, conditions deteriorated to such an extent that the employee was afraid to leave agency records at the office and felt compelled to take them home with him each evening. The employee did not know who to turn to for assistance in the National Office. This particular Regional Administrator has been replaced.

During the course of this same visit, the Task Force learned of possible misconduct on the part of certain other staff employees. Unfortunately, it appears that at least two staff members received certain benefits from oil companies while these companies were engaged in dealings with FEA. The benefits, which were in the form of free lunches and fishing trips, were not monetarily significant, but are nevertheless incompatible with professional and ethical standards and undermine the overall integrity and credibility of the Agency. I have been advised that the Agency referred this matter to the Justice Department which declined to prosecute, and that the Agency disciplined the staff members.

Since misconduct of this nature tends to be infectious, other employees might be tempted to participate in such activities, particularly if the moral tone set by the Agency's leadership is perceived as permitting it. What occurred in this Regional Office supports the theory that misconduct by management can create a climate conducive to misconduct by lower-level employees.

The Task Force also learned that former Regional employees who are no longer with the Agency may be appearing before the Agency on matters

in which they were involved as staff members. In one case, an FEA auditor responsible for auditing a particular firm was subsequently retained by that firm to represent it in negotiations with the Agency in respect to findings of overcharges he had made while he was an FEA staff member. The Regional Office personnel, while recognizing the impropriety of the former staff member's conduct, simply did not know how to deal with the matter.

Finally, it appears that a number of staff employees may be supplementing their income with outside employment. Although the Agency is apparently aware of this practice, it has not attempted, in individual cases, to determine the amounts of additional compensation, the manner in which it was earned, and the persons with whom Agency personnel have been associated in these undertakings.

Since the Task Force only gathered a limited amount of information in the area of questionable staff conduct, I urge that a full study of such practices, to the extent that they have not been already fully considered, be conducted by the Agency. One fact is clear—nothing can be more harmful to the proper functioning of an enforcement program than practices that compromise its integrity. This is particularly so in sensitive programs, such as the one administered by the FEA, where the amounts of potential violations are very large and the incentives for corrupting public officials are great.

I believe that the Agency must implement and enforce a rigorous code of ethics which will, among other things, identify problems of staff misconduct at an early stage — and provide a mechanism for effectively dealing with them. Such procedures should establish clear lines of communication for

enabling employees to report instances of misconduct by fellow employees without fear of retailiation or reprisal. I believe the recent establishment of a strong Inspector General's Office within FEA is an important and necessary first step in obtaining that objective.

(8) There has been a Lack of Acceptance of the Agency by Industry and the Public

The Task Force received a large number of adverse comments from various industry groups concerning the FEA operations in general and the enforcement program in particular -- comments that are a matter of substantial concern to the Task Force. While it is not uncommon for an Agency to be criticized by the entities it regulates, the nature of these comments are of a different dimension because they reveal a lack of respect for the Agency as well as for the professionalism and competency of its staff. Criticism also was directed at the quality of the regulations and the lack of expertise and knowledge of industry operations and problems by Agency personnel.

Unfortunately, this general lack of respect for the Agency has manifested itself in many ways, including the refusal to comply with staff requests for information and a lack of a confidence in the process of regulation that is conducive to promoting self compliance. If the Agency is to discharge its responsibilities effectively, it must engender the respect of the industry it regulates and the support of the consuming public. While the industry must be dealt with fairly and equitably, the Agency must make it clear that it has the ability and commitment vigorously to enforce its regulations.

The various segments of the consuming public who should be protected by the federal energy laws have also been quite vocal in their criticism

of the Agency, particularly with respect to the inattention by the FEA to their written complaints or other correspondence. Indeed, a review of pending requests for rulings before the General Counsel's Office reveals that some requests, received over three years ago, have not yet even been acknowledged by the Agency. Obviously, this circumstance must be corrected if the Agency hopes to maintain public support.

In addition, the Agency has been subject to criticism from various Congressional committees having oversight responsibility for the Agency's activities. This has manifested itself in numerous requests to Agency personnel for information and documents and by several critical studies of the Agency's operations. Implementation of a positive and vigorous enforcement program will go a long way toward alleviating this criticism.

(9) The Agency has a Morale Problem

The morale of the staff of the FEA is low. Staff members have expressed several major criticisms of the FEA's enforcement operations including its inability to move pending violation cases through the Agency's review system. In addition, virtually every staff member involved in enforcement work interviewed by the Task Force expressed frustration with their inability to obtain critical interpretations of particular issues that are important to the completion of pending cases.

Some staff members were critical of the continually changing work program assignments received from the National Office. Often employees are removed from their ongoing work projects and assigned, on an urgent basis, to other matters without being fully advised as to the reason for their changes in assignments. After the new assignment has been

completed, it is difficult for the employee to return to their old assignments and pick up where they left off.

The Regional Office staff has also complained that they are not given sufficient flexibility in deviating from work plans ordered by the National Office. While the Task Force is not in the position to pass judgment on this particular criticism, it believes that highly qualified and motivated persons charged with carrying out the program should have significant input in determining the most effective manner and method for performing their jobs.

Another complaint expressed in the Regional Offices relates to the ability of industry to undermine Regional enforcement efforts by going over their heads to high FEA officials in Washington. This complaint has not been verified; however, the allegation should be carefully investigated, and, if true, should be remedied.

The morale of FEA auditors assigned to the major refiner audits is particularly low. During the course of one of its Regional Office visits, the Task Force observed the audit team at one refiner working under difficult conditions in two small rooms totally isolated from the operations of the company under audit. All requests for information made by these auditors were channeled through a person designated by the refiner to act as a messenger for passing the information along to appropriate staff at the refiner. Responses to requests usually took weeks to be processed and there was little opportunity to obtain oral explanations of refiner documents without first having made an appointment to speak to the knowledgeable refiner personnel.

When a refiner representative finally appeared to provide the necessary explanation, he was sometimes accompanied by counsel.

The low morale of the staff is largely attributable to the lack of dedication and purpose in the Agency. It is my belief that the leadership necessary to imbue the staff with these ideals now exists at the National Office. The necessary steps should be taken immediately to transfer this spirit to the entire enforcement team.

How a sense of purpose can be brought to the Agency's enforcement program is exemplified by the Task Force's Philadelphia experiment. There the Task Force's decided to isolate certain cases pending in the Philadelphia Regional Office and attempt to dispose of them on an expedited basis. A small team of three or four people was asked to examine pending cases in the Region under $100,000 (which represented a majority of the Region's caseload), and to dispose of as many of the cases as possible within a ten-day working period. Although the attorney in charge of the experiment had no prior knowledge of the cases, some 44 units of work were materially advanced during the ten-day period. The success of the Philadelphia experiment both exceeded our expectations and demonstrated what can be done when highly motivated people are given a particular goal.

The team members also made an interesting observation concerning this project. They reported that only a very small portion of their on-going workload suffered a setback as a result of their being removed from their normal duties to participate in the experiment.

Several conclusions can be drawn from the Philadelphia experiment. It demonstrates that people can be motivated to a high level of accomplishment when given a sense of purpose and an objective. As a result, they can overcome numerous seemingly formidable barriers to effectively complete an otherwise seemingly impossible task. The Task Force urges that the Philadelphia experiment be used in similar circumstances. It can serve as a tool for reducing the number of pending cases, enhancing the morale of the staff, and eliminating the inertia that seems to have infested the work of the Agency.

(10) The Agency Needs to Realign its Regional Compliance Offices

Although the FEA has ten Regional Offices, each with a Compliance and Regional Counsel staff, the allocation of personnel to the Regions is not consistent with the Agency's overall workload requirements. For example, since the Dallas Regional Office is responsible for approximately 60-65 percent of the dollar volume of regulated transactions it presents the greatest potential for effecting consumer recoveries. Yet, that Office has only 37 percent of the Agency's total Compliance personnel. Viewed from another perspective, the New York Regional Office secured only $4.3 million in rollbacks and refunds between July 1, 1975 and May 31, 1977, at a direct cost to the Agency (i.e., that Office's budget) of approximately $3.8 million. An analysis of certain of the other Regional Offices similarly demonstrates that the cost of the Agency's remedial actions has far outweighed the program results they have achieved.

A cost-benefit approach, of course, should not be the sole basis for developing or justifying compliance and enforcement programs or

the deployment of Agency personnel. However, when the Agency is faced with difficult management decisions and limited resources, priority treatment should be given to areas where there are likely to be large dollar recoveries or opportunities for controlling principal access points for the pass-through of illegal overcharges (e.g., refineries). As an alternative to the present status, the Agency may wish to consider realigning the functions of certain Regional Offices. For example, the Compliance programs presently located in Boston, Philadelphia and New York might be consolidated, while additional area and Regional Offices are established in the areas of more significant program involvement.

(11) The Agency does not Possess the Competence to Handle Willful or Flagrant Violation Cases

A number of cases have come to the Agency's attention which clearly suggest that willful or knowing violations of FEA regulations were committed. The Agency's investigation of these cases has not been effective for a variety of reasons. Rarely have lawyers been assigned to participate in the inquiries. Moreover, very few persons within the Agency appear to possess the expertise to conduct an investigation which may ultimately involve criminal prosecutions. Although it is almost essential in cases such as these to subpoena documents and record testimony under oath, these investigative techniques are almost never employed.

As a first step, the FEA must immediately assemble a specialized group of attorneys and auditors in the National Compliance Office to actively participate in these cases. As soon as these staff members

familiarize themselves with the special characteristics of the FEA's enforcement program, their talents and experience should be shared with the various Regional Offices. Given the urgency of the Agency's need for experienced personnel, the Task Force believes it will be necessary for the FEA to tap the resources of other federal agencies with well-developed investigative and enforcement programs.

(12) The Agency should have the Authority to Handle its Own Civil Cases and not Have to Refer such Matters to the Department of Justice

The Agency has broad powers to remedy violative conduct in both the civil and administrative fora. Up until this time, however, the Agency has virtually abandoned its power to bring a civil injunctive action or seek restitution in the federal courts. Not doing so has impaired the effectiveness of the Agency's enforcement program. In large part, the FEA's reluctance to bring civil actions is due to the Agency's lack of authority to represent itself in Court. In addition, despite the enormity of the Agency's enforcement program, the Department of Justice only devotes approximately four man-years to the handling of FEA's civil actions.

An extremely important element in the effectiveness of other agencies with enforcement powers similar to those of the FEA has been their ability to represent themselves in federal courts — particularly in the context of seeking remedial judicial orders. Regulatory agencies created to develop a special expertise in complex or technical areas cannot be constantly required to rationalize or justify Agency policy to the Justice Department or to obtain its

concurrence in pursuing actions with significant regulatory consequences. Not only can the practice be terribly demoralizing to the Agency, but it can also impede the implementation of critical Agency policy decisions.

In order to have an effective compliance effort, the FEA must have more than four man-years devoted to its program of securing remedial action in the federal courts. The Task Force strongly urges that the FEA take immediate steps at the highest levels of Government to obtain the right to represent itself in court in the same manner as the SEC, FTC, and other independent and executive regulatory agencies.

(13) Certain Basic Regulatory Premises should be Reexamined

While the Task Force was not asked specifically to comment on the regulatory policies of the Agency, I would like to offer my views on one issue of importance because of its impact upon the overall enforcement program. A substantial amount of the FEA's compliance resources have been devoted to monitoring the pricing policies and practices of those firms subject to its jurisdiction. Violative conduct in this area has often resulted from non-compliance with the so-called "two-tier" pricing system. If the Agency can develop an alternative regulatory strategy for remedying the abuses to which the two-tier pricing policy is addressed -- e.g. through the imposition of an excess profits tax, a crude oil equalization tax or Government purchase of the lower-tier oil for domestic resale or stockpiling purposes -- the need for devoting the Agency's limited compliance and enforcement resources to that task would be significantly diminished.

By suggesting that the FEA consider alternatives to the two-tier system, I do not in any way intend to comment adversely on a Governmental policy which seeks to prevent windfall profits to an advantaged few at the expense of the consuming public. However, I do believe that there may be alternatives to the two-tier pricing system which both remedy predatory practices in the marketplace and create a regulatory structure which may be more easily enforced.

* * *

As a final suggestion, I would urge the Agency to closely monitor its Compliance Program and review the progress made by those administering the compliance and enforcement effort some six to twelve months from now.

This report reflects my personal impressions and observations developed in the course of my tenure as Chairman of the Compliance Task Force.

I would be pleased to discuss them further with the Agency's officials at any time.

SECTION I

INTRODUCTION

INTRODUCTION

Background

On May 13, 1977, the Administrator of the Federal Energy Administration created a Task Force on Compliance and Enforcement to make recommendations for measures to strengthen FEA's enforcement program in the area of Petroleum Price Regulation. The Administrator, with the concurrence of the Chairman of the Securities and Exchange Commission, appointed Mr. Stanley Sporkin, Director of the Enforcement Division of the Securities and Exchange Commission, as Chairman of the Task Force. Mr. Jerry L. Pfeffer of the Energy Research and Development Administration served as Executive Director. Task Force members included:

Paul L. Bloom, Deputy General Counsel, FEA

Ralph Ferrara, Executive Assistant to the Chairman
Securities and Exchange Commission

Gordon W. Harvey, Assistant Deputy Assistant
Administrator for Compliance, FEA

Richard B. Herzog, Deputy Assistant Administrator
for Compliance, FEA

Shelley Kolbert, Special Assistant to the
Administrator, FEA

Avrom Landesman, Assistant General Counsel for
Compliance, FEA

Theodore H. Levine, Assistant Director, Division
of Enforcement, SEC

Robert Nordhaus, Assistant Administrator for
Regulatory Programs, FEA

William Taylor, Regional Counsel, Region III, FEA

Larry White, Regional Director of Compliance, Region VI, FEA

Robert A. Wolfe, Special Assistant to the Assistant Administrator for Regulatory Programs, FEA

Mr. Rodney Eyster served as Special Counsel to the Chairman. Mr. Manfred Seiden served as the Chairman's Special Advisor on auditing and accounting issues.

The Task Force initiated its discussions on May 13, 1977, and concluded its efforts within the initially specified 60-day time frame. Thus, in many areas, the general recommendations drafted by the Task Force will require considerably more detailed study by the Agency prior to implementation.

Scope of Study

The Administrator's initial mandate to the Task Force identified several areas of principal concern to the Agency and the Congress wherein recommendations were to be formulated. These included:

1. A strategy for the disposition of pending cases.
2. A conceptual design for a compliance and enforcement strategy for the future, addressing the audit coverage to be given to the various types of firms subject to FEA's pricing and allocation regulations.

3. Techniques and procedures for auditing; for example, the use of preliminary audits.
4. Audit, legal and other national and regional staffing needs.
5. Legal support for compliance functions.
6. Communications and allocation of authority between National and Regional Offices, between the General Counsel and the Office of Regulatory Programs (at the National and Regional levels), and among different Regions.
7. Additional legislation in support of compliance functions.
8. Procedures for investigation of suspected willful violations.

Based on this mandate, the Task Force organized its efforts into five major study areas.

1. Analysis of the Agency's pending "backlog" of open audit assignments and legal cases.
2. Development of an integrated audit-legal strategy for dealing with the large backlog of unaudited transactions dating back to the 1973-74 embargo period and a "prospective strategy" for administering the future compliance program.

3. Development of a more effective organizational structure and administrative process (spanning the Offices of General Counsel and Regulatory Programs) for the Compliance Program.
4. Review of the Agency's existing enforcement powers and techniques (both statutory and administrative) and recommendations for needed improvements in this area.
5. Suggested improvements in the Agency's audit skills, audit techniques, training and personnel deployment.

While the Task Force did not directly consider the rationale and substance of the petroleum price regulations, per se -- regulatory issues were addressed both with regard to the regulatory development process, issuance of regulatory interpretations and drafting regulations in a manner consistent with evolution into a self-reporting system.

Organization of Task Force Efforts

To provide an objective basis for assessment of the existing Complaince Program and formulation of recommendations for needed improvements, the Task Force organized itself into four working groups corresponding to the five principal areas of study outlined above. Each of these working groups developed a study agenda (which was endorsed by the full Task Force) and proceeded to implement its study program. Draft working papers of findings and recommendations were submitted by each working group to the

Task Force where they were reviewed and discussed in great detail. The detailed findings and recommendations presented in this report were adopted by the full Task Force.

While each of the working groups focused on a different dimension of the Compliance Program, all were able to effectively utilize the considerable body of literature which has evolved from prior studies of Agency practices and procedure. In particular, the following documents were extensively reviewed by the Task Force in developing their recommendations.

- 1975 Hearings by the Senate Judiciary Committee, Subcommittee on Administrative Practice and Procedures (Kennedy Hearings on FEA Regulatory Programs), January 1975.
- Report of the Presidential Task Force on Reform of FEA Regulations (Frank G. Zarb and Paul W. MacAvoy, Co-Chairmen), December 1976.
- Transition Team Issue Papers, January 1977.
- Pfeffer-North Report to the Administrator on Assessment of FEA Regulatory and Compliance Program, April 1977.
- Internal (FEA) Working Papers, Management Studies and Memorandums.

In addition to published sources, the Task Force solicited inputs and conducted interviews with key

decisionmakers and staff in FEA, other Federal agencies and Congressional oversight committees as well as representatives of consumer groups and the petroleum industry (at all levels of the production, distribution and marketing chain). The Task Force has synthesized this information and applied their own critical judgments in assessing the current program and developing recommendations for the future.

SECTION II

OVERVIEW OF THE FEA COMPLIANCE AND ENFORCEMENT PROGRAM

HISTORY OF THE FEA COMPLIANCE PROGRAM

INTRODUCTION

The Federal Energy Administration's (FEA) Compliance program has had a diverse history although it has been in existence less than four years. Created in a crisis environment, it has been affected by a wide range of legislation and frequently changing regulations. It has had to cope with and adjust to problems associated with the evolution of a very large audit organization in an environment of constant uncertainty regarding the ultimate life of the program. Its mission of enforcing regulations applicable to the petroleum industry is unique among regulatory agencies.

To preserve some of the more important historical aspects of the program, this section will briefly outline the legislative history, the staffing history, the program evolution and the results of FEA's Compliance program. For the most part, the section covers the period from the inception of the program through June 30, 1977.

LEGISLATIVE HISTORY

Compliance activities in the petroleum industry began in August 1971, when the President ordered a general price freeze and established the Cost of Living Council under the authority of the Economic Stabilization Act of 1970. Since that time, numerous Presidential and Congressional

(*). For an indepth explanation of the history of FEA regulations; a technical description of the petroleum resources cycle; and the structure of the petroleum industry see appendix ____.

initiatives have had an impact on the Compliance program.

These initiatives include:

- The initial freeze on August 15, 1971, commonly known as Phase I, lasted 90 days.

- Phase II Regulations became effective November 13, 1971. Ceiling prices established during the freeze period became base prices, and a company could not charge prices above base prices unless: (1) the increases were justified, and (2) the company profit margins during the year did not exceed those during the base period.

- Phase III Regulations became effective on January 11, 1973. The petroleum industry was given more flexibility and some relief from profit margin limitations.

- On June 13, 1973, all petroleum prices were frozen for 60 days.

- On August 19, 1973, CLC issued comprehenisve petroleum regulations establishing pricing controls at all levels of the marketing chain except retailers. The retailer regulations became effective September 7, 1973.

- On November 27, 1973, the Emergency Petroleum Allocation Act (EPAA) was enacted in response to the Arab oil boycott.

- On December 4, 1973, the President issued an Executive Order establishing the Federal Energy Office which was delegated all his authority under the EPAA and the Defense Production Act of 1950, insofar as it related to the production, conservation, use, control, distribution and allocation of energy.

- On December 4, 1973, the Chairman of the Cost of Living Council was directed to delegate the CLC's price stabilization authority with respect to petroleum products and crude oil to the Administrator of the FEO.

- The FEO issued regulations on January 15, 1974, which essentially incorporated the pricing regulations of the Cost of Living Council. Also, on that date the mandatory allocation program became effective.

- The Federal Energy Administration Act of 1974, enacted May 7, 1974, established the Federal Energy Administration.

- On June 26, 1974, the IRS transferred control of the regional compliance force to the FEA Regional Administrators.

- On December 5, 1974, Public Law 93-511 was approved to extend the EPAA of 1973 to August 31, 1975.

- On September 29, 1975, Public law 94-99 was approved to extend the EPAA retroactively from September 1, 1975 to November 15, 1975.

- On November 14, 1975 Public Law 94-133 was approved to extend the EPAA one month until December 15, 1975.

- Public Law 94-163, approved on December 22, 1975, established the Energy Policy and Conservation Act (EPCA), which provided to the President for a period of 40 months standby authority to assure that essential energy needs of the United States are met. This legislation established new criteria which required regulatory changes, and the development and implementation of new audit techniques to assure compliance with the new regulations.

- On July 1, 1976, Public 94-332 was approved extending the Federal Energy Administration Act (FEAA) until July 30, 1976.

- Due to the expiration of the FEAA on July 30, 1976, the President issued Executive Order No. 11930 on July 30th establishing the Federal Energy Office (FEO). This was to allow the regulatory authority promulgated under previous legislation to continue until new legislation could be enacted and approved.

- On August 14, 1976, Public Law 94-385 was approved, which extended the FEAA of 1974 from the effective date of July 30, 1976 to December 31, 1977.

PROGRAM EVOLUTION

In the early days of the program under IRS, compliance efforts focused on violations which were readily apparent, easily remedied, and most often the subject of cosumer complaint. In other words, most of the effort was concentrated at the wholesale and retail levels. Moreover, IRS investigators did not specialize and, therefore, did not become expert in one segment of the industry or on one type of product.

Also in late 1974, FEA instituted a substantial reordering of priorities of its compliance program. As noted below, efforts were redirected away from the retail level, where competition rather than price controls was setting prices, and toward the more complex areas at earlier stages of the distribution stream.

Partially as a result of recommendations made by the Kennedy Subcommittee on Administrative Practice and Procedure after hearings were held on June 19 and 20, 1975, many improvements were made to the Compliance program during the latter half of 1975 and early 1976. Some of the major changes instituted during this period included:

- Supplementing the Compliance Action Plan of January 13, 1975, a Compliance Improvement Plan, covering the period July 21 to December 31, 1975, was prepared to precisely define and develop systems and procedures for carrying out compliance activities at both the National Office and at the Regional Offices.

- On-board personnel increased at the National Office and in the regions. Plans were developed for hiring additional compliance personnel to assure adequate coverage of various segments of the petroleum industry. However, these plans were held in abeyance due to budgetary problems.

- The Refinery Audit Review Program was strengthened by increasing the authorized staffing level at the major refiners. As of June 30, 1977, there were 272 auditors at the 35 major refiners. The largest refiners have teams of fourteen auditors each. For the other refiners the auditors per team vary from fourteen to four, depending on the complexity of the refiner. In addition, Regional Counsel Offices and General Counsel have increased their staffs to handle the expanded Compliance workload.

- The Compliance Field Manual was issued to the regions in October 1975, and is the authoritative guide for the operations of the Office of Compliance. The Manual reviews the entire compliance process and provides detailed guidelines and procedures for program development, operations, case resolution, reporting and information systems, and administrative activities. By specifying uniform policies, procedures, and reporting requirements, the Manual was designed to provide a means for achieving greater uniformity of the Compliance program within all regions.

- Under the Field Review Program initiated in July 1975, the regions are monitored for consistent application of the procedures and guidelines as stated in the Manual.

- Case Resolution procedures were revised and improved in an attempt to assure consistent application of the Regulations and timely resolution of cases.

- The existing computerized assignment tracking and information system was expanded and improved. It was implemented to receive data on audits in progress in the regions. This data included the level of distribution involved, the type of product, the nature of the suspected violation (if any), the action taken and the final results.

- A personnel locator system was established in November 1974.

- On August 12, 1975, FEA established policies on the collection of civil penalties when firms violated FEA regulations. Also on August 12, 1975, procedures to handle the referral of criminal cases to the Department of Justice whenever a compliance investigation uncovers evidence of possible criminal conduct were issued.

- The National Office of Compliance was reorganized on July 14, 1975, and the new offices of Compliance Policy and Planning, Compliance Operations, Compliance Case Resolution and Compliance Information were established. The new organizational structure was designed along functional lines in an attempt to provide technical expertise, to improve day-to-day operations and to dedicate specific resources to the development of programs, systems and maunals.

- A system of Quarterly Workplans for each region was developed to insure that manpower resources were scheduled to meet priorities and to lessen the impact of unprogrammed shifts in emphasis. The National Office provides general program guidance and the regions use this guidance to program their work. Each workplan is approved by the National Office to insure uniformity and appropriate coverage of each priority. Each region began implementation of its workplan on October 1, 1975 (2nd quarter FY 76).

- A system was developed for targeting resellers based on cost and price information they submitted to FEA on a special Compliance survey form. In the Importer, NGL, Propane Retailer, and Independent Crude Producer Programs, lists of firms in decreasing order of size were prepared to assist the region in selecting audit targets.

- Training courses were given at the National Office and in the regions throughout the year. Uniform programs of instructions were developed and a system for Training Program Review/Maintenance was implemented. Training courses included: Basic Auditing Techniques, Refinery Audit, NGL, Entitlements, Major Crude Oil Producers, and Special Investigations.

- The ten major Compliance programs under which all audits are conducted were instituted in April 1976. Formerly, programs were categorized either by type of business (e.g., Major Refiner, Propane) or origin of Assignment, (i.e., Locally initiated, Regional Office Directed, etc.). The new system categorizes all audits by type of business.

- A Common Audit Approach was developed and implemented for all ten programs in January 1976.

- A program for special investigations was implemented in an attempt to insure that credible indications of willful violations of FEA are investigated promptly, throughly and consistently, with the results presented in a manner which facilitates the proper determination of appropriate remedies.

- Plain language guides for importers, gasoline retailers, propane retailers, natural gas processors and crude producers have been printed and distributed nationwide for industry use.

- An historical Data Collection project was completed in June 1976, classifying all Compliance audit activities by program and region to provide a consistent data base spanning the two-year existence of FEA.

- Audit goals for Fiscal Year 1977 for all ten Compliance program were established in August 1976.

- Time-saving Audit techniques such as sampling (including statistical sampling) and use of Special Report Orders (SRO's) were implemented in calender year 1976.

- A procedure has been established to prioritize all open assignments to assure management that the total workload is receiving the proper attention. This system, called the open audit priority system, identifies open assignments into four categories consisting of; Special investigations (Category A) which must receive the top priority due to the high potential that a willful violation may have occurred; intensively managed audits (Category B), consisting of high dollar, very old, or for some other reason a special audit deserving management attention; normal ongoing audit (Category C not in need of special management attention, and audits in a hold status (Category D). Category D audits generally are in a hold status due to awaiting regulatory clarifications or because of higher priority work.

- Technical problem-solving teams have been organized to travel to audit sites in order to resolve issues or make critical decisions.

- Increased analysis of statistics and other information has improved the ability to identify program weaknesses and deviation from priorities.

- A system to identify and solve those issues which impede the timely resolution of cases has recently been implemented.

- Based on the favorable results of a field-test of a programmable calculator in Region VI, ten such systems have been procured for the regions to automate audit computation. In addition, a group has been established to support the regions in the use of these machines.

- A Computer Audit Assistance Program is currently being tested at a major refiner. This program will assist the RARP team to accomplish their task of verifying that the refiner has properly priced their covered products in accordance with the class of purchaser regulations.

OVERALL SUMMARY OF COMPLIANCE PROGRAM RESULTS

The primary goal of the audit/investigative program is to ensure compliance with FEA regulations, and to take strong and speedy corrective action in those instances where non-compliance has been detected. Overall, Compliance has completed about 23,844 audits and investigations. Approximately 9,076 violations have been resolved since the inception of the Compliance program in July 1, 1974.

For the period July 1, 1974 through June 30,1974, settlements amounting to $518.8 million were uncovered. Rollbacks and Refunds accounted for $192.3 million of this sum while the remaining $326.5 million were adjustments in "bank costs" (i.e., unrecouped costs available for pass-through in future months). In addition, $3.9 million in civil penalties were collected by Compliance and forwarded to the United States Treasury. The total violation and penalty amounts completed for the period are summarized below:

Rollbacks	$ 106,871,524
Refunds	85,455,496
Bank Adjustments	326,496,970
Subtotal	$ 518,823,990
Penalties	$ 3,887,253
Total	$ 522,711,243

As of June 30, 1977, there were 3,595 open cases. Of this total 1,028 have been identified as potential violation cases with a potential settlement value of $1,686 million. Remedial orders issued represent $143 million. Past studies have shown that the dollar amount will decrease before the case resolution process is completed.

COMPLIANCE PROGRAMS

The ten basic programs under which all Audits/Investigations are conducted are organized by type of business. The individual programs, with settlement and penalty amounts for the period July 1, 1974 through June 30, 1977, are as follows:

Programs	Settlement Amounts	Penalty Amounts
Importers	-	-
Crude Oil Resellers	-	-
Independent Crude Producers	$ 28,355,220	$ 931,822
Major Refiners	358,666,287	911,258
Small Refiners	29,529,811	390,466
Natural Gas Liquid Processors	1,604,005	-
Propane Resellers	6,425,833	154,452
Resellers (Other)	48,425,120	1,003,536
Propane Retailers	7,768,522	133,907
Retailers (Other)	$ 38,049,192	$ 361,812
Total	$ 518,823,990	$3,887,253

Due to either staffing shortages or pending regulation clarifications, FEA has only recently begun to audit Importers, Crude Oil Resellers, and Natural Gas Liquid Processors. Therefore, the accomplishments to date for these programs (in terms of dollar violations) have been minimal. However, it is anticipated that substantial dollar violations will be uncovered as soon as the ongoing audits are completed.

IMPORTERS

This program includes all firms primarily involved with the ownership at the first place of storage of a covered product brought into the United States. Currently, there are 579 firms in the Importer universe subject to the regulations of the Mandatory Oil Import Program.

Due to manpower demands in the other Compliance programs, FEA has only recently begun to audit Importers. As of June 30, 1977, 28 Importer cases were under way with one audit having a potential violation amount of $150,222. To date 27 cases have been completed without violations.

IMPORTED CRUDE OIL - ENTITLEMENTS PROGRAM

The Entitlements Program universe of firms subject to FEA regulation is 234 firms composed of major refiners (35), small refiners (123), and independent importers (76). Audits were initiated on October 1, 1976, and currently 102 audits are in process as follows:

Major Refiners	32
Small Refiners	46
Independent	24
Total	102

Audits in process are scheduled audits where FEA has not received required reports from the firms or where FEA has received preliminary reports but additional auditing is required to determine the extent of tentative violations.

Completed audits total 28 and represent 3 major refiners, 12 small refiners and 13 independent importers. The results of the completed audits indicated the following:

	No Violations	Violations
Major Refiners	-	3
Small Refiners	4	8
Independent Importers	9	4
Total	13	15

Violations in the Entitlements Program are applicable to:

A. Crude Oil Receipts

Firm has failed to include all the crude oil it received or the firm has misrepresented the correct category (i.e., old, new, released and stripper oil).

B. Runs to Stills

Firm included ineligible product in runs to stills such as NGL's, waste oil, lease condensate, etc., or the firm included Altamont type crude oil in runs to stills when in actuality the crude oil was run through a catalytic converter (Platformer).

C. Eligibility

Firm did not meet the eligibility criteria and thus, incorrectly received entitlement benefits.

As the audit data received is preliminary and is currently in the process of review and analysis, no formal enforcement actions have been taken. One Consent Order is in process and one Notice of Probable Violation is ready for release pending the result of the firm's request for an Exception. The NOPV involves the return of $25 million to the Entitlements Program for including 9.5 million barrels of ineligible products in the firm's crude runs to stills.

In addition, the regions have initiated four special investigations concerning entitlements. Ten firms have been required to file amended reports with the FEA.

CRUDE OIL RESELLERS

All firms primarily involved with the purchase, receiving through transfer or otherwise obtaining crude oil and reselling or otherwise transferring it to other purchasers without substantially changing its form are included in this program. The crude oil reseller universe is composed of 470 firms.

Audits in this program have begun only recently due to staff shortages. As of June 30, 1977, 6 audits of Crude Oil have been completed. No violations were found. However, on that date 31 Crude Oil Resellers were under audit with a potential violation amount of $4,760 thousand identified. Audits of 31 Crude Oil Resellers are scheduled to be completed by the end of Fiscal Year 1977.

INDEPENDENT CRUDE OIL PRODUCERS

This program includes all firms primarily involved with obtaining crude petroleum from the ground, or which own crude petroleum when produced, and subsequently makes the first sale. Crude Producers who are also refiners are not included in this program but are located in one of the two Refiner programs. There are 15,261 independent crude oil producers and 35 integrated oil companies with domestic crude oil production which produced $24.8 billion of crude oil in 1976.

As of June 30, 1977, 13% of the firms in the Independent Crude Oil Producers universe had been audited. Pricing violations totaling $28.36 million were settled with an additional $71.92 million in potential violations identified. Penalties collected total $933,000.

Period	Cases Completed	Refunds & Rollbacks	Penalties
7/74 - 12/74	24	$ 49	$ 1
1/75 - 12/75	444	4,247	227
1/76 - 6/77	1,809	24,060	705
Total	2,277	$ 28,356	$ 933

Dollar amounts in thousands.

Enforcement Actions for Independent Crude Oil Producers
7-1-75 through 6-30-77

Document	Number Issued	Dollar Amount
NOPV's	260	$ 43,576
RO's	56	$ 8,631
CO's	562	$ 26,630

Dollar amounts in thousands.

Since NOPV's and RO's may be issued prior to the issuance of a CO, these figures can not be totaled or double counting would occur.

MAJOR REFINERS (RARP)

The largest dollar violations have been found in this program which is composed of the 35 largest refiners. For Compliance purposes these are the firms which refine at least 75,000 barrels of crude oil per day. Compliance conducts continuous audits of the major refiners and has resident auditor teams located on-site.

As of June 30, 1977, settlement amounts totaled $359 million with $911,000 collected in penalties. In addition, $1,337 million in potential violations has been identified. Of this amount $132 million represent Remedial Orders which have been issued to the major refiners.

Period	Issues Completed	Refunds & Rollbacks	Bank Adjustments	Penalties
7/74 - 12/74	45	$ 46,137	$ 189,417	$ 300
1/75 - 12/75	101	5,408	79,139	215
1/76 - 6/77	222	10,587	27,978	396
	368	$ 62,132	$ 296,534	$ 911

Dollar amounts in thousands.

CRUDE OIL PRICING (REFINER IMPORTS) "LANDED COSTS"

The Transfer Pricing Program monitors transactions between U.S. firms and their foreign affiliates. These transactions are compared against open market sales between unaffiliated companies, and disallows inter-affiliate costs in excess of the arms-length standard prices. Forty-six firms have been identified as subject to FEA regulations and are required to complete Form F701-M-O.

To date, 27 firms have been reviewed for reporting accuracy and 20 multi-national oil companies were issued Notices of Proposed Disallowance on April 28, 1977, alleging that they inflated crude oil costs by $336 million in transactions with their foreign affiliates.

SMALL REFINERS

This program includes all refiners whose total refinery capacity is less than 75,000 barrels per day. The universe has 107 refiners. As of June 30, 1977, $29.5 million in settlements have been uncovered and $391 thousand in penalties have been collected. Current potential violations amount to $126.1 millions.

Period	Issues Completed	Refunds & Rollbacks	Bank Adjustments	Penalties
1/74 - 12/74	22	$ 353	$ 628	-
1/75 - 12/75	70	1,823	13,145	$ 256
1/76 - 6/77	188	894	12,687	135
	280	$ 3,070	$ 26,460	$ 391

Dollar amounts in thousands.

NATURAL GAS LIQUID PROCESSORS

All firms primarily involved with the operations of a gas plant in which natural gas liquids (NGL) are separated from natural gas, or in which NGL's are fractionated or otherwise separated into NGL products are included in this program. Currently, there are 825 plants in the Natural Liquid Processors universe.

As of June 30, 1977, eighty-three plants which were not subsidiaries of refiners, were under audit. As of June 30, 1977, settlement amounts totaling $1,604,005 were accounted for by refunds. Potential violation amounts of $17,979 thousand have been identified.

PROPANE RESELLERS

This program includes all firms (other than a refiner or retailer) primarily involved with the trade or business of purchasing, receiving through transfer, or otherwise obtaining propane and reselling or otherwise, transferring it without substantially changing its form. Reseller customers generally exclude those purchasers which are ultimate consumers. The exceptions are those commercial/industrial type ultimate consumers e.g., utilities, hospitals, municipalities, etc., that purchase products in large quantities. Currently, there are 2,500 firms in the Propane Reseller universe, of which 177 firms have been audited.

As of June 30, 1977, $6.4 million in settlements have been uncovered. In addition, $155,000 in penalties have been collected. Potential violations of $10 million have been identified.

Period	Cases Completed	Refunds & Rollbacks	Bank Adjustments	Penalties
1/74 - 12/74	122	$ 1,032	-	$ 15
1/75 - 12/75	208	1,697	$ 952	51
1/76 - 6/77	223	$ 2,425	$ 318	$ 89
	553	$ 5,154	$ 1,270	$ 155

Dollar amounts in thousands.

RESELLERS (OTHER)

All firms (other than a refiner or retailer) primarily involved with the trade or business of purchasing, receiving through transfer, or otherwise obtaining covered products (excluding crude oil and propane) and reselling or otherwise transferring them without substantially changing their form are included in this program. Reseller customers generally exclude those purchasers which are ultimate consumers. The exceptions are those commercial/industrial type ultimate consumers, e.g., utilities, hospitals, municipalities, etc., that purchase products in large quantities. When the Utility project was phased out in April 1976, those audits were added into the reseller program. Currently, there are 21,635 firms in the resellers universe. To date FEA has audited 1,452 reseller firms.

As of June 30, 1977, $48.4 million in settlements have been uncovered. In addition, $979,000 in penalties have been collected.

Period	Cases Completed	Refunds & Rollbacks	Bank Adjustments	Penalties
7/74 - 12/74	1,542	$ 8,139	-	$ 39
1/75 - 12/75	1,411	17,788	$ 2,000	340
1/76 - 6/77	1,039	20,453	44	625
	3,992	$ 46,380	$ 2,044	$1,004

Dollar amounts in thousands.

PROPANE RETAILERS

This program includes all firms (other than a refiner or reseller) primarily involved with the trade or business of purchasing propane and reselling it to private and non-commercial type ultimate consumers (in small quantities) without substantially changing its form. Currently there are 10,000 firms in the Propane Retailer universe, of which 578 firms have been audited.

As of June 30, 1977, $7.8 million in settlements have been uncovered. In addition, $133,000 in penalties have been collected. Current potential violations amount to $4 million.

Period	Cases Completed	Refunds & Rollbacks	Bank Adjustments	Penalties
1/74 - 12/74	455	$ 1,308	$ 15	$ 10
1/75 - 12/75	658	2,505	-	31
1/76 - 6/77	606	3,938	1	92
	1,719	$ 7,751	$ 16	$ 133

Dollar amounts in thousands.

RETAILERS (OTHER)

This program includes all firms (other than a refiner or reseller) primarily involved with the trade or business of purchasing covered products (excluding propane) and reselling them to private and non-commercial type ultimate consumers (in small quantities) without substantially changing their form. Currently, there are 276,224 firms in the Retailer universe of which FEA has audited 2,705 firms.

As of June 30, 1977, $38.0 million in settlements have been uncovered. In addition, $362,000 penalties have been collected.

Period	Cases Completed	Refunds & Rollbacks	Bank Adjustments	Penalties
7/74 - 12/74	9,896	$ 15,666	$ 3	$ 35
1/75 - 12/75	3,806	10,491	168	198
1/76 - 6/77	875	11,719	2	129
	14,577	$ 37,876	$ 173	$ 362

Dollar amounts in thousands.

STAFFING HISTORY

Initially, FEA's Compliance program was operated by the Internal Revenue Service (IRS). FEA assumed control over the program on June 26, 1974. In the early days, the Compliance effort centered around reseller and retailer audits. Although concentration on resellers and retailers may have been the right direction for Compliance during the embargo period, it soon became evident that a redirection toward refining and crude production audits was necessary.

In view of the overall interest in Compliance staffing and its critical impact on the effective of the Compliance program, a brief overview of the history of Compliance staffing is outlined below:

- On December 26, 1973, the FEO entered into an agreement with the IRS whereby the IRS would continue its compliance support for the FEO, as it had done for the Cost of Living Council (CLC). The IRS immediately detailed 300 persons to the program and agreed to recruit, train, and supervise a total staff of 1,000 auditors, investigators, and clerical employees.

- At the end of April 1974, FEO announced a regional hiring freeze. This was done because petroleum shortages had eased after the lifting of the embargo and prices became more competitive. Moreover, consumer complaints filed against firms at the retail level dropped significantly. Finally, the Administration began to formulate a decontrol strategy since the mandatory allocation authority was due to expire in February 1975. These factors created some doubt as to the need for a larger Compliance staff and started the process of projecting a phase out of the program.

- This period of program uncertainty had its effect on the Compliance program. Morale problems caused a gradual attrition of experienced staff as several employees exercised reemployment rights.

- On June 26, 1974, the IRS transferred control of the regional Compliance force to the FEO Regional Administrators. The FEA officially came into being on this date. The IRS also transferred 855 regional Compliance personnel to the FEA subject to the National

Office guidance. National Office Compliance staff totalled 46, giving combined staff of 901. A general hiring freeze imposed at the end of April 1974 was still in effect at this time. This freeze was in effect until January 1975, when those regions below authorized strength were to begin hiring.

- In mid-October 1974, FEA announced an end of year (FY 1975) staffing ceiling of 784. By this time field personnel had decreased to 829.

- In late 1974, a substantial reordering of priorities in the Compliance program was instituted. Efforts were redirected away from the retail level, toward refiners and crude producers.

- On January 13, 1975, an action plan was announced to expand and strengthen the Compliance program. It included plans to strengthen Compliance staffing. However, the actual number of on-board continued to decline. By April 1975, regional on-board personnel numbered 757.

- Administrator Zarb announced the utility project in May 1975; 220 additional slots were authorized for this project bringing the regional authorized ceiling to 1,004.

- By July 1975, personnel losses were still exceeding personnel gains, creating an aggregate decline in on-board regional staff to 724.

- On July 14, 1975, National Office Compliance was reorganized and an overall Compliance Improvement Plan was initiated. Initial plans submitted to FEA management called for a staffing ceiling of 2,021 in the regions and 188 in Headquarters. Although this plan received internal FEA approval, the staffing positions of the plan were not formally submitted to the Office of Management and Budget (OMB) for approval.

- By August, on-board personnel had finally begun to increase. The regional staff and National Office staff had risen to 887 and 78 respectively. Also, in August, Regulatory Programs proposed to increase the authorized Compliance staffing figures to 2,244 in the regions and 242 in Headquarters. These estimates were designed to give audit coverage each

year to those firms doing 80 percent of the petroleum business, every three years for those doing 15 percent, and every five years for those doing the remaining five percent.

In January 1976, after considering the audit coverage offered by several staffing options including the one mentioned above, the Administrator chose to submit to OMB a staffing request for 1,817 regional and 240 Headquarters personnel. This option would have permitted audit coverage of all firms doing 80 percent of the volume every two years and the remaining 20 percent every five years. In the interim, another hiring freeze was imposed on January 29, 1976.

- After some internal adjustments, the January staffing request was resubmitted in March, requesting a ceiling of 1,623 in the regions and 226 in the National Office. Based on this request, OMB requested Congressional approval for 1,164 in the regions and 162 in the National Office.

- In August, after Congressional approval, the Compliance staffing ceiling was set at 1,164 in the regions, and 162 at the National Office.

- On August 21, 1976, FEA lifted its hiring freeze. At that time the on-board Compliance staff consisted of 931 regional and 97 headquarters personnel. An accelerated hiring plan was initiated.

- In September 1976, a supplemental budget request for FY-77 was submitted to OMB. This request was to account for additional information gathered with regard to universe size and case times. This same submission covered the FY-78 request. In total, 1,429 personnel were requested for FY-77 and 1,428 for FY-78.

- In December 1976, OMB passback phased out the retailer program by end of FY-77 and phased out the reseller program by end of FY-78. The FY-77 supplemental was turned down and FY-78 budget request reduced from 1,428 positions to 1,221 positions.

- As of the end of December 1976, the accelerated hiring plan was completed with 1,061 on-board in the regions and 159 on-board in the National Office. RARP staffing stood at 256 on-board.

- In January 1977, new budget guidance was received from the Director of OMB. The reseller program was reinstated for FY 1978.

- In February 1977, the FY 1977 supplemental and FY 1978 amended budgets were submitted to Congress. A total staffing level of 1,396 was requested for FY 1977 and 1,384 for FY 1978.

- On March 1, 1977, a partial hiring freeze was imposed as a result of the President's 3 for 4 replacement plan. Consequently, Compliance's hiring rate was substantially slowed.

- On May 4, 1977, the President signed the FY 1977 supplemental request in which Compliance was authorized 70 additional people.

- The partial hiring freeze was lifted in June 1977. The current authorized ceiling for the regions is 1,185 of which 1,080 are on-board, as of June 30, 1977. The National Office has an authorized ceiling of 167 with 155 currently on-board.

SECTION III

REPORT AND RECOMMENDATIONS ON PENDING CASES

FINDINGS AND PRINCIPAL RECOMMENDATIONS

A. Resolution of Open Issues

The Task Force finds that a major cause of delay in the Compliance and Enforcement Program is failure to attain timely resolution of open issues. It recommends:

(1) The FEA develop a system whereby the Regional or National Office would respond to requests for issue clarification or interpretation on an expedited basis, with a specific turnaround time built in, and with a person given the responsibility for resolving the issue.

(2) Issues should be resolved in the context of the particular facts of pending cases.

(3) National Office of Compliance should develop capability to resolve issues through development of its own legal staff. The relationship of this capability and the Office of General Counsel is discussed in the Organization Section of this Report.

B. Use of FEA Authority

FEA has varied and extensive authority to compel production of documents and testimony and to require special reports. It can also request the Attorney General to institute civil injunctive actions. The Task Force finds that a major cause of delay in the Compliance and Enforcement Program is the failure to make effective use of these and other authorities. It recommends that:

(1) FEA begin to use the subpoena as one of its fundamental investigative tools especially in those instances where there have been indications of violations of the regulations or where there is some kind of refusal by the

person from whom the information is requested to provide that information on an expedited basis.

(2) Detailed training and instructions be provided by FEA to its staff on the use of subpoenas.

(3) Excessive delay in review and approval of subpoenas be eliminated by delegating to the attorney assigned to the case the responsiblity for its issuance, with the attorney having the option, if he has any questions concerning its issuance, to bring it to the attention of a senior attorney in compliance.

(4) A procedure be devised for assuring quick and effective follow-up when subpoenas that have been served are not complied with.

(5) FEA commence using subpoenas to compel the testimony of persons who are under investigation.

(6) Administrative proceedings to quash a subpoena should be streamlined.

(7) The FEA seek from the Department of Justice the authority to enforce its own subpoenas and if it is unsuccessful, it should seek legislation from Congress to accomplish that goal.

(8) Until that authority is received by the FEA, a system be set up, with specific turnaround times, to obtain speedy compliance. This could be accomplished by, for instance, streamlining the levels of review within a Region between the Regional and National Offices and between FEA and Justice, so that the matter can be presented quickly to a U.S. Attorney for immediate action.

(9) The attorney authorized to approve issuance of a subpoena should be authorized to handle subpoena enforcement including direct contact with the necessary U.S. Attorney's Office.

(10) The Special Report Order (SRO) be utilized as a primary audit and investigative tool.

(11) Auditors and investigators be trained in the writing and the use of an SRO.

(12) The Compliance staff be given assurance by FEA of the enforceablity of the SRO.

(13) The administrative process for issuance of SRO's and for quashing SRO's should be streamlined.

(14) A system be developed where there is adequate follow up to assure compliance with the SRO, within a prescribed time schedule.

(15) The civil injunctive authority under Section 209 of the Economic Stabilization Act of 1970 be utilized more frequently and in a much more effective way as an enforcement tool.

(16) The FEA seek the authority to handle its own civil injunctive cases.

C. Revision of Case Resolution and Enforcement Procedures

By questionnaires to all Regions and by an experimental two-week project on Philadelphia, the Task Force identified causes of delay in resolving violation cases. It also found shortcomings in the investigation of possible willful violations. The Task Force recommends that:

---

(1) The FEA must immediately establish a unit within the National Office of Compliance to investigate and prosecute the complex and willful violations of its regulations. This unit should consist of attorneys and investigative auditors with the appropriate experience needed to do the job. (See the Organization Section of this Report).

(2) As the National Office personnel develop the experience to deal with these cases, they should be located at the Regional Offices in order to train others in handling these cases.

(3) Intensive and extended training should be given to FEA personnel to deal with the complex and willful cases.

(4) The basic investigatory tools of the Agency must be utilized, especially the use of compulsory process and similar techniques.

(5) The number of qualified personnel with appropriate experience should be increased immediately.

(6) The Agency should not cease its civil inquiries when an element of willfullness is detected. Instead, the Agency ought to complete the fact gathering process and bring its civil actions. At any time during the fact gathering process or conduct of the civil action, the matter can be referred to the Department of Justice, if appropriate.

(7) The Agency's policy to elevate the criminal aspects of every case (no matter how significant) above the civil aspects of such case (no matter how significant) should be changed. The procedures, personnel and priorities, employed in handling the civil and criminal aspects of a pending matter must be based upon a careful analysis of all of the relevant facts.

(8) The National Office should greatly enhance its control over complex and willful cases, and multi-regional coordination of cases should be elevated to a satisfactory level.

(9) The Compliance Manual ought to specify that the originating office of an investigation should be permitted to conduct the investigation in another region with proper coordination.

(10) the Agency should review the Compliance Manual treatment of Special Investigations to more closely reflect the extent to which procedures intended for use by federal criminal prosecutions are suitable or necessary for the conduct of FEA inquiries.

(11) The Agency should immediately begin a review of its presently identified Special Investigations cases, in light of the foregoing recommendations, and those set forth elsewhere in this Report, to determine procedures for further investigation or other basis for disposition.

(12) The process for the review and issuance of formal enforcement documents be simplified and that certain redundant levels of review be eliminated.

(13) A realistic turnaround time be established with the assignment of specific responsibility to assure the goals are met.

(14) The manner of review should be made less formal, where appropriate.

(15) The nature of review should be lessened at each succeeding leval and concurrent review be utilized where possible.

(16) Attorneys and auditors should act as a team in the investigation and resolution of cases involving violations of FEA regulations. The relationship of attorneys and auditors is discussed in the Organization Section of this Report.

(17) The number of attorneys in Regional Offices must be substantially increased to permit their active participation in audits at earlier stages, and attorneys should be deployed to area offices or RARP sites when appropriate. In filling these additional positions, FEA must hire attorneys with substantial experience in enforcement, investigation and litigation be added to the Regional Office.

(18) The number of compliance auditors in regional offices, area offices and RARP sites must also be increased to expedite current audits and provide sufficient "backup" to insure that changes in personnel and other demands on professional time do not disrupt current audits. Auditors currently on board and experienced in regulation of independent crude producers and NGL processors should be deployed in support of RARP programs. In filling additonal positions, FEA should seek to employ investigative auditors experienced in the development of major complex and criminal cases to provide support for RARP audits and Special Investigations. Exception should be sought from prevailing Civil Service requirements where necessary to permit employment of such investigative accountants and others with particular skills and experience urgently required.

(19) The Agency compromise the amount of overcharges in certain specific instances as discussed in the Enforcement Authority Section.

(20) The entire process of case resolution ought to be streamlined and additional flexibility given to the Compliance staff.

(21) The Philadelphia Program can be of benefit when applied to other Regions. The procedures utilized in the Philadelphia Program should be used for similar types of cases and other aspects of the backlog.

(22) Consideration should be given to repeating a project of this type in every Region at least annually or at such other time as it becomes necessary.

(23) The settlement of compliance actions is vital to an effective compliance program. In order to insure that the settlement process is not being abused there ought to be built in a specific time period by which Consent Orders must be negotiated and completed and there must be someone

responsible for monitoring that time period and assuring that it is met. In addition, the FEA should be sensitive to a firm using the consent process as a means of discovering the Agency's view of how the firm has violated the regulations.

(24) The FEA should take a more aggressive approach to information gathering from firms under audit including the use of subpoenas and SRO's if appropriate.

(25) FEA have direct access to the computer systems and original records of the major refiners.

(26) FEA have direct access to the personnel of the major refiners with respect to questions relating to documents produced.

(27) The turnaround time for access to documents of the major refiners be substantially reduced and effectively enforced.

(28) The FEA simplify its exceptions and appeals process. (See discussion of Enforcement powers).

(29) The FEA should not delay enforcement actions because of FOIA requests.

(30) The FEA should establish separate staffs in the regions where practicalbe to handle the processing of FOIA requests.

(31) The FEA should review FOIA process as it impacts on the compliance operations.

D. Better Management Controls

Already noted is a need for establishing turnaround times for review of audit findings and enforcement documents, for obtaining compliance with subpoenas and other process, and for various other compliance and enforcement proceedings. Equally important is clear responsibility for requiring adherence

to expected levels of performance. The Task Force also recommends that FEA:

(1) Organize an audit-progress and a case-closing monitoring system.

(2) Require that regions fully utilize the established system for estimating audit completion dates as required by the Compliance Manual.

(3) Modify the RECTRAK system to show estimated audit completion dates and establish a system for management reviews at the National level of audit overruns.

E. Morale

While solving the other problems which have been interfering with the Compliance and Enforcement Program, in the last analysis, there is nothing more critical to such success than developing an esprit de corps within the Agency and imporving the morale of the Agency. The Task Force recommends:

(1) The uncertainties which have been built into the various programs and which have been permitted to continue to exist throughout the Agency's operations have to be put to rest. The Agency peresonnel must be given the clear commitment that the Agency is going to continue and that their work is vital to carrying out the mandate of Congress and the Administration.

(2) Lines of communication must be strengthened within the Regions and between the Regional Offices and the National Office so as to try to develop a team approach to effecting compliance with FEA regulations. The staff of Compliance must be able to feel that there is support from the top personnel within the Agency for what they are doing. This can be manifested in many ways, including responding to requests for additional personnel, prompt resolution of regulatory matters and issues which impact on them, as well as more frequent and better communications with them and an expression of interest and concern by top management in what they are doing.

I N D E X

SECTION III - PENDING CASES

I. Introduction

As part of its mandate, the Task Force has been asked to identify and evaluate the compliance open case assignments, both audit and legal, determine the causes of delay in the resolution of these open assignments, formulate recommendations for assigning audit and legal priorities to such cases and recommend a strategy for their resolution. Another aspect of the backlog problem, namely those matters potentially involving hundreds of millions of dollars in violations by major refiners where audits have not yet begun or, if begun, are in a preliminary audit stage, are addressed in the Compliance and Enforcement Strategies Section.

The Task Force attempted to study the open case assignments from several different points of view in order to determine if there was a problem and, if so to determine the cause of the problem and how to resolve it. Starting with the entire universe of open assignments, the Task Force developed a series of computer runs to analyze these assignments from both the audit and legal perspectives. In addition the Task Force conducted extensive interviews with FEA personnel at the Regional and National Offices and other persons in order to gain their insights. The Task Force also developed three questionnaires which were sent to all Regional Offices and the various elements of the National Office with respect to pending cases over $100,000 where certain events had occurred, e.g., a Notice of Probable Violation ("NOPV") or Consent Order had been drafted but not issued.

With respect to pending cases with violations under $100,000, the Task Force successfully conducted a pilot program with the Philadelphia Regional

Office which enabled a significant number of those cases to be resolved. The Task Force also analyzed the pending priority A ("Special Investigations") cases to determine whether they were assigned a correct priority and to develop a strategy for their resolution.

As a result of its studies, the Task Force has been able to isolate several major causes of delay in the resolution of these open case assignments. These delays have been caused by problems which are fundamental to the operation of the agency and which need the agency's immediate attention in order to be resolved. The resolution of cases possibly totalling many millions of dollars of violations is at stake. Obviously, the problems causing case delay cannot be considered in the abstract. Rather, they must be viewed in conjunction with other sections of this report which have focused on the identical problems from different points of view. The Task Force has, however, attempted to make recommendations to help reduce the delay in resolving pending cases and completing audits and will hopefully avoid recurrence of the problems in the future.

II. METHOD OF STUDY

At the time the Task Force commenced its operations, it identified 3680 open assignments at the FEA. This figure included 1217 cases where an audit had been completed, a violation uncovered, and a formal enforcement document (Consent Order, NOPV, or Remedial Order) drafted and/or issued ("open violation cases"). The balance of the cases (2463 cases) consisted of open audit assignments cases which were still in progress ("open audits").

A. Open Violation Cases (1217 Cases)

The Task Force used several methods to analyze the open violation cases, including special computer reports, summary management reports, interviews,

the Philadelphia Pilot Program and a series of questionnaires sent to the various elements within the FEA.

1. Special Computer Reports*

The FEA has a computerized tracking system (RECATRK) which tracks the progress of a case from its opening through its audit and enforcement phases to its closing. The Task Force utilized the computer in several ways to analyze the 1217 open violation cases and to test its hypothesis as to causes of delay in completing the cases. Annexed as Attachment III-A are descriptions of the computer reports utilized by the Task Force.

2. Management Summary Reports

Another source for the analysis of the open violation cases was a series of Reports, entitled Management Summary Reports, prepared monthly by the Office of Compliance Information. Attachments III-A and III-B are two tables from the monthly report for May 1977.** Attachment III-B shows the distribution of the open violation cases, by Region and by program. Attachment III-C sets forth a frequency distribution of all open cases, including both open violation cases and open audits. ***

---

* Most of these reports were run on June 24, 1977.

** The number of cases in all open and closed categories changed constantly during the life of the Task Force. While numbers on any two dates are not directly reconcilable, they are comparable; the absolute numbers changed, but relative relationships did not.

*** Code 50 (return for additional field work), may actually occur before an NOPV is drafted and thus, technically, not be within the above definition of an open violation case. However, it is rare that a case is returned for additional field work without a previous finding by an auditor or investigator of a probable violation. The return is usually to obtain further verification or documentation of the probable violation.

Other portions of the Management Summary Reports set forth for the current fiscal quarter both the numbers and dollar amounts of compliance settlements and the number of assignments opened or closed. These Management Summary Reports also set forth the same information for the entire period beginning July 1, 1975 (when the FEA computerized tracking system was established). Another section shows authorized and on board staffing, with data reflecting personnel turnover in Regional Compliance.

3. Interviews

As an additional method of studing the pending violation cases and open audits, the Task Force conducted interviews of people from within and outside of the FEA. The most significant portion of these interviews was with personnel from the organizational units within the FEA which deal with compliance matters. The Task Force interviewed representatives of the Department of Justice who are responsible for conducting FEA's civil litigation. Further, members of the Task Force met with the staff of certain Congressional committees who had in the past conducted extensive investigations of the FEA's compliance program.

(a) Regional and Area Office Visits

Members of the Task Force visited and conducted interviews with personnel at eight of the ten FEA regional offices. The regional offices visited were New York, Philadelphia, Atlanta, Chicago, Dallas, Kansas City, Denver and San Francisco. In addition, members of the Task Force visited personnel at certain area offices and RARP teams located at certain major refiners.

Typically, during each Regional Office visit, members of the Task Force met as a group with the Regional Administrator, the Regional Counsel and the Regional Director of Compliance. The members of the Task Force then split

into sub-groups and met with line compliance attorneys, line auditors, RARP Team Leaders, Area Managers, and Special Investigators. As a general rule members of the Task Force spent one entire day at each of the Regional and Area Offices.

The Task Force's interviews with the Regional Administrators focused on a general overview of the formal compliance structure of their particular region. Interviews with the Regional Counsels focused on (1) the relationship between the Regional Counsel and the Regional Director of Compliance; (2) the relationship between the Regional Counsel and the Office of General Counsel; (3) the adequacy of the FEA's existing enforcement authority; (4) staffing needs and (5) his general observations.

The Task Force's interviews with the Regional Directors of Compliance focused on (1) the relationship between the Regional Counsel and the Regional Director of Compliance; (2) the relationship between the Regional Director of Compliance and the National Office of Compliance, with particular emphasis on planning, case monitoring, substantive guidance, special investigations and case resolution, and (3) the adequacy of staff skills in regional compliance. The Task Force's interviews of line compliance attorneys focused on (1) the relationship between Regional Counsel and the Regional Director of Compliance and (2) the review of typical cases.

Interviews with line auditors, Area Managers, and Special Investigators focused on the review of typical cases, the relationship between Regional Counsel and the Regional Director of Compliance, staffing needs, methodology, perceptions of the use of compulsory process, and their general observations as to the main sources of delay within the system.

(b) Exceptions and Appeals

Members of the Task Force interviewed the Director of the Office of Exceptions and Appeals to gain his insights of how his office impacted on the compliance program.

(c) Department of Justice

Members of the Task Force interviewed Mr. Stanley Rose, Chief of the Economic Litigation Section of the Department of Justice, and Mr. Marvin Coan, Mr. Rose's assistant, who personally reviews all of FEA's enforcement litigation. The Economic Litigation section is the division which represents the FEA in all court proceedings. The focus of this interview was the relationship between FEA's Office of General Counsel and the Department of Justice and the relationship between the FEA's regional offices and the local U.S. Attorneys within these regions.

(d) National Office of Compliance - Case Operations and Case Resolution

Members of the Task Force interviewed the Director of the Office of Case Operations and the Director of the Office of Case Resolution. Both Case Operations and Case Resolution are subdivisions of the National Compliance Office. The main purpose of these interviews was to identify the role of these offices in the compliance program and to discuss the relationship among the National Office of Compliance, the Regional Offices and the Office of General Counsel. Another major subject of discussion during these interviews was the identification of issues requiring interpretations and clarification and the resolution of these issues.

(e) Office of General Counsel

Members of the Task Force met with representatives of the Office of General Counsel. The focus of these interviews was on the issue resolution process and pending matters awaiting clarification and interpretation.

(f) Congressional Committees

Members of the Task Force also met with representatives of Congressional Committees that had conducted investigations of FEA's compliance program. The Task Force met with Mr. James Mitchie of the Subcommittee on Antitrust of the Senate Judiciary Committee and Mr. David Finnegan of the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce.

(g) Industry and Consumer Groups

The Task Force, pursuant to a notice in the Federal Register, also met with various representatives of different sectors of the petroleum producing, refining, distribution and marketing industry to hear their views on various elements of FEA's compliance program.

(h) Other Persons Interviewed

The Task Force met with numerous personnel from FEA's compliance staff for briefings on the compliance program, the petroleum industry and the FEA's pricing regulations. The Task Force also met with Mr. Frank Zarb, former Administrator of the FEA and Gorman Smith, former Acting Deputy Administrator for Programs.

4. Questionnaires

As part of its analysis of the 1217 open violation cases the Task Force identified certain cases exceeding $100,000 in possible recovery where, since the drafting or the issuance of an NOPV, Consent Order or Remedial Order, some time period had expired with no further significant progress toward resolving the case. Thereafter, the Task Force prepared three questionnaires (forms) to find out why no significant progress had taken place with respect to these matters and what had to be done in order to resolve them.

The first form related to instances where an NOPV/Consent Order had been drafted but not issued. In this form the Task Force tried to identify

the type of case that was involved, including the type of violation that had been uncovered and, if the NOPV/Consent Order had been drafted for more than 60 days, why it had not been issued or the case closed. Moreover, the Task Force tried to find out when the NOPV/Consent Order would be issued or case closed and, if it could not be done within two weeks, why it could not be done. Further, the Task Force tried to identify any organization or unit where a matter had been delayed for more than 30 days and tried to isolate those instances where the NOPV/Consent Order had not been issued because of the need for a clarification or interpretation of a particular regulation.

The second form sent out related to those instances where an NOPV had been issued but no further work done. The third form related to those instances where a Remedial or Consent Order had been issued but had not been complied with. In forms two and three the Task Force sought the same type of information that is discussed above with respect to the first form, namely in the instance where the NOPV had been issued, could a Consent Order or a Remedial Order be issued and in the instance where a Remedial Order or Consent Order had been issued but not complied with, what would be necessary to obtain immediate compliance. The Task Force also tried to determine whether the case had remained in any organizational unit for more than 30 days and whether or not it was being held up because of the need for clarification or interpretation of a particular issue or regulation. Annexed as Attachment III-D are the three questionnaires (forms).

5. Philadelphia Pilot Program

An analysis of the various special computer reports showed that approximately 60 percent of the open violation cases were ones in which the identified

violation was less than $100,000. Further, it was observed that many of the small cases had been "in the system" for substantial periods of time, possibly clogging the system or at least giving the appearance of an enormous overload of over-charges. The Task Force established a pilot program in the Philadelphia Regional Office. Attachment III-E is a Project Report which describes the procedures that were used and summarizes the results. The objective was to process as many cases as possible where the probable violation was under $100,000 to see how many could be resolved by intensive effort during a two week period.

B. Open Audits (2463 Assignments)*

1. Management Summary Reports

As with the open violation cases, the Task Force found a great deal of useful information with respect to open audits in the monthly Management Summary Reports. Attachments III-F and III-B are portions of the May 1977 Management Summary Report. Attachment III-F reflects the distribution of open audits by Region and by program. Attachment III-B described above shows, by Region, the distribution of the open audits among the various status categories principally "case initiated", "field work started", and "return for additional field work."

2. Special Computer Reports

One of the most difficult things for the Task Force to assess was the progress being made in the open audits. Various management reports, as well as a number of special computer reports done for the Task Force, indicated

---

* It should be noted that the number of open audits changed constantly during the life of the Task Force.

that there were significant numbers of open audits which had been in that status for more than a year.*

In the RECATRK system, however, once field work has begun, no further entry is made in the computer records until the matter is moved to the next stage after completion of the audit, usually by noting the drafting of an NOPV or the forwarding of the audit report to the Area Manager. Records of the auditor's time are kept in a separate computer system which has little program flexibility.

In response to a request by the Task Force, FEA had a contractor develop a program for combining information from both systems. The RECATRK system first isolated open audits that were currently in the status of case open, field work started, returned for additional field work and, because of the large number of completed audits being held by Area Managers, Area Manager review level. This universe was reduced to a manageable size by excluding the continuous RARP program audits.

Open audits in the above categories (1398) were organized according to the date when they were opened and the total amount of audit hours spent in seven statuses, ranging from 0 hours to more than 320 hours. The open audits were then sorted again for further examination of those that had been in the current status since January 1, 1977 ("No change in status list"). For those cases (618), ** the audit hours were spread by time periods,

---

* Of course, not all open audits are backlogged. There will always be a certain number of cases in the system which should appropriately be and are in audit progress. However, since 50% of all open audits have been open over 270 days, there is a major problem in getting audits completed.

** There was no further attempt made to analyze the hours in the remaining 780 cases.

across each of the first two months in the current calendar quarter, the first calendar quarter of 1977, and each of the three preceding semi-annual periods. In addition, audit time for the most recent three months was analyzed to see whether it was straight audit time or whether it was time spent on case resolution or some other activity. *

3. Interviews

Another important source of information on the causes of the delay in finishing open audits was interviews in the regional and area offices, particularly interviews with Regional Directors of Compliance and Area Managers. These interviews identified programs in which the Area Manager thought progress was good, and those in which they felt progress was being impeded.

C. Special Investigations

The FEA has assigned top priority in its compliance program (Priority A) to investigating willful violations. As part of its study, the Task Force evaluated Priority A cases which are under investigation by a special unit within the compliance program. The Task Force tried to ascertain the number and type of cases under investigation and the impact of these cases on the pending case load. We also studied the procedures for conducting the investigations and interviewed several of the special investigators.

D. Processing of Cases

1. Preparation, Review and Approval of Formal Enforcement Actions

(a) Introduction

Section 5.303 of the Compliance Manual sets forth some general guidelines with respect to the review of formal enforcement actions. Once an auditor

---

* The Task Force intends to have the FEA send to each Region its portion of the special computer run described above. The Regional Administrators and Regional Directors of Compliance will be asked to supply their comments, with particular focus on a number of apparent problem areas.

has completed an audit, the Area Manager is required by the Compliance Manual to review the work of the auditor for technical and procedural accuracy as well as to assure that the cases are being completed on a regular and timely basis. After the Area Manager's review, the matter goes to a regional reviewer. After he has completed his review, it goes to the Regional Director of Compliance. Thereafter, Regional Counsel must concur before the issuance of the formal enforcement action. If National Office review is necessary as well, then the matter is transmitted to that office for review before issuance. Section 5.303.4 of the Compliance Manual, states that it is within the discretion of the Regional Administrator to establish procedures for the preparation, review and issuance of formal enforcement actions within the region.

(b) Method of Study

As part of its study of the procedures utilized by the FEA in preparing, reviewing and approving formal enforcement actions, the Task Force requested each Regional Office to provide to it certain information with respect to Consent Orders, NOPVs and Remedial Orders. The following questions were asked of each region:

A. Who prepared the first draft of a violation document?

B. What is the procedure for processing that draft? Who reviews it? Who changes it? What levels are involved in the review of it? What levels are excluded from the review?

C. Under what circumstances is the document sent to the National Office?

D. Who has the final approval?

In addition to requesting the answers to these questions, in connection with our interviews at the Regional Offices, we discussed with them their perception of the process.

III. RESULTS OF STUDY

A. Philadelphia Program

As discussed at pages III-8 and III-9, supra, (see also Attachment III-E), the Task Force conducted a pilot program in the Philadelphia Regional Office, the objective of which was to process as many open violation cases as possible where the probable violation was under $100,000. This experiment was undertaken to determine the number of cases that could be resolved within a two week period. Of the 44 open violation cases selected for processing, all were treated on an expedited basis and advanced toward resolution. As set forth in the Project Report, NOPVs were forwarded to the Regional Compliance Office for issuance in 11 cases. In another 11 cases, Consent Orders' were forwarded to the Regional Compliance for execution by the firms involved. In addition, five Remedial Orders were forwarded to the Regional Compliance Office for issuance. A conference with representatives of the involved firms was scheduled for four additional cases. The remainder of the 44 cases were moved to the next stage, or closed. It was estimated that under the normal operations, this work would have been spread over a period of twelve weeks.

The Task Force interviewed both Lesley Douglass, Deputy Regional Counsel for the New York Regional Office, who was detailed to conduct the project, and who signed the Project Report, and Charles Seravalli, Deputy Director of Compliance for the Philadelphia Region. In addition, representatives of the Task Force discussed the project, the report, and the results with H. William Taylor, Regional Counsel for the Philadelphia Region, who is a member of the Task Force. Several important conclusions emerged.

An important key to the success of the program was the addition of extra resources. The addition of two lawyers and a paralegal specialist from the

New York Regional Office proved very beneficial to the Philadelphia Office whose full authorized strength is four lawyers. Moreover, secretarial personnel and equipment were made available to Regional Counsel by the Office of the Regional Director of Compliance. Overtime and Compensatory time were authorized for attorneys and clerical personnel, a departure from Regional policy.

It also expedited most of the cases to have documents drafted or, more frequently, redrafted by an attorney, (principally Ms. Douglass) rather than by the Office of the Regional Director of Compliance, as is usually done in Philadelphia. Instead of a 100% mathematical verification, figures were spot-checked. Further, no narrative report on open issues was prepared and forwarded for resolution. In addition, several layers of review were eliminated. Finally, persons reviewing documents had a tendency, when finding a defect, to put the document through to the next stage if the defect was judged to be not material. Mr. Seravalli was of the opinion that these procedures sacrificed only quality assurance without sacrificing quality of the final product.

Mr. Seravalli prepared a tabulation of cases showing the type of violation, the dollar amounts, and the steps necessary to advance the matter to the next stage. The detailed case histories for each of the cases that were advanced were examined by Mr. Taylor, who then discussed them with a member of the Task Force, in an effort to identify further the reasons for the success of the program. In Mr. Taylor's view, the discipline of having a program for a finite, two-week period was a contributing factor. It caused the personnel involved in the project to have a positive and determined attitude to attain resolution if at all possible.

Moreover, there was a greater tendency during the project for the reviewing office to correct any defects uncovered rather than to return the defect to

the submitting office with a notation of the defects. In Mr. Taylor's view, a deliberate choice had been made earlier to return documents to Regional Compliance, principally because of Regional Counsel's meager staffing and as a means for training Compliance personnel (the earlier decision is now being re-evaluated to bring into account current training levels).

Another factor in the success of the program was that the staff participating in the project were insulated from their other responsibilities. They were physically away from their routine duties and not likely to be distracted by questions or requests for other work to be done. Even the people from Philadelphia put aside other matters, ranging from ordinary chores, such as filing, to routine processing of major refiner audits in order to devote the full time that they were instructed to give to this effort.

The Philadelphia Program demonstrated that people can be motivated to high accomplishment. It further proved that by affording people a sense of purpose and objective, they can overcome a number of seemingly formidable barriers to the effective completion of an otherwise impossible task.

The only "cost" of the program was deferral of action on other matters, which would have normally been handled by the persons involved. Everyone involved agreed that this cost had been kept within a reasonable level by specifying at the outset a two week duration for the report.

The Task Force believes the Philadelphia Program results suggest the utility of using similar techniques for many cases that, because of size or other characteristics, are backlogged.

Based on all these observations, the Task Force has several recommendations.

(1) The pilot project can be of benefit when applied to other regions. The discipline of trying to meet an objective of moving a large number of

small violation cases in a short period of time cannot fail to have a beneficial effect on all personnel who are exposed to the process, as well as those who are participants.

(2) Consideration should be given to repeating a project of this type in every Region at least annually or whenever it becomes necessary.

(3) The procedures utilized in the Philadelphia Project should be used for similar types of cases and other aspects of the backlog.

B. Questionnaires

In response to the three questionnaires sent by the Task Force which are discussed at pages III-7 and III-8, supra, (see also Attachment III-D) each Regional Office, the National Office of Case Resolution and the Office of General Counsel (OGC) submitted data on cases handled at their levels. Annexed as Attachment III-G are summaries of the questionnaire returns. * The first two questionnaires (forms) are summarized into common cause-of-delay categories to indicate why actions were not processed promptly. The third questionnaire (form), enforcement actions required, is summarized into categories by compliance status.

The Regional and National Offices returns discussed 325 cases for which NOPVs or Consent Orders were drafted but not issued and for which NOPVs were issued but had not been finalized. This was done to determine if delays occurred and what was needed to process the actions. Of these cases, 17 actions (5 percent) had no delays in processing (Code N), 230 actions (71 percent) were or had been delayed for one predominant reason (codes A through M) and 78 actions (24 percent) were delayed for several primary reasons (combination codes).

---

* These actions were stratified only for causes of delay and required actions. No weight was given to the complexity of issues involved in the actions or the precedents available to the FEA for resolving these issues. The time frames for the delays were computed from the date that the actions were drafted or approved through June 30, 1977.

Delays were mainly caused by 3 elements, or combination of these elements, additional field work required for the actions, backlogs in FEA elements and need for clarification and interpretation of FEA rulings and regulations. Other delay factors accounted for a relatively small percentage of delayed actions.

1. Additional Field Work Required

This cause of delay was the major factor in 72 cases and a contributing factor in 51 other cases. In 2 responses, lack of manpower was cited as the problem. Other responses stated that additional audit work was required because of new FEA rulings. Most responses cited either no reason for the additional work or merely indicated that the work was required by various Regional or National review levels.

2. Backlogs in Various FEA Elements

Although it was reported that 83 actions were delayed solely due to backlog in various FEA elements and 101 cited this backlog as a contributing factor to delay, the Task Force was unable to ascertain from the questionnaires the underlying causes in many instances. Some of the reasons mentioned for the backlogs were caseload, higher priority actions and lack of available personnel.

3. Interpretations and Clarifications

The Regions indicated that 40 cases were delayed because they were awaiting FEA rulings of further clarification of FEA regulations. In recent months, several rulings were issued which alleviated this problem. The following rulings most frequently referred to were: 1977-1, Clarification to Mandatory Petroleum Price Regulations Applicable to Domestic Crude Oil; 1977-3, Cargo Sales; 1977-5, Application of the Definition of Transaction for purpose of computing weighted average May 15, 1973 prices; and 1977-6, concerning Stripper Well

Property Exemptions. As a result of these ruling in certain cases, further audit work was required to restructure the compliance actions to be compatible with principles of the rulings.

C. Combined Computer Systems Reports on Open Audits

As previously discussed, the FEA had a contractor develop a program for combining information from the case tracking system with auditor's time records in order to evaluate the delay in completing open audits. In the brief time available to the Task Force for review of these reports, some observations were made and some preliminary comments were received from four regions. * The Task Force's observations are set forth in Attachment III-H.

The computer reports show a large number of cases in which hundreds of thousands of hours of auditor time had been spent in 1976 (or earlier) with no audit time whatever during the last two to five months, and a large number of cases in which there had been a high level of audit activity that has in more recent periods trailed off. The observations, together with the preliminary regional comments, suggest that while audit time normally trails off as segments are completed, many of the cases appear to be stalled.

Two points should be noted. These reports were, by design, exception reports. (See pages III-9 to III-11 above.) The reports should not be read as suggesting that there are comparable percentages of stalled cases through the totality of open audits. On the other hand, the large number of cases which changed status during the January-May 1977 period (780) should not be equated with progress. No analysis was made to determined how

---

* As noted above, these reports are to be sent to Regional Managers for their analysis and comments.

many of the changes were return for further work, suspensions, or a move to or from a review office.

Finally, it should be noted that regional and area personnel find the reports very useful for identifying problems. Probably, the report should be added to the present list of routine management reports.

D. Special Investigations

At the time the Task Force commenced its operations, there were 55 open assignments which appeared to involve potential willful violations of FEA regulations or federal statutes and have thus been assigned top priority by the agency ("Special Investigations"). The Task Force analyzed these open assignments by several means including management reports, review of case files, computer reports and interviews.

1. Analysis of Cases

Of the 55 open assignments, 27 cases involve retailers (of which 22 are gasoline stations), 23 cases involve resellers, 2 open assignments involve major refiners, 1 open assignment involves a crude oil producer, 1 open assignment involves an importer, and 1 open assignment involves a state set-aside matter. Further, of the 55 open assignments, 41 have been outstanding for over 1 year, 20 have been outstanding for over 2 years, and 4 have been outstanding for over 3 years.

The current status of the open assignments is is as follows: 30 cases are in an active investigative mode in the field, 5 are being reviewed at Regional Counsel, 6 are being reviewed at Regional Compliance, 7 are being reviewed in the Office of General Counsel, 1 is being reviewed by the National Compliance Office, 2 are being reviewed in Area Managers' office, and 4 have been referred to the Department of Justice. Of the cases

referred to the Department of Justice, 2 have been referred for criminal action and 2 have been referred for civil action.

A further analysis of the 55 open assignments indicates that the following types of matters are under investigation: 25 instances of fraudulent records or statements, 30 instances of exceeding the maximum lawful selling price, 3 instances of attempting to boost maximum selling price by sales to related entities, 6 instances of possible conspiracies to circumvent FEA regulations, 8 instances of improprieties involving allocations, 1 instance of destruction of records, 1 instance of miscertification of leases as stripper wells, and 1 instances of improprieties involving the state set-aside program.

There has been a noticable lack of use of compulsory process in conducting the Special Investigations. In only 8 of the 55 cases have subpoenas been issued.

2. Special Investigation Procedures

In October 1976, the FEA established special administrative procedures to be followed when a possible willful violation of FEA regulations was uncovered. Prior to the establishment of these procedures, only limited guidance had been provided by the FEA for the processing of willful violations. As a result, each region acted with virtual autonomy and absence of direction. Prior to October 1976, potential criminal violations were not given priority at either the National or Regional level.

In addition to the promulgation of these Special Investigation procedures, Regional Special Investigation units were ordered to be established within each region, and a National Special Investigation Unit was established. The National Special Investigation Unit has a

limited function and has only the most limited capability to actively undertake the investigation of criminal cases. The function of the National Special Investigation Unit is to monitor, coordinate, and provide technical assistance to regions conducting Special Investigations.

The procedures to have a case designated as a Special Investigation are extremely cumbersome to follow, involving substantial time delays and multiple levels of review. The Regional Administrators, who for the most part are not lawyers, have been designated as the persons to make a final decision if a matter is to be treated as a Special Investigation. However, General Counsel's concurrence is necessary if a decision is made by the Regional Administrator to treat the matter as a Special Investigation. Moreover, if a matter is so designated, it is the agency's policy to cease all civil work being done on the matter immediately and not to resume such work until its criminal status has been resolved.

The Task Force has determined that the agency's entire approach to the question of willful violations of its regulations is unsound and should be drastically modified. As previously indicated, the entire process by which a matter is designated as a Special Investigation is overly cumbersome and generates considerable time delays. The final decision on whether a matter is to be handled as a Special Investigation is made by non-lawyers. In fact, for the most part, attorneys are not involved in the on-going investigatory process at any step. The agency does not have a sufficient number of qualified personnel (either attorneys or auditors) to accomplish

the investigations and those who are involved in performing the investigations have not been provided the training to do so.

Further compounding the lack of effectiveness of the agency's efforts is the failure of the agency to use the appropriate investigatory tools to conduct the investigations. As discussed in several places in the Task Force Report, the use of subpoenas to produce both documents and testimony has been virtually non-existent. In fact, it appears to the Task Force that the process of handling a matter as a Special Investigation has resulted in confusing the staff of the agency and delayed bringing willful violators to justice.

The Task Force is of the opinion that the practice of ceasing to process a case from a civil point of view when a case has been designated a Special Investigation does not make sense and must be stopped. In fact, what has occurred on occasion is that the civil work has been stopped, the case has been sent to the Department of Justice and, after an extensive period of time, the matter has come back from the Department of Justice with no prosecution. The agency has been required to resume an audit at a time when the facts have considerably aged and the investigatory process has become more difficult.

The Task Force also has determined that the National Office control of and its involvement in, Special Investigations has been materially deficient. At the present time, the only information which the National Office typically receives on Special Investigations in process are summaries of the case sent from the Regional Office. Case summaries are not adequate to enable the National Office to have the necessary

input into the conduct of the investigation. In addition, the National Office has limited capability to conduct any investigation on its own and this is particulary important since a number of the Special Investigations involved highly complex, multi-regional cases involving millions of dollars in possible violations.

In its evaluation of the Special Investigations, the delays and frustrations were apparent to the Task Force. For example, in one region, an audit was begun in April 1975 and in June 1975 the Regional Office needed an affidavit from one of the principals involved, but the person refused to talk to the FEA auditors. The FEA auditors then asked the Regional Counsel for his concurrence in the issuance of a subpoena to that person, but the Regional Counsel refused, indicating that the matter was too complicated. In September 1975, an interview was again requested by the FEA with the same person and once again it did not occur. In October 1975, the FEA auditor sent a memorandum to the Regional Director of Compliance for determination if the matter should be handled as "criminal." The matter stayed with the Regional Director of Compliance from October 1975 through April 1976 and during that time virtually no investigatory work was performed. In April 1976, the Deputy Regional Administrator determined that the matter should not be treated as a criminal matter and that the civil aspect of the case should be continued.

In October 1976, an NOPV was drafted and sent to the Regional Counsel for review. During the time the case remained with Regional Counsel, from October 1976 to February 1977, no work was done. In February 1977, the Regional Counsel returned it to the auditor for additional field work which was

completed in March 1977. As of June 1977, an NOPV has not been issued and the Regional Compliance Director is still trying to determine whether or not the case should be processed as a Special Investigation.

Another factor which complicates the Special Investigation practice is the relationship among the various Regional Offices. A number of the most complicated cases involve more than one region. The present system of requesting "help" from the other regions rather than sending a person from the region doing the investigation to the other region to complete an aspect of the investigation, has substantially delayed the completion of the cases.

Notwithstanding the FEA's elevation of Special Investigations to top priority status and the promulgation of elaborate procedural guidelines, the agency's capability to detect violations and successfully prosecute the complicated and willful cases is inadequate.

It is important in restructuring the Special Investigations program that general guidelines be established to determine the priority of the cases to be pursued. Those cases involving large dollar recoveries or having significant deterrent value should be assigned the highest priority. That is not to say that cases with small dollar amounts should not be pursued. Those cases provide important deterrent value which is important to any enforcement program. Deterrence and the need to afford the agency's compliance program high visability, is essential so that potential violators or persons contemplating violating the energy laws will consider the impact of potential enforcement action before they engage in their contemplated activities.

In restructuring the program, techniques should be devised so that an evaluation of a case may be made after there has been a limited probe in order to determine whether more effective work should be done. Since the Special Investigation program is still in its formative stages, it is important that the National Office maintain close supervision over the program in order to evaluate it continuously and make the necessary changes to be more effective.

The Task Force has the following recommendations:

(1) The FEA must immediately establish a unit within the National Office of Compliance to investigate and prosecute complex, large, willful violations of its regulations. See discussion in the Organization Section of the Report. This unit should consist of attorneys and investigative auditors with the appropriate experience needed to do the job.

(2) As the National Office personnel develop the experience to deal with these cases, they should be located at the Regional Offices in order to train others in handling these cases.

(3) Intensive and extended training should be given to FEA personnel to deal with the complex and willful cases.

(4) The basic investigatory tools of the agency must be utilized, especially the use of compulsory process and other similar techniques.

(5) The number of qualified personnel with appropriate experience in these types of cases should be increased immediately.

(6) The agency should not cease its civil inquiries when an element of willfullness is detected. Instead, the agency ought to complete the fact gathering process and bring its civil action.

At any time during the fact gathering process or conduct of the civil action, the matter can be referred to the Department of Justice if appropriate.

(7) The agency's policy to elevate the criminal aspects of every case (no matter how significant) above the civil aspects of such case (no matter how significant) should be changed. The procedures, personnel and priorities employed in handling the civil and criminal aspects of a pending matter must be based upon a careful analysis of all the relevant facts.

(8) The National Office should greatly enhance its control over complex, willful cases and the multi-regional coordination of cases should be elevated to a satisfactory level.

(9) The Compliance Manual should specify that the originating office of an investigation should be permitted to conduct the investigation in another region with proper coordination.

(10) The agency should review the Compliance Manual treatment of Special Investigations to reflect more closely the extent to which procedures intended for use by federal criminal prosecutors are suitable or necessary for the conduct of FEA inquiries.

(11) The agency should immediately begin a review of its presently identified Special Investigation cases, in light of the foregoing recommendations, and those set forth elsewhere in this Report, to determine procedures for further investigation or other basis for disposition.

E. Analysis of Special Computer Reports

As previously indicated, the Task Force utilized the computer system in a number of ways to analyze the open violation cases and open audits.

As a result of this analysis, certain information was developed which helped identify causes of delay in the completion of the audits and cases.

For example, 93 audits are presently suspended awaiting guidance or regulation changes with more than 70% of the 93 audits being suspended longer than 60 days. These suspended audits occur in all the regions, but predominantly in the Chicago and Dallas regions with 36 and 15 suspensions, respectively. In the Dallas Region, suspensions are fairly evenly distributed within the programs; however, in Chicago, 24 of the 36 suspensions are in the Reseller (not propane) program. Nationwide, in fact, most suspensions have occurred in that program (52 of 93).

More than 50% of all open audits have been open longer than 270 days. More than 40 percent have been open for longer than a year. Of these audits older than a year, over one third have shown no change in status for more than a year. Three fourths of all audits older than a year are in the Major and Small Refiner Programs. This reflects in part the continuing nature of the major refiner audit process.

A comparison of time elapsed from the first draft of an NOPV to the issuance of a Consent Order or Remedial Order was made. It was determined that nearly two-thirds of the 601 cases involving an NOPV, and subsequently a Remedial Order or a Consent Order, did not result in the issuance of a Remedial Order or Consent Order within six months of the NOPV. Seventy-two percent of these cases were in the Retailer and Reseller Programs (including Propane).

An evaluation of the number of open violation cases in various review locations (area manager and above) is also very informative. At the present time, 1041 cases are currently in the Area Office, Regional Compliance, Regional Counsel, National Compliance, or General Counsel for review. Seventy percent

of these cases are in Compliance while 30% are being reviewed by Counsel.* Twenty-five percent of the cases are located in Dallas. The remaining regions (except for Boston) each have approximately 10 percent of the total.

Further, the Crude Producer and Reseller Programs account for one-half of all the cases in a review location. Half of all the cases in a review location have been there for more than 60 days. The Area Offices and National Compliance have the highest incidence of cases in location more than 60 days: 57 percent of all cases in the Area Offices and 61 percent of the cases in National Compliance have been there more than 60 days. Although the Task Force identified the organizational unit where processing delays were occurring, the Task Force did not quantitatively identify those open assignments that were delayed due to unresolved issues.

F. Preparation, Review and Approval of Formal Enforcement Actions

As a result of our study of the procedures for preparing, reviewing and approving formal enforcement actions, we determined that while there was a uniformity in the various Regional Offices concerning the processing and issuance of formal enforcement actions, there were significant differences which we have attempted to isolate and analyze.

1. Preparation of Formal Enforcement Documents

In five of the regions, the auditor who is doing the audit is responsible for the initial preparation of the violation document. In one other region,

---

* The percentage of cases in the counsel review location only reflect compliance cases which are being reviewed by the Office of General Counsel and not requests for clarification or interpretation. Other cases in the compliance or other review locations may involve issues which are awaiting resolution in the Office of General Counsel.

the Area Manager has that responsibility. In the other four regions, there is a mixture of people responsible for the document preparation, depending on what type of document it is and, in some instances, the dollar amount of the document.

In Chicago, a Consent Order is prepared by the auditor, whereas an NOPV and Remedial Order are prepared by an attorney. In Kansas City, a Consent Order and NOPV are prepared by the auditor, while the Remedial Order is prepared by an attorney. In Seattle, the Consent Order and NOPV are prepared by the auditor, while a Remedial Order is prepared by the Regional Review and Resolution Office. In New York, a Consent Order under $100,000 which involves a retailer and where no NOPV has been issued, is prepared by an Area Manager. All other Consent Orders and all Remedial Orders are prepared by the Office of Regional Counsel. Moreover, all NOPVs are prepared by auditors in that region.

2. Review of Formal Enforcement Documents

The Task Force study found that there was a great disparity in the review process among the Regional Offices. While the Compliance Manual establishes uniform procedures, the departures were significant. With respect to NOPVs, most regions follow a review process whereby the Area Manager, the Regional Reviewer in the Regional Compliance Office and then Regional Counsel all review the documents prior to its issuance. In Dallas, if the NOPV is over $1 million or involves a precedential issue, then the standard review process is followed. However, if the NOPV is under $1 million, then the Area Manager in consultation with the attorney assigned to that area office can issue the document without a review by the Regional Office. In Denver, if the NOPV is under $50,000, no review is required by the Regional

Compliance Office. In New York, only the Regional Counsel reviews the documents except for Consent Orders of less than $100,000 which involved a retailer and where no NOPV has been issued.

With respect to Consent Orders, most regions follow the review process of Area Manager to Regional Compliance and then Regional Counsel before it is issued. In New York, if the Consent Order is under $100,000 and a retailer is involved, and no NOPV has been issued, the Area Manager reviews it and then the Regional Reviewer reviews it and then the Area Manager issues it. In Dallas, if the Consent Order is $500,000 or more or involves a precedential issue, they follow the Area Manager, Regional Compliance, Regional Counsel review procedure. If, however, the Consent Order is under $500,000, then the Area Manager can issue it after his review without the necessity of review by the Regional Office. In Denver, as was the case with NOPVs, if the Consent Order is under $50,000, no review is required by the Regional Compliance Office. In Seattle, if the Consent Order is under $5,000, the auditor issues it without review by anyone. If the Consent Order is over $5,000 they follow the Area Manager, Regional Reviewer, Regional Counsel review process.

With Remedial Orders, the review process is generally the same in most regions. It goes from Area Manager through the Regional Reviewer and Director of Compliance and then through Regional Counsel. In New York, Regional Counsel handles the drafting, review and issuance of Remedial Orders. In Denver, if the Remedial Order is under $50,000, it is not reviewed by the Regional Compliance Office.

3. Issuance of Formal Enforcement Documents

The various Regional Offices follow different practices with respect to the issuance of formal enforcement documents. In a number of the Regional

Offices, the Area Manager issues Consent Orders and NOPVs, although in others, such as New York, the Regional Director of Compliance issues NOPVs while Remedial Orders are issued by a Regional Counsel, except for Consent Orders under $100,000 which are issued by the Area Manager. In other regions such as Atlanta, the Consent Orders and NOPVS are issued by the Deputy Regional Administrator. In Seattle, a Consent Order of under $5,000 is issued by the auditor, a Consent Order of $5,000 to $100,000 is issued by a Compliance Branch Chief, and a Consent Order or NOPV over $100,000 is issued by the Director of Regulations Division. With respect to Remedial Orders, in a number of regions, the Regional Administrator or Deputy Regional Administrator issues them. In New York, all Remedial Orders are issued by an attorney. In Philadelphia, the Remedial Order is signed by the Director of Compliance.

IV. RESULTS OF COMPLIANCE PROGRAM

A. Completed Cases

As previously indicated, the primary goal of the Compliance Program is to insure compliance with FEA regulations and to take the appropriate enforcement actions where violations have been detected. From July 1, 1974 through June 30, 1977, compliance has completed 23,844 audits and investigations. Out of that total, approximately 9,076 violations have been resolved. For the same period, settlements amounting to $518 million were achieved. Rollbacks accounted for approximately $107 million, refunds approximately $85 million and the remaining $326 million were reductions in "bank cost" (i.e., unrecouped costs available for pass through in future months). In addition, $3.9 million in civil penalties were collected by compliance and forwarded to the U.S. Treasury.

Of the $518 million in violations which have been uncovered and resolved to date, approximately $358 million are in the Major Refiner program. Of this $358 million, $62 million represents refunds and rollback and $296 million represents bank adjustments. Moreover, approximately $911,000 in penalties have been collected. The second largest program in terms of settlements is Reseller (Other)* where approximately $48 million in settlements has been achieved. Of the $48 million, $46 million represents refunds and rollbacks and $2 million represents bank adjustments. In addition, there have been penalties of $1,004,000 recovered.

The third major program in terms of violations uncovered is the Retailers (Other) program with $38 million in violations settled. Of the approximately $38 million, almost 99 percent of that amount has been in refunds and rollbacks. In addition, $362,000 in penalties has been collected. The fourth major area of settlements to date has been Small Refiners where approximately $30 million has been collected. Of the $30 million, approximately $3 million represents refunds and rollbacks and approximately $27 million represents bank adjustments. In addition, penalties of $391,000 have been collected.

B. Open Violation Cases

As previously indicated, there are approximately 3,680 open assignments. Of this total, 1,217 have been identified as open violation cases with potential violations of approximately $1.7 billion.** Of the $1.7

---

* This program includes all resellers and retailers of covered petroleum products.

** Annexed as Attachment III-I is a breakdown of potential violation amounts by program and last major activity as of June 30, 1977.

billion, * approximately $1.34 billion relates to violations with respect to major refiners. Of that amount, $582 million represents NOPVs that have been drafted, ** an additional $135 million represents NOPVs that have been issued and approximately $311 million represents NOPVs that have been amended. Moreover, of the the $1.34 billion in violations in the major refiners program, approximately $132 million represent Remedial Orders that have been issued.

The next program which has the greatest potential violation amount is Small Refiners where approximately $126 million has been identified. Of that $126 million, $46 million are NOPVs that have been drafted, $42 million are NOPVs that have been issued and $29 million represents Consent Orders that have been drafted. The program with the third greatest potential violation amount is the Resellers (Other) where there are approximately $101 million worth of potential violations now identified in a status ranging from NOPV drafted to criminal actions at the Department of Justice. Of the $101 million, approximately $72 million represents NOPVs drafted.

The fourth largest potential violation amounts is in the Independent Crude Producer program where there has been identified approximately $72 million of potential violations of which approximately $26 million represent NOPVs that have been drafted, $13 million represent Remedial Orders that have been drafted, and $16 million represent Consent Orders that have been drafted. For the remaining six programs, the total potential violation currently identified is only approximately $51 million.

---

* The $1.7 billion figure is a preliminary estimate at the completion of the audit. It included rollbacks, refunds and bank adjustments. The amount of money to be recovered is not synonmous with these preliminary estimates.

** Historically, there has been a substantial reduction in potential violation from the NOPV stage to the Consent Order or Remedial Order stage.

C. Status of Open Audits

1. Major Refiners

The FEA price regulations specify that the maximum allowable selling price for a refinery product is the May 15, 1973 price adjusted for subsequent changes in costs, dollar for dollar, for each class of purchaser. The largest amount of open audits of major refineries, by far, is in the Dallas Region followed by the Chicago and San Francisco Regions. A substantial amount of the audit work done to date has been directed toward the determination of May 15, 1973 prices, including the application of such terms as transactions and class of purchaser discussed elsewhere. Subsequent changes in costs have been reported by the refiners to FEA, but only some of these reports have been verified against the books and records of the refiner. In the regions visited by the Task Force, there has been only a limited audit of booked costs increases.

2. Small Refiners

Generally speaking, the auditors of small refineries have been plagued by the necessity for resolution of all of the issues which have delayed the determination of May 15, 1973 prices and costs of major refineries. These include resolution of issues as to the meaning of May 15, 1973 "transactions" and the definitions of "class of purchaser." These and other causes of delay are discussed more fully below.

3. NGL Processors

There are approximately 825 plants which process Natural Gas liquids. Currently, 185 plants, most of which are not subsidiaries of refiners, are under audit. This program appears to be one in which the open issues seem

most perplexing. Apparently for that reason, the regions differ greatly with regard to progress to date. One Regional Director of Compliance reported that he has major problems in the program and has made little progress to date, while another believes that satisfactory progress has been made and is being made.

4. "Upstream" of the Refineries

Refineries, of course, receive their supply of crude oil from domestic production and from foreign oil importations. Domestic production can be divided between major refiners who are included in the RARP program and independent crude producers. Again, the Dallas region has the largest number of producers and the largest amount of crude oil production, followed again by the San Francisco and Chicago regions.

Generally speaking, the progress in auditing independent crude producers has been good. FEA's crude oil price regulations are addressed to each producing "property" and there have been numerous issues regarding the proper definition of "property". Subsidiary issues relate to treatment of unitizations, and rules applicable for purposes of the price exemption of "stripper" wells. These issues appear to be resolved in large part, with remaining open issues becoming less significant in terms of the overall audit effort.

Unfortunately, that is only a small part of the domestic crude oil picture. As suggested above, the major refiners in the RARP program account for over 70 percent of domestic production, and they also are the largest importers of foreign crude. Audit of the crude oil portion of major refiners is in its early stages.*

---

* See the discussion in the Compliance and Enforcement Strategy Section infra.

The balance of crude runs to still is accounted for in the Importer and Crude Reseller programs.

As noted above, Attachments III-B and III-F indicate that audit efforts in Crude Importer and Reseller programs are not as substantial as they should be. That is particularly true in view of the fact that information available to FEA, from the audits and investigations that have been undertaken, as well as from other sources, indicate that a significant number of crude resellers subject to regulation under these programs were not in business on May 15, 1973 and thus may be persons deserving special scrutiny.

5. "Downstream" from the Refineries

The earliest compliance and enforcement effort, by the Internal Revenue Service for the Cost of Living Council, tended to focus heavily on retailers and jobbers. Those efforts produced substantial numbers of violation cases, often with poor documentation which has made them hard to dispose of. Since 1975, downstream audit and investigatory efforts have tended to focus on independent resellers and retail service stations.

6. Propane

A great deal of variation exists among the regions in this program. In part it is attributable to the fact that propane is an important fuel in some areas but not others. Progress has been slowed by a number of troublesome issues. Apparently, the most troubling has been the proper application of the multiple inventory rules. *

---

* The propane firms have filed for an exception to the single inventory rule. This request has been pending before Exceptions and Appeals since the fall of 1976 and as a result has delayed completion of audits.

As the issues are resolved, progress is made, but not without practical difficulties. In many instances, an auditor will find that the small retailer or reseller has not kept records adequate to determine whether or not it is in compliance with FEA pricing regulations. * The auditor then faces the dilemma of whether to go in and reconstruct records for the firm, which is time-consuming for the auditor or to seek from his superiors a Special Report Order requiring the firm to construct the records. Usually the auditor will choose the former action.

Audit work has been suspended or diminished pending action on certain key exceptions requested by certain large firms.

V. CAUSES OF DELAY AND RECOMMENDATIONS

One of the major issues the Task Force had to identify was the causes of delay in resolving open violation cases and completing open audits. As previously indicated, approximately $1.7 billion in potential violation have been identified. These cases have progressed to a point where at least an NOPV has been drafted. Studies have identified several major causes of delay in the resolution of these cases which are discussed below. These cases must be immediately dealt with if the FEA is to develop an effective compliance program.

A. Open Issues

Clearly a major cause of delay in the compliance and enforcement programs has been, and is, the failure to attain timely resolution of disputed issues in the interpretation and application of FEA Regulations.

---

* This is true of small firms in the other reseller and retailer programs.

During the course of Task Force interviews with the Regional Offices and as a part of the questionnaire sent to them, the following questions were asked: What is the procedure for processing issues which effect an audit? Who first surfaces an issue? Who reviews it? How many levels of review are involved? Under what circumstances is the National Office involved? Who finally resolves the issue?

Two of the larger regions seem to operate at opposite ends of the spectrum; others appear to be in between. One region follows the approach of deciding the issue whenever it believes it can do so in a sound and supportable manner. Then it proceeds with the enforcement document, usually a draft of NOPV, in the hope of forcing the issue to resolution in the context of review at the National Office or at the Office of Exceptions and Appeals. Another region tends to put the case into a suspense status and forwards the issue to the National Office for resolution. This latter region has a relatively high number of cases in suspense categories. Other regions seem to choose among the issues, sending up for review, either formally or informally, those which seem to be of pervasive effect, meanwhile suspending work dependent on the answers.

With respect to procedures, the response to our questionnaries and the results of our interviews indicate a fairly standard approach among most of the Regional Offices. Normally an issue which is focused on by the auditor or Area Manager goes through the auditor or Area Manager's offices to the Regional Compliance Office and then to Regional Counsel. It can be either oral or written, depending on the practice of the Region, the complexity of the question to be resolved, and other factors.

If the issue cannot be resolved through that process, the matter is normally sent to the National Office of Compliance Operation, to Case Resolution, or to the Office of General Counsel for resolution.

Attachment III-C shows 121 of the open audits suspended because of need for interpretation, clarification or ruling. The numbers of audits suspended is only one indicator of the magnitude of delay resulting from the need for approved issue resolution. The informal comments from one region on the analysis of audit hours included 16 Reseller (Other) cases without status change since January 1, 1977. Four are currently delayed by definition problems. In three, the question is what is the "firm" whose price is regulated. Of the four, only one has been formally placed in a suspense category, and that did not occur until more than 1800 audit hours had been spent. If the "firm" to be audited differs from what has been under audit, some of those 1800 hours will have been fruitless.

There is another indication of the magnitude of the problem. One of the most frequent complaints from the regions is the enormous amount of time taken by the National Office to respond to requests for resolution of issues. In part this is due to the cumbersome review process before an issue is presented for resolution, and in part because of the way that the National Office handles the resolution of the issue. Some of the regions indicated that, on occasion, the National Office of Compliance and the Office of General Counsel did not even respond to telephone calls from lawyers or compliance personnel attempting to follow up requests. The Task Force received information from more than one region which showed extensive periods of time,

amounting in some cases to many, many months or even years between the time when the matter was sent up for resolution and when the response was received.* This delay obviously had an enormous impact on case resolution and audit completion.

Another element of the picture is the procedures established by the National Office requiring certain categories of cases to be sent to the National Office for review before the issuance of an NOPV or other formal document. The categories are those regarded as precedents and those exceeding a specified dollar amount ($500,000 or $1 million, depending on program). Frequently, the review will identify an issue for the first time, or reverse a regional decision, and thus necessitate reworking the audit.

1. Recommendations

The Task Force finds the issue resolution process to be particularly troublesome and a particularly important cause of delay in audit completion and case resolution. As discussed here, and at other places in the report, the regulations administered by the FEA are sometimes difficult to apply in certain factual circumstances. To get answers to the regions so the audit can be completed or the formal enforcement document issued, another system must be developed. The system would have the Regional or the National Office respond to requests for issue clarification or interpretations on an expedited basis, with a specific turnaround time built in, and with a person given the

---

* Without exception, all Regional Counsel interviewed by the Task Force credited two senior lawyers in one branch of the Office of General Counsel with being prompt and decisive in their responses to informal (usually oral) requests for interpretation, and with expeditious processing of formal (written) requests for interpretation.

responsibility for resolving the issue.* Issues presented for resolution, or interpretation, should be related to particular facts of the case, rather than trying to resolve the issue by attempting to anticipate the impact of the interpretation on every matter which is pending, or contemplated to be pending, at the FEA. The Task Force also recommends that the National Office of Compliance develop the capability to resolve issues presented to it through the development of its own legal staff. The relationship of this capability and the Office of General Counsel is discussed in the Organization Section of this Report.

B. Staffing

One cause of delay in the development, review and resolution of audits and compliance actions is the shortage of experienced attorneys and auditors in Regional Offices. Computer Reports reviewed by the Task Force indicate that significant numbers of cases have languished for protracted periods in the field, in area offices, Regional Compliance Offices and Regional Counsel's Office without any change in status. While some of this delay is attributable to factors other than limited staffing (i.e., the need for legal or technical guidance from National Compliance or General Counsel, or dependency upon an awaited Exceptions and Appeals or judicial decision on related issues), the shortage of qualified auditors and attorneys may be responsible for a significant part of this delay.

The Task Force survey of open cases with NOPV's drafted, but not issued, and potential violations in excess of $100,000, indicate that 55 of the 204

---

* Recent changes in the Compliance Manual with respect to issue resolution are too new to evaluate at this time.

cases were identified as "backlogged" in Regional Compliance or Regional Counsel. Some were expressly identified as delayed due to lack of staffing.* These cases represent 27 percent of the open cases by number, and 24 percent by dollar volume of potential violation. If those cases in which "additional audit work required" was the reason given for delay are added to the "backlogged" cases, the percentage of total open cases represented rises to 48 percent, and the percentage of dollar volume to 42 percent.

In its 1975 Report on FEA Enforcement of Petroleum Pricing Regulations, the Subcommittee on Administrative Practice and Procedures of the Senate Judiciary Committee recommended an increase in FEA staffing and a reallocation of existing manpower to key programs. **

---

* Cases specifically identified as delayed pending court decision, Exceptions and Appeals decision, or interpretations, or for other reasons involving activities outside a region, were excluded from the open cases identified as "backlogged" as were delays pending responses from firms under audit. The principal reason these cases are "backlogged" thus may well be a lack of sufficient manpower to process them in an expeditious fashion.

** "FEA must reallocate its enforcement manpower more effectively and efficiently and must increase the manpower assigned to key programs. While the agency has made some progress in terms of doubling the authorized number of auditors at the 17 largest refiners, inadequate manpower still hampers other programs such as small refiners, producers, and wholesalers, and the national compliance office is understaffed. Even within the large refiners, personnel assignment appear to have been made inefficiently and on the basis of an overall formula rather than the individual requirements and qualifications needed at each company.

"FEA should increase the manpower assigned to the major and small refiners, producers, and wholesalers and develop targeting criteria for assigning auditors to individual firms within each category. Furthermore, the agency should increase the staff in the National Compliance Office in order to enable badly needed enforcement programs to be effectively implemented and monitored." P. 42

In response to the Committee's recommendation, FEA developed Regional Work plans to align regional resources with national priorities. It also increased the authorized compliance positions for regional activities from 725 (on board as of July 1, 1975) to 1195 (authorized for the 3rd quarter of fiscal 1977). The total number of regional compliance personnel on board as of June 30, 1977, was 1080.

Staff levels and qualifications for auditors are a function of the compliance objective of the agency. Based on discussions of staff levels with national and regional personnel, the Task Force has concluded that FEA, as a whole, requires additional auditors. Some regional managers have indicated that they have sufficient personnel to meet current objectives. It has even been suggested that certain auditors are concerned about "running out of work" - a perception perhaps attributable to persons with limited case loads in non-refiner areas, but certainly not borne out by a view of the FEA's current objectives.

Given present audit strategies, it appears that a shortage of qualified auditors is in part responsible for the large number of open cases resolved. Certain programs, particularly the major and small refiner audits, would clearly benefit from additonal staff. The RARP program, on the whole, currently has 272 auditors, a relatively small number considering the magnitude of the task required of them. The potential for increasing the effectiveness of particular programs through a reallocation of present regional auditors is discussed in the section regarding strategy.

At current staff levels there is little "backup" in many areas. The loss of one or two key personnel can severely impair a major audit, or even a full RARP program. This problem has been noted in a number of public comments, and confirmed in conversation with regional compliance directors. Increases in staff levels would permit development of experienced second level personnel who could provide a continuity now lacking in many major audit staffs. Increases in regional compliance staff levels would also permit demands for professional time occasioned by Congressional inquiries, Freedom of Information Act requests and the information needs of the National Compliance Office to be handled with less disruption of current operations. This has especially impacted on the RARP program.

Changing national priorities and the resulting misallocations of resources, as well as technical problems in completing major audits (problems in getting access to information, need for legal advice) complicate any assessment of the degree to which the audit "backlog" is a product of a shortage of manpower. It is evident, however, that an increase in trained audit personnel could produce a substantial increase in the processing of cases and a significant decrease in the number of cases opened but not actively worked.

Increases in trained compliance personnel cannot be accomplished overnight. Of the 1185 regional compliance positions presently authorized, 1080 are presently filled. Some regions actually have more personnel than they are authorized; others have not filled all authorized positions. The continual hiring

freezes, budgetary restraints, and personnel turnover have restricted FEA's efforts to increase the number of qualified auditors. Hiring of compliance auditors is done from Civil Service Registers in accord with current regulations. Some departures from this system may be necessary to provide individual auditors with the particular mix of investigative and accounting skills required by FEA, especially for RARP programs and Special Investigations.

The Task Force also found a need for additional attorneys to support the compliance program. FEA's Compliance Briefing, prepared for the President-elect's Transition team in December of 1976, summarized this need as follows:

> The review of all enforcement documents is handled by the Regional Counsel offices and a special unit within the Office of General Counsel. While sufficient procedures exist, there is a need for an increased number of attorneys assigned to the compliance function, particularly in the regions. This situation is exacerbated by the fact that area offices and posts of duty do not have attorneys on site. The absence of adequate legal staff delays the case resolution process and causes substantial amounts of audit work to have to be redone, thereby slowing down case closing.

Comments by Regional Counsel and Regional Compliance Directors during Task Force visits to a number of regions support this view.

Responses to the questionnaires covering open violation cases over $100,000 indicate that close to $80 million of cases are identified as "backlogged in Regional Counsel". In a number of regions, concern was expressed by compliance personnel that regional attorneys "had their own priorities" and were not sufficiently responsive to Compliance Division requests for expedited treatment of particular cases. This reflects the need for Regional

Counsel to meet the demands of a number of programs, as well as a difference of opinion regarding the most productive allocation of professional staff. This conflict in priorities, between two offices dedicated to the compliance program, could be substantially reduced if sufficient attorneys were available to handle compliance cases.

Only two regions currently provide on-site legal support in outlying area offices. Many smaller area offices would not make full time use of an attorney under present work loads. However, Regional Counsel for three additional regions have indicated that at least one area office in each region could make good use of a full time attorney.* Apart from concerns for professional review and lines of authority, current staffing limitations would make it difficult for these regional counsel to maintain attorneys in area offices or RARP sites on a full time basis.

The Task Force has considered and addressed elsewhere the need to have attorneys included in the development of cases prior to preparation of formal enforcement orders. Regardless of the organizational basis for such involvement, it appears that the early participation of attorneys in compliance cases is essential. Present staff levels in regional offices severely restrict the opportunity for close support for compliance auditors, as attorneys are often not free to attend conferences with firms under audit (and their counsel)

---

* The identification of individual attorneys in the regional office as responsible for particular area offices or RARP teams has been attempted by several regional counsel to provide greater responsiveness to ongoing needs for legal advice. In general, this appears most useful where the caseload of a given area office or the proximity of the office to regional offices makes placement of an attorney in the office unnecessary. It cannot provide the full range of responsive legal service requested by area offices with large caseloads or by major RARP programs.

located at area offices or RARP sites, and must concentrate their time on the required review of compliance orders, slighting requests for technical advices regarding ongoing audits. This has produced additional delays, as cases first reviewed by an attorney after audit work has been completed sometimes must be substantially redone to correct errors which could have been avoided with early legal involvement.

A survey of FEA's Regional Counsel indicated that of the 63 attorneys presently on board in the Regions, approximately 48 * were engaged in support of compliance activities. Comments of the Regional Counsel indicated that an additional 23 attorneys would be required to provide full support to the compliance program, as presently conducted. If Task Force recommendations regarding increased legal support for compliance programs are to be fully impelemented, substantially more attorneys would be required in regional and area offices than this conservative estimate. Obviously, National Office requirements for legal services would also dramatically increase and additional compliance attorneys would be required in the National Office as well.

1. Recommendations

The number of attorneys in regional offices must be substantially increased to permit their active participation in audits at earlier stages, and attorneys should be deployed to area offices or RARP sites when appropriate. In filling these additional positions, FEA must hire attorneys with substantial experience in enforcement, investigation and litigation.

---

* This figure represents "man years" rather than attorneys, as a number of regions use individual attorneys on both compliance programs and the broad variety of other regional programs which require legal support. This broad distribution of responsibilities was seen by some regional counsel as providing essential flexiblity and backup particularly in smaller offices, and an incentive in attracting and keeping qualified attorneys.

The number of compliance auditors in regional offices, area offices and RARP sites must also be increased to expedite current audits and provide sufficient "backup" to insure that changes in personnel and other demands on professional time do not disrupt current audits. Auditors currently on board and experienced in regulation of independent crude producers and NGL processors should be deployed in support of RARP programs. In filling additional positions, FEA should seek to employ investigative auditors experienced in the development of criminal cases and major complex civil cases to provide support for RARP audits and Special Investigations. Exception should be sought from prevailing Civil Service requirements where necessary to permit employment of such investigative accountants and others with particular skills and experience urgently required.

C. Processing of Violation Cases

One of the most significant factors that has lead to the delay in processing cases is the multiple layers of review which have been established both within the Regions and at the National Office. The review process is both cumbersome and duplicative. As previously discussed, while there are wide variations in the review process among Regions, there is at least one basic element which all the Regions share - multiple levels of review with no meaningful turnaround time at any of the review stages and no management mechanism for forcing a decision at any point in the process. A review of the 1217 pending violation cases reveals that the system is sometimes used by persons as a means of avoiding the making of decisions and the resolution of cases. The sending of an enforcement document back from a particular level through the chain of review takes a period of time and it enables the reviewer to avoid having to make a decision with respect to the case.

Moreover, the formal nature of the review system by itself results in considerable delay. If at any point there is a problem with a violation document at any level of review, the document is generally filtered back down the system to the person who originated the document to be changed. For example, if a Consent Order is drafted by an auditor and makes its way up through the Area Manager to the Regional Director of Compliance and to Regional Counsel, and Regional Counsel wants to modify the document or get some additional field work done, then the document is sent back through the offices of the Regional Director of Compliance, and the Area Manager, to the auditor where the changes are made or the additional work done. This obviously takes a considerable period of time and unnecessarily delays the conclusion of the case.

An example of how the review system is contributing heavily to the delay of pending cases is the following crude oil producer case. The case was opened in September of 1974. Field work was started in that month and the audit and investigation was completed in March of 1975. Two months later, the NOPV was drafted by the auditor and was forwarded to the Area Manager for review in May of 1975. Five months later, in October of 1975, the case was sent to the Regional Director of Compliance for his review. The Regional Director of Compliance passed the case on to the Regional Counsel's Office.

Four months later, in February of 1976, the Regional Counsel's office passed the case back to the Regional Compliance Office. From there it went to the National Compliance Office which passed the case on to the National Office of General Counsel in March 1976. In June 1976, the General Counsel's Office sent the case back to Regional Compliance who in turn sent it back to the Area Manager who finally was able to issue the NOPV one year after it was drafted. The progress of this case is not unlike a substantial number of the other cases which the Task Force has uncovered during its studies.

Further compounding the problem of the multiple layers of review is the extent of review afforded to violation cases as they pass through the system. The review at various levels is redundant and this has the obvious effect of slowing up the review process for that particular case as well as other cases which are waiting to be reviewed by the particular reviewer. The nature of review at each succeeding level must be streamlined if the system is to work.

An additional factor which has significantly impacted on the completion of violation cases and audits is the fact that attorneys get involved in the case resolution process at much too late a point. Normally, an attorney does not see a violation document until after it has been prepared by an auditor and reviewed by at least his Area Manager.* In a large number of cases, the case will go through several levels of review until it reaches the attorney only then to be returned to the auditor due to a misinterpretation of the regulations or for some other reason. If the attorney had been working with the auditor from the outset, this could have been avoided. There are significant legal issues at the various stages of the audit and preparation of violation documents and an attorney must be involved.

An additional factor further complicating and delaying the resolution of cases is an inadequate number of qualified attorneys to fully and effectively service the audit staff. The Regional Counsel at the present time clearly do not have sufficient manpower to process the violation cases within a reasonable period of time.

---

* In some area offices where the attorneys are located, this is not true. In addition, in the New York Regional Office only attorneys prepare certain violation documents. (See pp. III-28 to III-31, supra.)

In some of the largest regions which the Task Force visited, the most striking element of the relationship between auditors and attorneys was its adversary nature. In one region, the situation had degenerated to such a degree that the auditors and attorneys were not even speaking to one another on a direct basis. In another region, the Regional Counsel and Regional Director of Compliance were corresponding in writing with respect to cases. This clearly had an adverse effect on the completion of violation cases and audit cases.

This unsatisfactory relationship has developed for several reasons. One key reason is duality of command to which the attorneys are subjected. Attorneys and auditors are responsible to different persons. Attorneys are being asked to perform compliance functions but are not accountable to compliance persons. This is not a workable situation. It does not permit the development of the kind of esprit de corps which is vital to an effective enforcement program.

The Compliance process, as currently structured, is overly dependent on the role of the Regional Administrator. Due to the organizational structure, it is the Regional Administrator who must insure that the Regional Counsel and the Compliance Director work together efficiently. The Regional Administrator's problem in bringing the Regional Counsel and Compliance staff together in a firm and efficient working relationship is made more difficult by the two separate chains of command over the Regional Counsel previously discussed.

1. Recommendations

The Task Force recommends that:

(1) the Process for the review and issuance of formal documents be simplified and that certain redundant levels of review be elminated.

(2) A realistic turnaround time be established with the assignment of specific responsibility to assure the goals are met.

(3) The manner of review should be made less formal, where appropriate.

(4) The nature of review should be lessened at each succeeding level and concurrent review be utilized where possible.

(5) Attorneys and auditors should act as a team in the investigation and resolution of cases involving violations of FEA regulations. The relationship of attorneys and auditors is discussed in the Organization Section of this Report.

D. Inadequate Use of Extensive Audit/Investigative Procedures and Enforcement Powers

1. Subpoena Issuance and Enforcement

(a) Subpoena Issuance

(i) FEA Practice

Under 10 C.F.R. §205.8, the FEA is authorized to require the attendance of a witness or the production of documentary or other tangible evidence in the possession, or under the control, of the person served or both. The Regional Administrators have been delegated the authority (with powers of re-delegation) to issue subpoenas. Section 3.904.05 of the Compliance Manual suggests that a subpoena should only be used as "a last resort after an investigator has exhausted all of the proper avenues available for obtaining information." First the investigator is told he should seek information by verbal request and if that is not honored the investigator should follow up that request with a "soft approach" letter. If the letter does not obtain results, the person should be advised that failure to provide the information requested

leaves the investigator with no alternative but to recommend that a subpoena be issued.

Moreover, the same section of the Compliance Manual provides that the Area Manager, Regional Director of Compliance and Regional Counsel must all concur in the issuance of a subpoena prior to its execution. Beyond that, for regional cases, all subpoenas must be executed by the Regional Administrator or his delegate. In addition all requests for subpoenas must be accompanied by a brief memorandum explaining the necessity of its issuance.

The Compliance Manual also provides procedures for a response to the subpoena. Under 10 C.F.R 205.8, it is specified that a person served with a subpoena may within 10 days from date of service, file with the issuing official an application requesting that the subpoena be quashed or modified. This application automatically stays the subpoena for 10 days after service, and if the application is received within that 10 day period, the stay will remain in effect until a review of the request has been completed by the issuing official. If the issuing official denies the application, the person may apply within 10 days of such denial to the Regional Administrator, or if it is a national case to the applicable Assistant Administrator or Office Director to request that the subpoena be quashed or modified.

If an adverse decision is rendered at the second level, or if no decision is rendered within 20 days, the person may within 10 days thereafter, petition the Office of Private Grievances and Redress for relief and the return of a writ of review. Relief at this third level, according to the Compliance Manual, is premised on the ability of an applicant to demonstrate his circumstances are so exceptional that immediate review is warranted to correct substantial errors of law or cure gross abuses of administrative discretion.

National Compliance has recently conducted a regional study of the history and efficacy of the use of compulsory process by the FEA. In that study, it was found that as of June 10, 1977, the regions had records of issuing 191 subpoenas. A large majority of the subpoenas were for documents, with five subpoenas for testimony. Seventy-five percent of the subpoenas were in the retailer and reseller programs. The study found that the review and approval process for issuance of subpoenas historically has been quite lengthy, ranging up to several months. It also found many examples of excessive time delays even for friendly subpoenas, although this time delay apparently has been significantly reduced recently. The study also found a general reluctance at the FEA to use subpoenas in order to gain access to documents and an even greater reluctance to use the subpoena to take testimony. This was confirmed by the Task Force's regional office visits and our interviews with other persons. The statistics relating to the issuance of subpoenas also supports this conclusion.

One of the reasons for this reluctance is the fact that the processing time to issue a subpoena is too long for the subpoena to be an effective investigative tool. In addition there is a feeling that issuing a subpoena will jeopardize the resolution process and that in the long run the auditors are better off working with delays but increasing the likelihood of a settlement.

There are also a large number of instances where subpoenas had not been used although, at least on the surface, the use of a subpoena appeared warranted and the person interviewed appeared to want to use it. When asked why a subpoena was not issued in a particular matter, either one of the reasons cited above

was given or the person being interviewed really could not come up with a reason. In several instances, the response given was that Regional Counsel or Compliance would not support its issuance.

Although this fact has not been documented by the Task Force, the reluctance to use subpoenas and other forms of compulsory process appears to impact substantially on the ability of the agency to complete audits and investigations especially in situations involving serious or willful violations of the FEA regulations. In many instances, the lack of use of compulsory process has led to substantial delays in receiving, or to the non-receipt of, documents from persons and entities to whom requests have been made.

In addition, the FEA has not utilized the option of obtaining investigative testimony compeling the witness to answer under oath with the threat of perjury if he does not tell the truth. The lack of use of investigative testimony has also forced the agency in certain instances where a party has refused to provide information, to go back and redo a portion of the investigation, thereby increasing the time for resolution of the matter.

(ii) Recommendations

A subpoena is a very effective and efficient means of information gathering during audit and investigative activities and the Task Force recommends that:

(1) FEA begin to use the subpoena as one of its fundamental investigative tools especially in those instances where there have been indications of violations of the regulations or where there is some kind of refusal by the person from whom the information is requested to provide that information on an expedited basis.

(2) Detailed training and instructions be provided by FEA to its staff on the use of subpoenas.

(3) Excessive delay in review and approval of subpoenas be eliminated by delegating to the attorney assigned to the case * the responsibility for its issuance, with the attorney having the option, if he has any questions concerning its issuance, to bring it to the attention of a senior attorney in compliance.

(4) A procedure be devised for assuring quick and effective follow up when subpoenas that have been served are not complied with. (See discussion of subpoena enforcement, infra).

(5) FEA commence using subpoenas to compel the testimony of persons who are under investigation so as to make and perserve a record in anticipation of subsequent enforcement action.

(6) Administrative Proceedings to quash a subpoena should be streamlined.

(b) Subpoena Enforcement

(i) FEA Practice

Under the present system, if a firm fails to comply with a subpoena, then a recommendation for subpoena enforcement is filtered through the FEA system much the same way that the issuance of a subpoena proceeds. Once it goes through the Regional Office system, it then comes to the National Office and ultimately to the Office of General Counsel. The Office of General Counsel then personally transmits the matter to the Department of Justice who then designates the particular U.S. Attorney assigned so the subpeona can be enforced.

---

* This assumes that attorneys will be normally assigned to audits and investigations in the future. See discussion at pages III-45 to III-47, supra.

This procedure is cumbersome, unnecessary and obviously serves to delay the enforcement of the subpoena with the resultant delay in obtaining the information and completing the audit or investigation. Further, the delay in getting a subpoena enforced has a negative effect on the incentive of investigators to issue them. In addition, the Department of Justice and the various U.S. Attorneys have very large caseloads and subpoena enforcement actions referred to them are not treated with the highest priority.

(ii) Recommendations

The Task Force recommends that:

(1) The FEA must seek from the Department of Justice the authority to enforce its own subpoenas and if it is unsuccessful, it should seek legislation from Congress to accomplish that goal.

(2) Until that authority is received by the FEA, a system be set up with specific turnaround times so that it should not take more than two weeks from the refusal of a person to comply with a subpoena till the point where the matter ends up in the hands of the Department of Justice. This could be accomplished by, for instance, streamlining the levels of review within a Region, between the Regional and National Offices and between FEA and Justice, so that the matter can be presented quickly to a U.S. Attorney for immediate action.

(3) The attorney authorized to approve issuance of a subpoena should be authorized to handle subpoena enforcement including direct contact with the necessary U.S. Attorney's Office.

2. Special Report Order Process

(a) FEA Practice

According to the Compliance Manual, the Special Report Order ("SRO") was developed in order to help expedite audits. The FEA determined that after a random sample of audit units, where various types of violations were uncovered, it would be appropriate to have the audited firm determine the full extent of a violation and its dollar impact. Thus, the agency developed the SRO, which requires an audited firm to perform specified calculations necessary for the FEA to determine the actual full magnitude of a discovered violation or the amount of dollar refunds to individual customers. The broadest authority to require such reports is in Section 13(c) of the FEA Act of 1974 (See discussion of enforcement authorities in Chapter V infra).

The Compliance Manual sets out the criteria as to when an SRO should be used. The SRO should be used if there is a certain definable violation which is believed to be present throughout a certain universe of firms. In addition it can be used where sampling audit uncovers wrongdoing, but the magnitude and exact description of the violations are more difficult to define. Thus, the SRO is used to require the firm to perform calculations and data gathering which are necessary to the audit. There is also discussion of the use of an SRO as part of another formal action. That is to say, a Remedial Order or Consent Order is issued with respect to certain identifiable violations and the SRO is made a part of the Remedial Order, in order to require the firm to develop the calculations to determine the full extent of violations. Once an SRO is prepared for issuance by the Regional Office, a copy must be sent to the National Office of Compliance Operations for review after issuance.

(b) Use of SRO

The agency is not currenly using the SRO as an effective investigatory tool. Seven out of the ten regions had averaged slightly over two SROs for the nearly two years since the instructions were put into the Compliance Manual. The other three regions (IV, V and VII) have averaged eight SROs.

In the various regions, there is an unjustifiable skepticism regarding the enforceability of the SRO. There is a fear that if the SRO is challenged, it may lose in court and thus there is concern about putting substantial time in its preparation. In addition, the Regional Offices do not believe that most firms can comply with an SRO due to the technical difficulties and ambiguities of the regulations.

Another reason for the lack of use of SROs is the cumbersome regional review process. Generally the SRO is reviewed in the same manner as other formal actions. Further, there is apparently a lack of understanding by many auditors and Area Managers of how and when to use an SRO. In fact, there are some persons who have no idea of the value of an SRO. As a result of the lack of use of the SRO, there have been a large number of audits which either have not been completed or have been substantially delayed because the FEA staff has had to calculate the potential violations. This delay may have been avoided if the SRO procedure had been effectively utilized.

(c) Recommendations

Like a subpoena, the SRO is another auditing and investigative tool which should be utilized by the FEA much more frequently in order to aid in the completion of the audits and investigations. To achieve the optimum use of the SRO, the Task Force recommends that:

(1) The SRO be utilized as a primary audit and investigative tool.

(2) Auditors and investigators be trained in the writing and the use of an SRO.

(3) The Compliance staff be given assurances by FEA of the enforceability of the SRO.

(4) The administrative process for issuance of SROs and for quashing SROs be streamlined.

(5) A system be developed where there is adequate follow up to assure that the SRO is being completed within a certain prescribed time schedule.

E. Civil Injunctive Authority

Another cause of delay of case resolution and ultimate recovery of overcharges is the fact that the FEA basically does not use the full panoply of civil remedies available to it. The approach of the agency to date has been to basically use the administrative process for effecting compliance with FEA Regulations and the agency has used the Department of Justice only to seek enforcement of the agency's administrative orders.

Under Section 209 of the Economic Stabilization Act of 1970, the FEA has the authority to:

> "request the Attorney General to bring a civil injunctive action to enjoin a person from violating any order or regulation under that Act if that person has engaged, is engaged or is about to engage in a violation of such order or regulation."

In addition, the court may also order restitution of monies received in violation of any such order or regulation. The FEA has brought few civil injunctive actions seeking a judgment of permanent injunction enjoining a person or entity from

violating an order of the agency or a regulation. In addition, the agency has not used the restitution provision to recover monies obtained in violation of an order or regulation.

The administrative process is a cumbersome practice as utilized by the FEA for compliance purposes. As more fully explained elsewhere in the report, the administrative process has been beset with problems due to numerous factors including, among others, the time delay it takes for an enforcement action to go through the review process within the Regional Office and the National Office and also the way in which the Office of Exceptions and Appeals and the courts have been utilized by violators to frustrate the implementation of agency enforcement orders. As a result of these problems, a tremendous delay has developed in the time it takes for a Consent Order, NOPV or Remedial Order to be issued and then complied with.

Even if the FEA could attempt to utilize its civil injunctive or other powers, it would probably not be very effective under the present system. First, since the FEA cannot bring its own civil actions, all matters would have to be referred to the Department of Justice. This builds in considerable delay in preparing the referral memo and file, having the matter proceed through the various review levels within FEA and having the Department of Justice learn the facts and legal theories of the case. In addition, the Department of Justice does not presently have the manpower to handle an increase in FEA cases. In the last year, the Department of Justice devoted four man years to FEA enforcement matters. Finally, the Department of Justice has not been involved in the formation of the philosophy which underlies the regulations nor has it the expertise in dealing with the complicated issues which arise under them.

1. Recommendations

The Task Force recommends that the FEA begin to use its full range of civil enforcement powers in order to seek full and effective compliance with agency orders and regulations. The The Task Force specifically recommends that:

(1) The civil injunctive authority under Section 209 of the Economic Stabilization Act of 1970 be utilized more frequently and in a much more effective way as an enforcement tool.

(2) The FEA seek the authority to handle its own civil injunctive cases.

F. Settlement of Compliance Actions

1. Consent Orders

(a) FEA Practice

After an audit is completed and a possible violation identified and the firm under investigation indicates it will comply, the FEA usually will enter into a Consent Order with that firm. When the proposed Consent Order is for over $500,000 (excluding penalities) and it has been signed by the firm and the FEA, the Compliance Manual requires that it be published in the Federal Register and a press release be issued highlighting the significant facts of the Consent Order. There is a waiting period of at least 30 days from the date of publication in the Federal Register before the Consent Order becomes final.

The Consent Order procedures also have contributed to the delay in the resolution of pending cases. Firms under audit have used the Consent Order procedure as a way of delaying the ultimate resolution of the case. This has occurred in two ways. First, a very significant length of time elapses after

the Consent Order is first proposed and negotiations take place until the Consent Order is signed and published in the Federal Register. The passage of time is a benefit to the firm, since it is able to "not comply".

In addition, some firms use the Consent Order procedure as a process to get discovery of the FEA's case at an early stage. This is accomplished as follows: A firm indicates it is interested in discussing settlement and it gets a copy of a draft Consent Order from the FEA. The firm then spends a significant period of time with the FEA discussing the violations and after going through this process it determines not to sign the Consent Order. This obviously delays the completion of the case because if the Consent Order is not signed, then the FEA must go back and either issue an NOPV or Remedial Order and then go through the process of getting that Remedial Order enforced.

(b) Recommendations

The settlement of compliance actions is vital to an effective compliance program. In order to insure that the settlement process is not being abused there ought to be built in a specific time period by which Consent Orders must be negotiated and completed and there must be someone responsible for monitoring that time period and assuring that it is met. In addition, the FEA should be sensitive to a firm using the consent process as a means of discovering the agency's view of how the firm has violated the regulations.

G. Ability to Compromise Overcharge and the Interaction of Overcharges and Penalty in Negotiations

Another factor which has impacted upon the effectiveness of the settlement procedures at the FEA has been the perception at the agency of its ability to negotiate with a firm the overcharge violation that has been uncovered.

The FEA has taken the position that the agency cannot compromise the overcharges since the money does not belong to the FEA. This has led to some very difficult negotiations. For example, there have been cases where a firm has been or is willing to pay back a substantial portion of the overcharges and the agency would like to be able to settle the case on that basis. However, because of its position on overcharges, the negotiations have broken off and the agency must now issue an NOPV or Remedial Order and has to fight the matter through the administrative process and the courts. Another problem which has arisen in settlement discussions involves the situation where the agency and the firm reach agreement on the amount of overcharge but are not in agreement on the amount of penalty to be paid. Once again in those situations, negotiations normally break off and the agency proceeds through the administrative process and the courts to seek recovery.

1. Recommendations

The Task Force recommends that the agency compromise the amount of overcharges as discussed in the Enforcement Authority Section of this Report (Section V) in certain specific instances.

H. Compliance Procedures

As presently described in the Compliance Manual, the compliance procedures relating to the resolution of cases are extremely specific in detail. Because of this specificity, the agency has lost some flexibility in handling compliance matters and this has resulted in delay in the resolution of cases. While there must be agency guidelines on how to proceed with a compliance matter, an effective enforcement operation needs the flexibility to adopt forms or procedures to

the facts and circumstances of a particular case in order to conclude the case successfully and as quickly as possible. The Compliance Manual, as interpreted by the FEA staff, does not provide this flexibility and this has contributed to the delay in the resolution of pending cases. Moreover, as presently constituted, the compliance process has built in tremendous delay within the case processing and case resolution system and this has also contributed to the backlog of pending matters.

1. Recommendations

The Task Force believes that the entire process of case resolution ought to be streamlined and additional flexibility be given to the Compliance staff in order to premit it to carry out its functions in a more effective way. The streamlining of the Compliance Manual can be accomplished without sacrificing the control over the cases by National Office and the maintenance of a uniform compliance policy.

I. Morale

1. Program Uncertainty

Historically one of the big causes of delay in compliance case resolution has been the philosophy of decontrol and uncertainty as to the continued existence of the agency. The establishment of a permanent Department of Energy, the commitment in the National Energy Plan to maintain price controls on crude oil for so long as the world price of crude oil is determined by OPEC, and a clear intention to prosecute vigorously past violations for products which are decontrolled, should have the effect of providing the commitment to the compliance operation which is necessary in order to have it operate in an

effective manner. In addition, there has not been the type of significant input by the Compliance staff into interpretations or resolution of pending issues in the regulations and in the formation of policy for the agency. Numerous regulatory changes which have taken place without significant input of the Compliance operation. In many instances, changes made without taking into consideration the Compliance point of view have complicated the task for the Compliance operation.

Another factor which has impacted on the resolution of Compliance cases has been the uncertainty created by the approach by Congress and the past Administrations to the various programs which the agency administers. In the course of the last four years, there have been a number of short term program extensions by Congress having a very negative impact on the morale of personnel in the Compliance operations. It is also perceived by the compliance staff that the compliance operation has been placed in an inferior position in FEA's organizational structure. Hence, it does not believe that its needs are given the kind of attention by the Administrator that are necessary in order to have him respond to problems that exist in its operations. Compliance further believes that its programs do not get the kind of priority in the agency operations which are needed to have them operate effectively.

As a result of the problems of the agency which have been identified throughout this study, there have been a tremendous number of outside persons who have had an influence on the Compliance operation of the agency. There have been numerous Congressional inquiries and demands placed on the agency. These demands have necessitated a change in priorities in handling cases, reallocation of people and isolating people in order to respond to these

inquiries. In addition, OMB has had an impact on the agency and the agency has spent a considerable amount of time responding to the criticism of Congress and OMB. Moreover, compliance has expended considerable time in responding to GAO reviews and inquiries. Also, as is discussed in other parts of this report, the system of review, and the other problems which have been identified as impeding the compliance operation, have had a tolling effect on the operations of the compliance unit. It has weakened morale considerably. It has contributed to the high turnover rate which has been identified previously as existing at the agency.

To some extent the problems which have been identified have created a defeatist attitude at the agency. However, given all the problems that exist, the Task Force has been truly surprised at the dedication of a substantial number of the compliance staff to the task at hand and amazed that the staff has been able to operate as effectively, given the complexity of the system, the nature of the regulations, the attitude of prior top management and the lack of coordination and the indirection which exists at the agency.

There has been considerable tension between lawyers and auditors in the various regions. In one region, the Director of Compliance and Regional Counsel communicated by memoranda for a five month period. In addition, a similar tension exists between the Regional Office and National Compliance Office. In the past, there has been a feeling in the regions that the National Office does not have the ability or experience to review their work. This tension among staff had reached serious proportions and substantially impacted on the agency's ability to resolve cases and complete audits.

2. Recommendations

While solving the other problems which have been identified as impacting on successful and expeditious movement of pending cases, in the last analysis, there is nothing more critical to such success then developing an esprit de corps within the agency and improving the morale of the agency. This can be accomplished in many ways. First, the uncertainties which have been built into the various programs and which have been permitted to continue to exist throughout the agency's operations have to be put to rest. The agency personnel must be given the clear commitment that the agency is going to continue and that their work is vital to carrying out the mandate of Congress and the Administration.

In addition, lines of communication must be strengthened within the Regions and between the Regional Offices and the National Office so as to try to develop a team approach to effecting compliance with FEA regulations. The staff of Compliance must be able to feel that there is support from the top personnel within the agency for what they are doing. This can be manifested in many ways, including responding to requests for additional personnel, prompt resolution of regulatory matters and issues which impact on them, as well as more frequent and better communications with them and an expression of interest and concern by top management in what they are doing.

The agency and more particularly the Compliance effort of the agency, is only as good as the people who are carrying it out. It is essential that the Compliance staff's morale be improved in order that they can carry out their mandate in a more effective way.

J. Enforcement and Auditing Strategy

Currently, top priority is given to cases of possible willful violation (priority A cases). Second priority is given to those cases (priority B) which have been open for more than one year and in which the identified possible violation exceeds $150,000. A fourth priority D is assigned to thoses cases that are suspended awaiting interpretation, guidance, or a ruling. All other cases are third priority C.

Over the life of the program, different priorities have prevailed. At one point, priority was given to products with a high visibility (gasoline; home heating oil) or activities of high visibility (independent retailers and resellers) to the public or to the Congress or to both. Many of these investigations were of firms whose records were inadequate, making the audits difficult to close. Now, with changed priorities, the level of effort has dropped and cases are accordingly prolonged.

Another set of priorities is imposed by the so-called "national goals". They are fixed in the context of the agency's budget. For each of the ten programs, a determination is made of the percentage of the total universe of firms subject to the program which will be audited in each fiscal year. For example, funding for fiscal year 1978 has been requested for a level of auditors calculated to permit the auditing of 31 percent of the small refiners. The National number for the small refiner program is then spread across the ten regions by an arithmetic formula which takes into consideration the number of small refiners in the region, the number of auditors within each region authorized for the particular program, a fraction of which the numerator is the on-board regional strength and the denominator is the total authorized strength.

This rigid approach produces results of which most, if not all, of the regions are highly critical. A frequently repeated complaint is that the region would like to concentrate greater resources on what it perceives to be a particular problem area, say independent crude producers or small refiners, while the national goals require it to increase its audits of resellers or retailers or some other area at the expense of audit efforts in the perceived problem area. It sometimes appears that a regional or area manager will try to do both. Cases are opened in the preferred area but effort diverted from it in order to meet the national goals.

It is the opinion of the Task Force that the priorities of the "national goals" should be replaced as discussed in the Compliance and Enforcement Strategy Section of the Report (Section VI).

Another cause of delay, in the view of the Task Force relates to potential willful violations. It appears that when a matter has been identified as potentially a willful violation, all work on the civil aspects of the case is brought to a halt. That should not be. Normally a case should be investigated until all the facts are uncovered and a civil action is brought. At any time during the investigation or civil action, the matter should be referred to the Department of Justice for criminal prosecution if appropriate.

1. Recommendations

(1) See the recommendations in the Compliance and Enforcement Strategy Section of this Report (Section VI).

K. Utilization of Compliance Management Systems to Manage Audits

The National Office and the Regional Offices currently use data from the computerized Regional Compliance Assignment Tracking System ("RECATRK"),

the Compliance Time/Activity Tracking System ("CTARS"), and Personnel Locator System, to manage the various audits performed under the ten programs. While these systems have been expanded and improved in the last two years, they require fairly constant updating to reflect the changes which occur as the Compliance program evolves.

To effect a change it is necessary for Compliance to submit a Data Service Request ("DSR") through the Office of Data Services ("ODS"). ODS has ultimate jurisdiction over the computer systems within Compliance. Further, the Office of Compliance is not allowed to program any changes to the systems although Compliance has the in-house capability to do so. The current procedure is both time consuming and expensive as ODS must contract outside the Agency for programming support.

For example, when the system of classifying cases as priority A, B, C, or D was placed on RECATRK, it took four weeks. This was a very minor change which only involved the addition of one new data element. Another element involves the regionalization of the CTARS system, to enable the regions to input and extract data, a procedure currently performed in the National Office. The contract for this change has been in the pre-award stage for the last three months and has previously hampered efforts to use these systems effectively to manage the Compliance program.

Another problem caused by ODS having control of the computer systems is the fact that Compliance has jurisdiction over the computer terminals and support staff in only three regions. In the other seven regions the computer terminals and staff are under the jurisdiction of other Regional Offices,

and thus are not always responsive to the needs of Compliance. Since the Compliance Information Systems are used exclusively by Compliance and it has the capability to manage and update these systems, it seems only reasonable that Compliance be given full responsibilities for these systems.

1. Recommendations

(1) Compliance should be given full responsibility to manage its Management Information System, including authority to program necessary changes and updates to the computer systems.

(2) Compliance should have control of its own computer terminals and support staff in the regions.

L. Lack of Management Objectives and Controls

At the national office level, management sets objectives for each fiscal year for the number of audits to be completed within each of the ten different audit programs. Short of that, there are few intermediate objectives, and those that do exist appear not to be enforced. The Compliance Manual does set forth "turnaround times" for resolution of issues, but they are not enforced.

Although compliance has developed a procedure for estimating target dates for completing audits, this procedure has not been effectively used by the regions. The procedure is an integral part of the common audit approach in which the auditor is required to program an overall target completion date plus target dates for the various stages of the detailed audit plan. The target dates as well as the overall detailed audit plan are required to be approved by the Area Manager. The Task Force found, however, that the procedure was used only sparingly by the regions. In addition to requiring the full and complete implementation of this procedure,

a system should be devised for reporting the target completion dates on Compliance's case tracking system so that the audits can be appropriately monitored by the National Office.

1. Recommendations

(1) Organize case progress and closing monitoring system.

(2) Require that regions fully utilize the established system for estimating audit completion dates as required by the Compliance Manual.

(3) Modify the RECATRK system to show estimated audit completion dates and establish a system for management reviews at the National level of audit overruns.

M. Industry Recalcitrance

1. Access to Documents and Personnel at Major Refiners

During the course of interviews, one of the big problems examined by the Task Force was the length of time that it takes to audit a major refiner. In discussing with the various regions why it takes so long, one problem that universally was raised was the inability of the FEA auditors to have direct access to documents and personnel at the major refiners.

At most major refiners the FEA has RARP teams which maintain their offices in the offices of the refiners. Each RARP team has a team leader and then several auditors who comprise the team. In one example, Shell Oil, there used to be only two auditors on that team, it was then increased to eight and very recently increased to thirteen.

In order for the RARP team to get documents or information from the refiner where they are located, the team leader must submit a written request for the information to a liaison person who has been assigned by the refiner

to coordinate all requests for information. Once the request is made in writing that liaison person then transmits it to a person who produces the documents. Generally the information then comes back to the liaison person and then is turned over to the FEA personnel. One of the major integrated companies claims that there is a 14 working day turnaround time although FEA personnel suggest that the time is considerably higher. It may run as long as six months from the time the information is first requested until the time it is actually received.

In addition to considerable unhappiness at the method and length of time it takes to get information, if there is a question which FEA people have concerning information contained in the documents they received, in order to have a person designated to respond to their question they must do the same procedure, namely request in writing that the person appear and that is then transmitted through the system and the appropriate person found. Once again this is very time consuming and until that question can be answered, it obviously in a number of instances will hold up the continuous audit of the documents in question.

Further, the system for communicating with persons at various refiners is very formalistic. The presence of a lawyer with a person, when that person does finally appear to answer a question, creates an adversary proceeding which makes the information gathering process more difficult.

An additional problem exists concerning the ability of FEA to have access to the computer systems of the major refiners. Apparently, a large amount of information that exists at the major refiners is in their computer system and yet it is difficult if not impossible for FEA to get access to

that system in a meaningful way so as to utilize it in performing the audits at hand. There is strong negative reaction by a major refiner to a suggestion made by a member of the Task Force that the FEA be given total access to the computer system of the various major refiners.

As indicated elsewhere in the report, obviously the amount of people that FEA has on the audits of major refiners is totally inadequate and is creating substantial delays in completing the audits of those refiners. audits of those refiners. However, notwithstanding the inadequacy of personnel, the way in which FEA people are getting access to documents and personnel during the course of the audits also is a substantial contributing factor to the progress of the audit of the major refiners.

(a) Recommendations

(1) The FEA should take a more aggressive approach to information gathering from firms under audit including the use of subpoenas and SRO's if appropriate.

(2) FEA have direct access to the computer systems and original records of the major refiners.

(3) FEA have direct access to the personnel of the major refiners with respect to questions relating to documents produced.

(4) The turnaround time for access to documents of the major refiners be substantially reduced and effectively enforced.

2. Use of Exceptions and Appeals Process

As discussed elsewhere in this report, the FEA regulations provide companies administrative relief when they believe they are adversely affected by the application of an FEA regulation or any action taken pursuant thereto, including final enforcement actions (Remedial Orders). Among the means of

obtaining relief are the filing of an application for exception and the filing of an application for exemption. Any person aggrieved by the FEA's determination of the application for exceptions or exemptions, may file an appeal from that determination.

The regulations also provide generally that an appeal may be filed from an FEA action by any person adversely affected by that action. Applications for exceptions and appeals are generally filed with and resolved by the National Office of Exceptions and Appeals. The Regional Office of Exceptions and Appeals exercises jurisdiction in certain cases. All applications for exception are filed with and decided by the National Office of Exceptions and Appeals.

The Task Force has identified several instances where persons subject to audit and formal administrative action by the FEA have utilized the exceptions and appeal process as a means of delaying the completion of the audit or avoiding compliance with an order issued by the agency. Normally, during the course of an audit or at a time when an issue letter or NOPV has been issued by the FEA, an aggrieved party can file for an exception from the regulation and his application is considered by the Office of Exceptions and Appeals. Normally the agency will hold up processing the NOPV pending a decision by the Office of Exceptions and Appeals on the application. Assuming that the applicant is not successful in obtaining an exemption from the regulations, the FEA then issues a Remedial Order and the aggrieved party has the right to appeal that Remedial Order within 10 days of its issuance. The applicant usually seeks a stay which, if granted, delays compliance with the order. Of course if the appeal is turned down by the

Office of Exceptions and Appeals, the applicant then has the opportunity to appeal the matter to the appropriate court.

In addition, companies to which Remedial Orders have been issued have also used the appeals process to gain time. While they are appealing the Remedial Order within the agency, they are often also preparing to go to court to challenge the agency through the filing of a request for a declaratory judgment. If Exceptions and Appeals denies the appeal, the party has frequently filed an action in the forum of its choice seeking to enjoin the agency from effecting compliance with its order.

This entire process of the use of exceptions and appeals and the institution of judicial proceedings has a major impact on the effective resolution of pending audits and enforcement proceedings at the agency.

(a) Recommendations

(1) That the FEA simplify its exceptions and appeals process. (See discussion of Enforcement powers).

3. Use of the Freedom of Information Act

Certain firms have attempted to use broad requests under the Freedom of Information Act ("FOIA") to delay FEA audits or investigations. A properly worded FOIA request might require extensive search time and has the effect of virtually shutting down field enforcement or audit activities for extended periods. Since the field staff which must conduct FOIA searches of audit files is the same as the staff which actually conducts the audits and since the FOIA has legislatively mandated time limits, the auditors and investigators must suspend their audits or investigations in order to complete the FOIA searches. This suspension may last for an extended period.

A situation has arisen in several regions (most recently in Region IV) where recipients of NOPVs, issue letters, or other compliance actions have attempted to use FOIA requests to extend inordinately the times given them for responding to such compliance actions. At least one attorney has addressed numerous energy meetings and has published a commercial energy compliance news service advocating that any FEA compliance action should be immediately met with an FOIA request for all files, data, and materials supporting the issuance of the compliance action. The firm could then demand that their response time be predicated on the time they recieve the materials under the FOIA.

(a) Recommendations

(1) The FEA should not delay enforcement actions because of FOIA requests.

(2) The FEA should establish separate staffs in the regions where practicable to handle the processing of FOIA requests.

(3) The FEA should review FOIA process as it impacts on the compliance operations.

SECTION IV

REPORT AND RECOMMENDATIONS

ON COMPLIANCE PROGRAM ORGANIZATION

Summary Recommendations

1. Issuance of written interpretations.

The issuance of written interpretations is crucial to the proper working of the regulatory program. As long as this remains a function of the OGC, it should be exercised by a separate Assistant General Counsel with adequate staff with sole responsibility for interpretations.

2. Authority of General Counsel in relation to Regional Counsels.

The General Counsel should have all authority to direct those legal activities to be performed by Regional Counsels. The Assistant General Counsel for Compliance should have the responsibility for supervising all Regional Counsels and their staffs.

3. Relation of Regional Counsels and Regional Compliance Directors.

Because of the need to ensure that Regional Counsels will be properly responsive to the needs of the compliance program, the Regional Counsels should adhere to the compliance work priority assignments determined by Regional Compliance Directors.

4. Authority of the Director of the Office of Compliance.

Because of the need to ensure consistent policy implementation in the Compliance program, the Regional Compliance Directors should be the senior compliance office personnel at the regional level and the Regional Administrators should cease to be involved in any aspect of the compliance program. The Deputy Assistant Administrator for Compliance should have direct line authority over all compliance office personnel at the regional level.

5. Integration of legal skills into the compliance program of the National and Regional Levels.

The existing arrangements for attorney participation in compliance actions have been inadequate. Attorneys should be integrated into the compliance program, from the earliest stages of auditing and investigation, through case resolution and the defense of the remedial order in exceptions and appeals proceedings and any ensuing litigation (see also other recommendations dealing with self-representations of the agency in civil lititation). Most Task Force members believe this integration must be accomplished by assigning Schedule A lawyers to the Office of Compliance at both the national and regional levels.

6. Review of compliance actions at the National and Regional Levels.

Review of compliance actions by attorneys of the General Counsel should not delay the work of the compliance program or result in unresolved disputes between General Counsel and the Compliance Office. General Counsel Office attorneys should review enforcement actions promptly before issuance, unless they elect not to exercise their right to review. A mechanism should be created for prompt resolution by a senior Agency official in the event of a dispute between the two officials over any proposed action.

7. Streamlining of steps in Administrative procedure.

FEA's administrative procedure in taking enforcement actions is too cumbersome and time-consuming. In appropriate cases the Agency should consider omitting the NOPV and otherwise seek to accelerate and simplify the development of enforcement actions.

8. National Office Enforcement Capability.

Most members of the Task Force believe that the National Office of Compliance should create a cadre of skilled auditors and attorneys with a capability of directly conducting appropriate cases. Task Force members from the Office of General Counsel feel that such a cadre should be an integrated

team representing both the General Counsel and Compliance Offices. In either case, the Task Force recommends that this cadre at the national level should ultimately provide the nucleus for developing a similiar capability at the regional level.

9. Staffing.

The Task Force recommends a significant increase in the number of attorneys assigned to the agency in support of the compliance program at both the national and regional levels.

Organization of Compliance Activities in FEA

1. Introduction

FEA compliance-related activities under the Emergency Petroleum Allocation Act of 1973 (EPAA) fall into three major categories:

(1) interpretation of regulations,

(2) auditing to monitor compliance with regulations and investigate suspected violations, and

(3) enforcement of regulations through administrative or judicial actions.

The interpretive function has been carried out principally by the National Office of General Counsel; auditing and investigation have been carried out by compliance office staff in the regional offices, under the supervision and review of national compliance office personnel; and administrative decision-making (in the form of notices of probable violation, remedial orders, consent orders, etc.) has been carried out by regional and national compliance personnel working with regional and national legal personnel. In other words, "compliance," as the term is used in this discussion, comprises the full range of activities commencing with the issuance of final regulations under the EPAA and concluding with the taking of administrative or judicial action in a given case arising under FEA regulations. Of course, remedial orders

and comparable administrative actions are subject to timely appellate review within the agency and, ultimately, in the courts.

The compliance activities of FEA represent the implementation of at least three major policy objectives of FEA: (1) making its regulatory system comprehensible and predictable to the regulated firms; (2) detecting and punishing violations of its regulations; and (3) creating a climate of deterrence calculated to enhance "self-policing" by regulated companies. FEA has been extensively criticized in connection with the implementation of all three of these policy objectives. The Task Force has found that a need exists for significant improvement in agency activities in all three areas.

The Task Force is aware that the Federal Energy Administration will soon cease to exist as an independent agency of the executive branch, upon the final activation of the new Department of Energy. However, the Task Force believes that those charged with designing the structure and procedures of future compliance activities within the Department of Energy can benefit from an analytical discussion of the problems encountered in the past. It is hoped that they will similarly benefit from the recommendations of the Task Force in respect to ways and means of avoiding those problems in the future.

2. Existing delegations of authority

To understand the existing organizational structure of the Office of Compliance and the Office of General Counsel, (the two FEA components responsible for the compliance activities), it is necessary to briefly examine the overall delegations of authority within FEA. The Assistant Administrator for Regulatory Programs has received a delegation from the Administrator charging him with the development and promulgation of regulations and with the auditing and enforcement activities necessary to attain compliance with those regulations. Within the Office of Regulatory Programs an Office of Compliance has been organized, headed by a Deputy Assistant Administrator for Compliance. The Deputy Assistant Administrator supervises more than a thousand auditors, investigators, and supervisory personnel in the national and regional offices. Under existing arrangements, the Office of Compliance has no internal legal staff, in the sense of a cadre of attorneys whose function it is to advise in, or legally review, compliance actions. The Office of Compliance looks to the National Office of General Counsel and the Regional Counsels in the ten FEA regions for legal advice and legal review of proposed administrative actions.

There are sixty-three attorneys presently employed in the ten FEA regional offices (ranging from three in Boston to twenty in Dallas). They provide general legal support for all FEA programs in the regions, including compliance.

3. Organization of the Office of General Counsel

The Office of General Counsel consists of the staff of the General Counsel, an FEA officer to whom the Administrator has delegated power to interpret FEA regulations and to concur, or refuse to concur, in administrative decisions within the compliance program. One of the General Counsel's three deputies has been designated as Deputy General Counsel for Compliance and Litigation. This deputy generally supervises Assistant General Counsels who are charged respectively with advising the Office of Compliance in its day-to-day legal problems, and concurring in administrative decisions made by the National Compliance Office. In addition, they refer enforcement actions to the Department of Justice and support the Department of Justice in judicial reviews of agency actions and other items of litigation.

a. The issuance of written interpretations

At present, the function of interpreting regulations under the EPAA (both in response to requests from regulated companies and requests from the Office of Compliance) is vested in two Assistant General Counsels who are supervised

by another Deputy General Counsel. This arrangement has not resulted in timely issuance of interpretations and rulings required by the compliance program due to a cumbersome process for handling interpretations, personnel limitations and competing priority assignments in the Office of General Counsel.

The Task Force has concluded that the function of interpreting EPAA regulations is fundamental to the work of explaining the regulatory program within and without the agency, thus essential to efforts at enforcing these regulations. Therefore, as long as the issuance of legal interpretations and rulings remains a function of the Office of General Counsel, it should be assigned to a separate Assistant General Counsel charged exclusively with that responsibility. The Task Force believes that this Assistant General Counsel should be associated closely with, although not subordinated to, the Assistant General Counsels responsible for Compliance and Litigation.

b. The provision of informal interpretive advice and supervision of regional counsel

Since March 1975, the Assistant General Counsel for Compliance has been physically co-located with the Office of Compliance in order to provide more accessible and

timely legal services and review of Compliance activities. In addition to providing day-to-day legal advice to the Office of Compliance and legal review (and concurrence) of enforcement actions in the national office, the Assistant General Counsel for Compliance has also developed the function of coordinating the provision of similar legal services by regional counsels and their staffs to regional compliance office personnel. This latter function has apparently evolved in response to a perceived need to ensure uniform and speedy resolution of legal problems, notwithstanding the present lack of clear and direct supervisory authority in the Office of General Counsel over the work of the regional counsels.

The Task Force believes that the work of the Assistant General Counsel for Compliance and his staff has made a valuable contribution to the Compliance program of FEA in the early stages of the FEA enforcement effort. This experience indicates the need for a major change in the provision of legal services for the Compliance program and in the organization of the General Counsel's Office. The Task Force believes that the General Counsel should be made directly responsible for the supervision of all legal activities performed by Regional Counsels, and the latter should be directly integrated for management purposes into the Office of General Counsel.

Thus, the duties of the Assistant General Counsel for Compliance should be enlarged to include the duty of supervising and coordinating regional counsel and their staffs.

4. Legal services in the regions

At the regional level, the Compliance Program is implemented through the Compliance Office and Regional Counsel staffs in the ten regions. In the regional offices, compliance activities comprise a varying percentage of total regional activities. These percentages vary from about 50% to 90% of personnel assignments. Each regional office is headed by a Regional Administrator responsible for supervising legal, compliance and other FEA program activities in a given region. Each Regional Administrator acts under a delegation of authority from the Administrator and reports to the Deputy Administrator for Programs. These delegations include the authority to give final approval to administrative actions in the Compliance program (e.g. notices of probable violation, remedial orders and consent orders). Thus, the Regional Administrator has powers and responsibilities essential to the proper functioning of the compliance program, without holding a "line of authority" position in the Office of Compliance.

In each region, a regional counsel with supporting professional staff (ranging between two and 20 attorneys)

provides certain legal services, including review and concurrence of compliance program actions, for all of the region's program activities. Thus, a regional counsel must in a sense "serve three masters": he is administratively supervised by a regional administrator in matters of personnel, budget and space, and is responsible to him generally for the professional quality and speed of legal work; he must serve the Office of Compliance, and more particularly the regional Director of Compliance, as a client requiring day-to-day legal advice and concurrence with specific enforcement actions; and he serves the General Counsel in the sense that the latter provides the delegated legal authority under which the Regional Counsel acts in enforcement matters. Thus, he is generally responsible, as the agency's senior legal officer, for all legal actions of the agency.

The Task Force has concluded that the existing arrangements for provision of legal services and review by Regional Counsels, for the Compliance program, are inadequate. As discussed in 3b above, the Task Force recommends a change in the direction of making Regional Counsels administratively accountable to National Office of General Counsel, but work priorities should be determined by the regional compliance directors. It is suggested that these two objectives can be achieved by implementing the previous recommendation that the

Regional Counsel function as the local representative for the General Counsel's office at the regional level. They would receive from the General Counsel a standing instruction to discharge their function of providing legal advice and legal review of compliance program activities within their regions in conformity with the work priority assignments made by the compliance director.

5. Role of the regional administrator

It is the view of the Task Force, consistent with prior recommendations, that the Regional Administrator should cease to be directly involved in the issuance of enforcement actions unless it is deemed appropriate to combine the functions of the regional administrator and compliance director (in selected regions).

6. Role of the Regional Compliance Director

Based on the conclusions outlined above, the regional compliance director should become the senior regional official responsible for compliance activity. For all purposes of the EPAA regulations, the compliance director, under the direct supervision of the Deputy Assistant Administrator for Compliance, would be responsible for activities in his region, except with respect to those legal services performed by regional counsels. Even with respect to the latter items

of legal support, the compliance director should determine the work priorities for legal review by members of the Regional Counsel's staff.

7. Lawyers' participation in the compliance program

a. General discussion

The Task Force has noted that historically, the compliance program of the FEA has suffered from a lack of aggressiveness in identifying and prosecuting possible violations of EPAA regulations. Under the existing arrangements, the timing and scope of the lawyer's participation in an investigation is largely determined by the auditor. At the invitation of the auditor, the lawyer is directed toward issues that, in the auditor's perception, are legal issues appropriate for consideration by a lawyer. What is presented to the lawyer during the investigation stage is not an "investigation" but an "issue."

The lawyer's response, therefore, is ordinarily confined to issuing an opinion on a particular issue. The attorney's responsibility is thus to answer a question, not to develop a case. Such participation has often tended to be static and abstract. The attorney in the field is therefore often not a force in the development and unfolding of an investigation. The lawyer does not feel that the case is his; lawyers are not an integral part of the process.

These arrangements have contributed to the present tendency of the compliance program to perform as a technical, fact-gathering and monitoring activity rather than as an aggressive law enforcement activity. When there is evidence of a violation -- which might be in hand either before an audit begins or during the course of the audit -- the Compliance function is a law enforcement function and not simply a technical, fact-gathering function. What has come into being is an investigation in which there is reason to believe that the law has been violated. Moreover, even at the audit stage, the application of the FEA's EPAA regulations involves closely interrelated issues of fact and of law.

No better example exists of the costs of the present system than the failure of the compliance program to make more frequent and aggressive use of subpoenas for testimony. The result has been unnecessarily laborious reconstruction, through records and inferences from records, of matters that could have been more economically determined through knowledgeable questioning of company officials.

The present legal arrangements have produced a considerable institutional problem. There is a sense in the Compliance Office staff of imbalance between auditors and lawyers, a sense of distrust and dissatisfaction and an uneasy sense that lawyers are sometimes making decisions based upon policy

grounds rather than legal ones. In regional counsels' offices there is a sense that Compliance Office personnel view lawyers sometimes with suspicion, and that auditors sometimes prefer to keep lawyers' knowledge and involvement to a minimum.

The attorneys too often are viewed not as a resource, but an an impediment. The frequent attitude on the part of auditors is that lawyers represent a barrier to vigorous enforcement, rather than a technical resource that can enhance the effectiveness of the audit. In fact, the present arrangements create a situation wherein auditors are frequently advised by attorneys late in the audit process that an incorrect audit approach had been utilized in a particular case. This tends to result in both wasted effort and poor staff morale.

Similarly, because lawyers are distant from the development of investigations, they may not always feel comfortable with the auditing work that has been done when, at the end of the process, they are finally presented with the entire matter in the form of an NOPV or CO. This distrust, in turn, sometimes impels lawyers to take the most secure ground, which often can be a legal position that does not reflect an optimal effort to respond to enforcement considerations.

The Task Force believes that the FEA should take whatever steps are necessary to ensure that in the future the Agency's

lawyers and auditor/investigators will undertake all investigations in a spirit of cooperation, and on the basis of close teamwork to achieve a common objective.

b. Integration of legal services

Based on its study of the existing program, the Task Force believes that experienced attorneys knowledgeable of regulatory and administrative policy, familiar with the tools of litigation and enforcement, and experienced and comfortable in adversary dealings must be integrated into all compliance investigative activities. It cannot reasonably be expected that most auditors are trained or skilled in adversary dealings, and in crystallizing myriad facts and calculations into clear statements of legal reasoning.

The relationship of attorneys to auditors should not be one of reviewer or consultant, but as an at-hand technical resource and guide. Attorneys should be involved in an investigation at its very earliest stages, rather than with specific issues preselected by an auditor or with an NOPV in whose development they played a limited role. With early substantive involvement, the attorney will have the opportunity to identify issues and to suggest lines of inquiry or kinds of facts that might be particularly useful in developing a case. In general, the attorney should integrate his knowledge

of legal interpretations, difficulties currently encountered in litigation in other matters, and the like, into the performance of the overall audit.

Using such an approach, the program will benefit from the involvement of attorneys in dealings with companies that frequently resist being audited and assume an adversary posture. Indeed, since many regulated companies increasingly are involving their own attorneys very early in their dealings with the FEA, these kinds of arrangements would insure that the FEA representatives are comparably equipped in dealings with these firms. The FEA auditors should, for example, have the benefit of an attorney's judgment in deciding when and how to use subpoenas for documents or testimony or special report orders. The intensified coverage of major refiners proposed elsewhere in this report will be a particularly important area in which to achieve this kind of close integration.

In one Region, the Regional Counsel has had formal responsibility for case resolution for the past two years, and in one or two other Regions a similar arrangement has been less formally made. Because of personnel and other limitations affecting these Regions, this departure from usual FEA practice did not provide a useful experiment testing the proposition that lawyers should generally direct case resolution. The Task Force believes that the idea is a sound one and should be implemented.

Many of the same considerations that bear upon the relation of auditors and attorneys in the field apply equally to the relations of auditors and attorneys in Headquarters. Additionally, the National Office of Compliance is constantly engaged in developing, communicating and monitoring policy with a high legal content (for example, on the use of compulsory process). The office needs an in-house capacity for major research to enhance its performance of these functions.

With the benefit of better integrated legal services, the Office of Compliance should be better able to identify issues, define them, and develop extensive analyses and specific proposed resolutions for review by the Office of General Counsel. Presently, inadequate presentation of issues can elicit advice that is not focused or useful. The directors of the major divisions within the Office of Compliance all concur in the concept of having attorneys working with them.

The Office of Compliance has an important role to play in the development of new regulations by the Office of Operations within ORP and by other offices within the FEA. Considerations of auditability and enforceability have historically not been adequately taken into account in developing new regulations. A better integration of legal services would be useful at Headquarters in developing and presenting a Compliance perspective in the regulatory development process.

If a Headquarters capability to conduct investigations and develop cases directly is to be developed (as recommended elsewhere in this report) close integration of attorneys into such a cadre of auditors and investigators would be extremely important. Similarly, the guidance given in investigations of possible willful violations would be enhanced by the involvement of an attorney with experience in the prosecution of "white collar crime." In the past, the Office of Compliance has not systematically considered the role of private actions under the pricing regulations. Attorneys closely involved in the work of compliance should be best able to fashion appropriate policies and procedures relating to private litigation, and to be sensitive to opportunities for appropriate enhancement of such litigation as an adjunct to the FEA's own enforcement program.

In the view of most members of the Task Force, the integration must be accomplished by placing Schedule A attorneys in the Office of Compliance and the Regional Compliance Offices. In addition the Task Force recommends a substantial increase in the agency's legal manpower assigned to support the compliance program. Such a role would be similar to the role of attorneys involved in enforcement in such agencies as the Securities and Exchange Commission, the Federal Trade Commission, the Antitrust Division of the

Department of Justice and U.S. Attorneys offices. However, it would differ from the role of attorneys in cabinet departments having regulatory enforcement or compliance divisions.

Moreover, an integrated relationship will involve attorneys directly in the daily affairs of compliance in a manner quite unlike anything that has occurred in the past. Their participation will not be limited to passing upon selected questions or formal enforcement actions. Rather, there will be innumerable decisions, research projects, memoranda, counselling on tactics, dealings with companies and resolutions of numerous issues that turn so heavily on particular facts that they are not generated into the formal issue-resolving system.

c. Arrangements for review

As presently structured the General Counsel has a veto power over enforcement actions, and is not subject to any turnaround-time requirement on actions submitted for review.

The procedures for the issuance of formal actions should be such that the General Counsel will promptly, prior to issuance, review all formal enforcement actions except where the General Counsel has elected not to exercise the right to review. In the case of a difference of opinion between General Counsel and Compliance, the agency should provide a mechanism

for prompt resolution of the matter by a Deputy Administrator or official at a similar level in the Department of Energy. Resolution by the Administrator or head of the Agency is unrealistic because the staff would be strongly disinclined to bring any but the most compelling issues of policy to him.

A similar mechanism should be adopted at the regional level. Regional Counsel should, promptly, prior to issuance, review all formal enforcement actions, except where he elects not to exercise the right of review, and in the case of a difference of opinion, should be required to forward to the national level any disputed matter for disposition in the manner described above.

8. Streamlining of enforcement action review

The Task Force has studied the elaborate and time-consuming process by which FEA prepares and takes administrative action to enforce EPAA regulations. While the procedures followed in the preparation, review and issuance of notices of probable violation, remedial orders, etc. vary to some extent from region to region, they all demonstrate, in the opinion of the Task Force, an excessive conservatism and an unjustifiable level of bureaucratic redundancy.

The following are the principal stages in the preparation, review and issuance of a remedial order in a typical regional office:

(a) Selection of firm for audit and initial determination of material violation. Interim consultation with Regional Compliance and Counsel staff often required.

(b) Review of audit findings and proposed remedies by Area Manager.

(c) Review by Regional Compliance staff and Regional Director of Compliance.

(d) Review by staff attorney and Regional Counsel.

(e) Resubmission to Regional Compliance Office.

(f) Submission to and review by National Office Compliance staff and Deputy Assistant Administrator for Compliance.

(g) Submission to and review by staff attorney and Assistant General Counsel.

(h) Referral back to Regional Director of Compliance.

(i) Referral back to Regional Counsel.

(j) Issuance of Notice of Probable Violation.

(k) If response of firm deemed inadequate, drafting of Remedial Order.

(l) Steps (b) through (j) repeated.

(m) Appeal of Remedial Order, normally accompanied by Requests for Stay.

(n) If compliance still resisted, litigation report drafted by Regional staff attorney and referred, in order,

to the Office of General Counsel, Department of Justice, and the appropriate United States Attorney's Office for filing a civil suit.

(o) A Consent Order may be entered at any time, although requiring repetition of steps (b) through (j).

(p) Exception relief may be requested at any time.

(q) If criminal allegations are raised, the investigatory and review steps multiply.

(r) The process is elongated continuously by meetings between the audited firm and Regional and/or National staff, and by possible referral of issues for interpretation to Regional Counsel or OGC.

It is immediately apparent that in many if not most enforcement cases and certainly in many complex and legally unprecedented cases, this remarkably elaborate procedure imposes a cost of many additional months in reviewing auditing and legal work and decisions. It is perhaps understandable that a newly created agency regulating the nation's most complex and diverse industrial sector under a novel and highly detailed set of regulations would tend to implement a cautious and conservative system of procedures for taking enforcement actions that may have a significant impact on regulated firms. The Task Force believes FEA's enforcement

procedures should now be streamlined and simplified to accentuate decisiveness and expedition in enforcement action.

Furthermore, the Task Force believes that the Office of Compliance should have and flexibly utilize the power to omit the stage of notice of probable violation (NOPV) in appropriate cases (i.e., in cases where issues of law and fact in dispute between the agency and an audited firm have been clearly identified at the conclusion of an audit or a significant phase of an audit). After the audited firm has been apprised by letter of FEA's position at the conclusion of the audit, and has had a reasonable opportunity to respond, the agency should proceed to issue a remedial order directing a refund or other adjustment unless the company's response has persuaded the agency that corrective action is inappropriate or unnecessary. Perhaps because existing statutory powers for the collection and evaluation of corporate records have not been used to optimal effect, NOPVs are increasingly employed as a device for compelling an audited firm to take a detailed position of record on specific issues and to submit documentary materials bearing on an investigation. If an investigative audit were carried out with full use of legal tools to compel disclosure of records and statements of an audited firm's position on various issues, and if the audit were concluded by a letter definitively identifying

areas of fact or law in which the Compliance Office believed that violations had arguably occurred, and the audited firm had an opportunity to respond, then the agency should be able in many such cases to elect to proceed directly to a remedial order if it was unpersuaded by the response to the closing audit letter.

It should be noted that the omission of the NOPV involves two potential costs which are difficult to quantify: the first is the "quality control" dimension of a preliminary administrative action, and the second is the opportunity for independent legal review at the NOPV stage of the legal theory upon which the enforcement is premised. The "quality control" benefit is minimized by the considerations that the audited company will, in addition to informal conferences and submissions during an audit, have an opportunity to respond to a statement of audit issues at the close of the audit. It will also have the opportunity to appeal a remedial order and demonstrate any error it is believed to contain. With regard to problems posed by the loss of opportunity for an additional legal review of a proposed enforcement action, the Task Force believes that the need for such a review is minimized by two factors: (1) the proposal that significantly increased legal support be provided in or to the Office of Compliance from the earliest

suitable stages of an audit through investigation and case resolution and, (2) by the consideration that the remedial order will still require formal and independent legal review, before the audited firm is required to take an administrative appeal of enforcement action.

9. Regional Compliance

Presently, the formal authority of the Office of Compliance over Regional Directors of Compliance is a functional authority, not line authority. Regional Directors of Compliance are hired by the Regional Administrator, who report to a Deputy Administrator in FEA. Yet, the National Office of Compliance is obviously responsible for performance of the Regional Compliance operations -- indeed, they conduct virtually all audits and investigations. The Regional Directors of Compliance have no responsibilities other than Compliance. The Task Force believes that the National Office of Compliance must be able to exert direct control over Regional Directors of Compliance and therefore should be given line authority over them.

SECTION V

REPORT AND RECOMMENDATIONS ON ENFORCEMENT AUTHORITY

INDEX

SECTION V

SUMMARY OF RECOMMENDATIONS ON ENFORCEMENT POWERS

I. SUMMARY OF RECOMMENDATIONS ON ENFORCEMENT POWERS

A. Introduction

In announcing the formation of the Task Force, the Administrator indicated that one of its objectives was to evaluate FEA's present enforcement powers and recommend appropriate legislation to give the Agency any additional powers that might be needed for a more effective program. Additionally, he asked that the Task Force evaluate FEA's procedures for referring cases to the Department of Justice and recommend improvements in the referral system. In response, the Task Force formed a Working Group on Enforcement Authority to address these and related issues.

In preparing its Final Report, the Task Force attempted to evaluate FEA's full enforcement authority and report on areas where, in the view of the group, the enforcement program could be strengthened. As an initial approach, the Task Force determined to set forth the critical aspects of each of those regulatory programs with respect to which the FEA has maintained a substantial compliance effort. After an introduction and evaluation of the statutory objectives of FEA's regulatory programs generally, the Task Force prepared an analysis of the following specific programs: Price Regulation of Crude Oil Refiners; Price Regulation of Domestic Crude Oil; Price Regulation: Imported Crude Oil; Natural Gas Liquids: Pricing; Refined Products: Price Regulation Reseller/Retailer; and Domestic Crude Oil Allocation. In addition, the Task Force considered

on a more summary basis the impact of the various FEA allocation, entitlements and miscellaneous programs on the Agency's enforcement activities. Through this evaluation, the Task Force sought to properly frame the principal issues that FEA's compliance program was required to deal with. 1/

The Task Force then considered whether FEA's existing grants of authority, and the regulations that have been adopted thereunder, are sufficient to deal effectively with compliance problems arising in the administration of each of the Agency's regulatory programs. The Task Force began its analysis with a review of the recordkeeping and reporting obligations of those subject to FEA's jurisdiction -- matters which the Task Force regarded as the cornerstore of an effective compliance program. Thereafter, the Task Force considered FEA's authority to implement each phase of its enforcement program from the initial investigatory and audit procedures employed through the conduct of FEA's administrative proceedings, civil proceedings brought on its behalf and criminal proceedings initiated to deter and punish willful or knowing violations of the laws it administers. Finally, the ability of parties to enforce violations of the pricing and allocation provisions of the national energy laws through private court actions, as well as the impact of such actions on the administration of FEA's compliance program, were also reviewed.

1/ These materials are appended hereto.

At each stage of the enforcement process, the critical aspects of FEA's authority were examined and considered from the point of view of whether additional legislative or regulatory initiatives were called for. Viewpoints were collected together in materials prepared by the Working Group for the use of the Task Force. The materials that underly the recommendations that follow, therefore, should not be regarded as authoritative expressions of law or policy by the Task Force, its Working Group, or the FEA since they were prepared for an entirely different purpose.

B. Recommendations

1. Remedial Orders

In view of FEA's pervasive authority to issue remedial orders, the Task Force urges that the Agency continue to develop, through regulation or by example, forms of remedial relief necessary to eliminate or compensate for the effects of a violation. As part of this effort, the FEA should undertake to make clear that a direction to cease and desist violative conduct is a remedy that may be imposed in a remedial order. Remedial orders should routinely include cease and desist language.

2. Involuntary Consolidation of FEA Actions and Joinder of the FEA in Private Actions

The FEA should seek legislation to make clear that, notwithstanding the provision of 28 U.S.C. 1407(a), or any other provision of law, no civil action instituted by the FEA pursuant to any of the national energy laws shall be consolidated or coordinated with other actions not brought by the

FEA, even though such other actions may involve common questions of fact or law, unless such consolidation or coordination is consented to by the Agency. Similar legislation should be sought placing in FEA's sole discretion whether or not the Agency should be joined as a party in any private action involving claims under the national energy laws.

The FEA should internalize a review procedure of pending private actions and regularly seek participation as a "friend of the court" in any action significantly impacting upon the orderly development of the national energy laws.

3. Payments of Refunds to the United States Treasury

The FEA should require the payment of overcharges to the United States Treasury in instances where the persons injured by the overcharge cannot be identified by reasonable measures, or where its remedial actions cannot have the intended restitutional effect of compensating injured parties. The Task Force believes that authority to require such payments presently exists in statutes and regulations administered by the FEA — see, e.g., FEAA Section 5(b)(5) directing the administrator to "prevent unreasonable profits within the various segments of the energy industry. . . ." -- and provisions for civil penalties and private relief under the EPAA do not raise any significant impediments. FEA should consider as an alternative procedure seeking of related civil penalties on a basis that will, at the very least, deprive the violator of the benefit of overcharges. The exercise of its authority to refund overcharges directly to the federal government will become increasingly necessary as the compensatory goal of FEA's compliance program becomes more difficult to achieve.

4. Criminal Liability for Corporate Officials

The FEA should seek a legislative revision of EPAA Section 5(a)(4), as amended by EPCA Section 452, to provide that corporate officials or agents who knowingly and wilfully authorize, order or perform any act in violation of the regulation under EPAA Section 4(a), may be subject to imprisonment whether or not they knew or should have known that a notice of non-compliance had been received by the corporation from the FEA. Corresponding amendments would need to be made to 10 C.F.R. 205(e)(1).

In the interim, the Task Force urges that the FEA adopt a requirement that corporate subjects of any remedial or consent order serve the order on all senior corporate officials, as well as subordinate officials and agents whose scope of authority involves the particular corporate program to which the remedial or consent order speaks. To assist in establishing actual notice, the FEA should obtain proof of service from all corporate officials that have received the remedial or consent order.

The Task Force urges that the FEA also reconsider the direction in 10 C.F.R. 205.203(e)(B) that a "notice of non-compliance" shall be limited to remedial and consent orders. Notice of Probable Violation (or any actual notice of non-compliance provided at any time) should also serve as notices of non-compliance.

5. Compromise of Overcharges in Consent Orders

Enforcement experience has indicated that the FEA should adopt procedures to permit the compromise of violation amounts in a consent order.

Such procedures would significantly enhance FEA's enforcement strategies by permitting the Agency to consider such factors as the strength of its case, the resources available within the Agency to commit to the full prosecution of a case, and the likelihood that its position will be upheld on judicial review.

The statutory authority to compromise overcharges derives from the broad grant to FEA to develop compliance procedures. As long as the exercise of that authority does not impinge upon the statutory jurisdiction of FEA's Office of Private Grievances and Redress, does not prejudice claims by third parties, and as long as procedural safeguards are implemented to avoid abuses in reaching compromises in particular cases, the implementation of authority to compromise violation amounts does not directly contradict any legislative mandates.

6. Finalization of Consent Orders

The Task Force sees merit in the requirements of Sections 205.197(b) and (c) that delay the effective date of executed consent orders and require publication in the Federal Register before such orders can be finalized. However, while the Task Force believes that it is desirable to have this independent check on the case resolution process, there does not appear to be a need to republish consent orders that have been amended in response to comments received unless the amendments are highly material.

7. Assessment of Civil Penalties

The Task Force recommends that the FEA initiate a change in its present practice of referring civil penalty actions to the Department of Justice and

adopt a procedure for the entry of administrative orders providing for the payment of civil penalties. Such orders would be subject to administrative review and direct enforcement in the courts.

Although the imposition of civil penalties has been traditionally considered a judicial function to be exercised by the courts, case law has recognized the right of Congress to enact legislation permitting imposition of civil penalties through administrative rather than judicial proceedings. Given the civil penalty provisions and broad enforcement authority already provided by the Congress, the Task Force believes that developing administrative procedures for the assessment of civil penalties is consistent with the legislative scheme.

8. Recordkeeping

The Task Force recommends that the FEA consolidate its generic recordkeeping requirements and, where the Agency has not already done so, repromulgate them under FEAA Section 13. The FEA should also provide for the maintenance of such specific records as may be necessary to facilitate efficient audit and compliance field work. Records that should be required to be specifically maintained include, but are not limited to, computer records, flow charts, chart of accounts and management and accounting procedures manual. In addition, specific records must be maintained as follows:

A. Records showing the specific derivation and audit trail for data submitted to the FEA in required reports.

B. Records showing the derivation and methods used to calculate base period prices in sufficient detail to provide an audit trail back to the companies business records. Additionally, records showing a list of all customers

and each customer's base period price by class of purchaser.

C. Records showing the derivation and methods used to calculate maximum lawful selling prices including products and non-product increases, including applications of unrecouped costs from previous periods which are uniformly and consistently maintained and reconciliable to the firm's business records.

D. Records supporting the periodic pass through of increased costs which clearly demonstrate that the increased costs are appropriately calculated as prescribed by FEA rules and regulations.

E. Records supporting increased cost recovery calculations that are constructed to demonstrate appropriate recovery for each element of the maximum lawful selling price.

9. Reporting Requirements

The Task Force urges that an examination be made of each of the FEA's reporting requirements to determine whether they, as well as the forms promulgated thereunder, have been issued pursuant to the FEAA — particularly Section 13 — as well as the EPAA. New reporting forms devised as a result of the findings of the Task Force's Working Group on Strategy should conform to this recommendation and should reference, where possible, EPAA Section 4(a) to take advantage of the EPAA's more stringent enforcement provisions.

10. Subpoenas

The Task Force recommends that procedures be implemented to routinize a practice of requesting information needed in an audit or investigation through an investigative subpoena rather than informal requests. Procedures should be adopted to insure that when testimony is taken in investigations

the authority of EPAA as well as the FEAA be invoked so that the provisions of 18 U.S.C. 1621 are brought fully to bear on the witness. It should be made clear in 10 CFR 205.201(a) that the use of investigative subpoenas is not inconsistent with FEA's efforts to otherwise encourage voluntary cooperation with its investigations.

In the view of the Task Force, 10 C.F.R. 205.8(h) — the administrative procedure for quashing an investigative subpoena — should be withdrawn, particularly to the extent that it has any application to investigative subpoenas. At a minimum, and even if found to be only applicable to administrative as opposed to investigative subpoenas, the provisions of Section 205.8(h) should be amended and simplified.

11. Special Report Orders

The Task Force recommends that the FEA routinize a practice of requesting information by Special Report Orders when the information sought appears not to be available in any document or series of documents producible pursuant to a subpoena. The Task Force believes that the procedures for reviewing a Special Report Order in 10 CFR 210.91(b)-(d) are far in excess of what is needed to remedy any perceived abuses associated with their issuance. Although a Special Report Order, in some instances, may have greater consequences upon the recipient than would an investigative subpoena and, while it appears that FEAA Section 21(b) may be more clearly applicable to such

orders than it is to subpoenas, that section does not appear to be any justification for maintaining the complex review procedures presently provided for in FEA's regulations.

The Task Force recommends that standards be developed classifying various types of Special Report Orders and delineating the persons who are authorized to issue such orders and circumstances under which they may be issued. Thereafter, a simplified, one step, procedure providing the recipient an opportunity to request relief can be adopted.

12. Review of Remedial Orders

Currently, FEA procedures allow a respondent to a remedial order to seek an exception, interpretation or modification at any time during the administrative and even judicial review of that remedial order. Such provisions can complicate the efficient operation of an enforcement system based largely upon resort to administrative remedies.

Accordingly, the Task Force recommends that procedures be adopted to require respondents in administrative proceedings contesting remedial orders to raise during the course of those proceedings all arguments of fact or law which impact upon a need for an exception (10 C.F.R. 205.50(a)(1)), or modification (10 C.F.R. 135(b)(1)) or otherwise be barred from doing so at a later stage in the review process. Those procedures should also make clear that requests for interpretation concerning matters alleged in an NOPV will not be considered after the issuance of the NOPV except in the context of the enforcement proceeding.

13. Enforcement Techniques

The Task Force believes that the FEA should develop procedures and an internal disposition to proceed flexibly in the application of enforcement techniques and draw from the full panoply of tools given by the Congress to the Agency. Moreover, it is imperative that greater use be made of civil actions for injunctive relief. Develoment of the administrative remedies and powers of the Agency as well as criminal referrals should remain an important thrust of FEA's enforcement efforts. Engrafting upon the administrative process, either by rule or legislation, cease and desist authority, the ability to assess civil penalites and authority to appoint special masters and conservators where needed, will serve to maintain the vitality of the administrative process.

14. Authority for FEA to Litigate on Its Own Behalf

The Administrator should be conferred with the exclusive responsibility and authority for the conduct of all administrative, civil, criminal and appellate proceedings on behalf of the FEA. The Task Force is of the strong belief that providing the FEA the capacity to litigate on its own behalf is a critical aspect of any effort to enhance its overall enforcement capabilities. At a minimum, until it receives full authority to represent itself, FEA attorneys should be routinely appointed as Special Assistant United States Attorneys for the conduct of civil litigation involving violations of the national energy laws.

15. General Antifraud Provisions

The FEA should adopt a general and flexible deceptive practices provision designed to augment the more specific legislative and regulatory provisions currently provided. Here proscriptions of material misstatements and omissions as well as of acts, practices or courses of business which operate in a deceptive or fraudulent manner, would give the FEA flexible authority to effectively deal with emerging problem areas. Specific proscriptions for aiding and abetting violative conduct should be provided.

16. Right to Question Persons

The right of access conferred upon the Administrator by Section 13(d) of the FEAA includes not only the right to obtain information and inspect records but also the right "to question such persons as he may deem necessary." This right is quite apart from the authority conferred elsewhere to issue subpoenas for testimony. The Task Force has noted in other sections of its report that there has been insufficient questioning of persons in the course of audits, particularly at RARP sites. The Task Force recommends that the authority conferred by Section 13(d) be responsibly and vigorously exercised.

II. EXAMINATION OF PETROLEUM INDUSTRY COMPLIANCE

A. Overview

The authority of the Federal Energy Administration to gather information and conduct audits and investigations derives as an initial matter from the Regulations promulgated under the Economic Stabilization Act of 1970, Pub. L. 91-379, as amended (the ESA). The requirement that firms maintain adequate records documenting their compliance with the Cost of Living Council's (CLC) Economic Stabilization Program necessarily derived from the Congressional mandate to enforce controls on wages and prices. As a result of the enactment of the Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159 (the EPAA), the Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended (FEAA) and the delegation of authority from the CLC to the FEA, the Administrator both succeeded to the authority originally vested in the CLC and received his own special grant.

Thus, Section 13(a) of the FEAA specifically authorizes the Administrator to "collect, assemble, evaluate and analyze energy information by categorical groupings . . . of sufficient comprehensiveness and particularly to permit fully informed monitoring and policy guidance" with respect to the exercise of the price and allocation control functions vested in the agency under the EPAA. All firms engaged in any phase of energy supply or consumption are required under Section 13(b) to "make available to the Administrator

such information, including periodic reports, records and documents . . ." as may be necessary for the proper exercise of his functions under the Act. That Section also empowers the Administrator to issue orders and regulations in order to carry out the agency's information gathering authority. Section 13(c) authorizes the agency to issue Special Report Orders when necessary to obtain information which is within the scope of the FEA's general information gathering powers. Section 13(d) confers authority to the FEA to conduct audits and investigations in order to verify the accuracy of the reports and records which are required to be maintained by firms engaged in energy supply and consumption activities. Finally, Section 13(e) authorizes the FEA to issue subpoenas and specifies the procedure for enforcing subpoenas in the United States District Courts.

The FEA has promulgated regulations which specify the record-keeping and reporting obligations of firms engaged in the production or consumptions of petroleum products. Clearly, it would be impossible for the FEA to even attempt to meet its Congressional mandate to control and monitor the pricing and allocation of crude oil and petroleum products at all levels of production and distribution without investigatory and information gathering powers.

B. Recordkeeping and Reporting Obligations

1. Recordkeeping

The FEA has promulgated a number of regulatory provisions which require firms to maintain certain records to demonstrate that prices

charged or amounts sold are in compliance with FEA regulations. FEA's current general statement of recordkeeping requirements, 10 C.F.R. 210.92, is apparently promulgated pursuant to the broad grants of authority in Sections 4 and 8 of the EPAA. Additional support under the EPAA to issue such recordkeeping provisions can be gleaned from ESA Section 203, 1/ at least to the extent that EPAA Section 5 indirectly incorporates ESA Section 203 into the EPAA through the direct incorporation of ESA Section 209.

FEA's most pervasive statutory authority for prescribing detailed recordkeeping requirements are Sections 13(b) and 13(g) of the FEAA. And, whether or not specific recordkeeping requirements were promulgated pursuant to the FEAA, the Task Force is not unmindful of the principle that so long as administrative action taken is within the purview of the Administrator's functions, he is entitled to cite any proper authority to uphold such act. In Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States, 377 U.S. 235 (1963), the Court held that an administrative action could invoke principles or facts not used if the omitted matter urged to uphold the decision did not, by its exclusion, prevent an administrative determination to be made with relevant criteria in mind and in proper procedural manner. Id. at 248. In using this theory

---

1/ Since the ESA does survive for purposes of pre-expiration enforcement (Section 218), and since EO 11790 Section 3 confers ESA presidential authority under ESA Section 203 to the Administrator, FEA can arguably even now promulgate a rule requiring retention of records reflecting regulated transactions that occurred prior to May 1, 1974, including records reflecting May 15, 1973 transactions.

the Supreme Court upheld an administrative act which cited the wrong statutory provision as authority for the action. Reliance on that principle here serves to enhance the viability of recordkeeping rules not specifically re-promulgated under the FEAA or applicable to transactions occuring after the expiration of ESA Section 203.

Nonetheless, at a minimum, FEA should affirm or reaffirm, if it has not already done so, that Part 210 is also promulgated pursuant to Sections 13(b) and 13(g) of the FEAA. On the other hand, while those sections offer an express statutory basis to support any recordkeeping regulation applicable to transactions occuring after the expiration of ESA Section 203, care should be taken to inference the enabling provisions of the EPAA, particularly Section 4(a), wherever possible to avoid the limitations on sanction contained in the FEAA. Thus, a violation of FEAA Section 13(b) only subjects the violator, by virtue of FEAA Section 13(i), to the sanctions contained in Section 12 of ESECA. Besides containing more lenient sanction provisions than those contained in EPAA Section 5, ESECA Section 12 precludes the recovery of damages by "any person."

In addition, it should be noted that FEAA Section 13(i) does not refer violations of FEAA Section 13(g) — the most relevant statutory provision for purposes of promulgating recordkeeping rules — to even the sanction provisions of ESECA. But, FEAA Sections 13(g) and 13(i) were adopted on the same day, and Section 13(i) is an expression of congressional policy that there should be a means of enforcement of

certain of the reporting and recordkeeping provisions of Section 13 — albeit not Section 13(g). Accordingly, to give full effect to the congressional policy in enacting Section 13(i), FEAA Section 13(g) may fairly be read as an extension of the powers "vested in or transferred or delegated to the Administrator" (FEAA Section 13(g)) under EPAA Section 4(a). To the extent, therefore, that the Administrator promulgates recordkeeping requirements pursuant to FEAA Section 13(g) which are reasonably related to the FEA's regulatory functions under EPAA Section 4(a), those requirements are enforceable pursuant to EPAA's Section 5, which in turn incorporates by reference the stringent enforcement provisions of ESA Section 209.

Moving beyond the issue of the most appropriate authority for the adoption of recordkeeping requirements, the Code of Federal Regulations Part in which the recordkeeping rules were placed neither contain the pricing and allocation regulations to which they relate nor do the operative provisions contain a direct reference to the Parts wherein those regulations are contained. This is a technical point that should be clarified. Moreover, the Task Force recommends that the recordkeeping requirements be consolidated, with appropriate cross references, under a single Part in the Code of Federal Regulations. Miscellaneous recordkeeping provisions in Parts 211 and 212, e.g., Sections 211.223 and 212.128, may serve to unnecessarily complicate its recordkeeping requirements.

2. Reporting

With respect to the general and special reporting requirements — including the issuance of Special Report Orders -- 10 C.F.R. 210.91 and 41 Federal Register 55322 (December 20, 1976) make clear that FEA's reporting rules are adopted pursuant to both the EPAA and FEAA. The Task Force's observations with repect to relying upon the EPAA as a statutory basis upon which to promulgate Section 210.91 are similar to those articulated above with respect to the promulgation of the Agency's recordkeeping requirements in Section 210.92. Moreover, the FEAA, particularly in Sections 13(b) and 13(c), confer pervasive authority upon the FEA to prescribe reporting requirements such as those contained in Section 210.91. To the extent, however, that the FEAA is relied upon as the jurisdictional predicate for the regulation, those reporting requirements are only enforceable through the reference in FEAA Section 13(i) to the sanction provisions of ESECA.

FEA's various requirements for the reporting of information are necessary to permit the FEA to control and monitor the pricing and allocation of crude oil and petroleum products at all stages of production and distribution from the first sale of crude oil to the sale of refined products at the retail level. For example, all purchasers of domestic crude oil are required to file on a monthly basic FEA Form P124-M-0. This document provides to the FEA the data necessary to monitor and enforce the weighted average first sale price of domestic crude oil and to make adjustments and administer sanctions as necessary.

Form P110-M-1 is filed by all domestic refiners with the FEA on a monthly basis, and provides the means by which refiners compute, report, and adjust their selling prices for covered products. Refiners must also submit Form P102-M-O on a monthly basis which provides the data necessary for the FEA to administer the Old Oil Entitlements Program. In addition to these reporting programs, the FEA also requires the filing of various other reports in order to fulfill its statutory obligations. For example, the FEA monitors the price of No. 2 heating oil through the use of Form P 112-M-1; oil imports into the United States with Form P113-M-O; propane sales volumes with Form P315-M-O; and the transfer pricing with Form F701-M-O.

C. Investigatory and Information Gathering Powers.

The distillation of the implied and explicit investigatory powers is found in 10 C.F.F. §205.201, Investigations:

> (a) General. The FEA may, in its discretion, initiate investigations relating to compliance by any person with any rule, regulation, or order promulgated by the FEA, any decree of court relating thereto, or any other agency action. The FEA encourages voluntary cooperation with its investigations. When the circumstances warrant, however, the FEA may issue subpoenas in accordance with and subject to §205.8. The FEA may conduct investigative conferences and hearings in the course of any investigation in accordance with subpart M of this part.
>
> (b) Investigators. Investigations will be conducted by representatives of the FEA who are duly designated and authorized for such purposes. Such representatives have the authority to administer oaths and receive affirmations in any matter under investigation by the FEA.

FEA's authority to investigate violative conduct derives, in part, from the ESA Sections 206 and 209, which have been incorporated into § 5 of the EPAA. The powers conferred upon the President in EPAA Section 5 were subsequently placed in the Administrator by Executive Order No. 11790 (June 27, 1974). ESA Section 206, Subpoena power, provides that the head of an agency exercising authority under the ESA, or his delegate:

> shall have the authority for any purpose related to this title, to sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant books, papers, and other documents, and to administer oaths.

ESA Section 209 provides that persons authorized to exercise authority under the title can seek injunctions wherever it appears that a person has, is, or is about to commit a violation. Criminal and civil sanctions and the implied authority to discover the violation which would precipitate their imposition are provided in ESA Section 208 for violations that occurred before December 22, 1975, and in Section 5(a)(3) of the EPAA for violations occurring thereafter.

FEAA also provides specific investigatory powers to the FEA, particularly in Section 13(d);

> The Administrator, to verify the accuracy of information he has received or otherwise to obtain information necessary to perform his functions under the Act, is authorized to conduct investigations, and in connection therewith, to conduct, at reasonable times and in a reasonable manner, physical inspections at energy facilities and business premises, to inventory and sample any stock of fuels or energy source therein, to inspect and copy records, reports and documents from which energy information has been or is being compiled, and to question such persons as he deems necessary.

The Administrator's authority to delegate his functions is found in § 4(b)(2) of the FEAA; among those functions are those otherwise specifically vested by Congress or delegated by the President pursuant to authority vested in him by law, such as that conferred by the EPAA.

Similarly, FEAA Section 13(e)(1) confers upon the Administrator or any of his duly authorized agents authority to issue subpoenas both compelling testimony and the production of documents. The authority of the FEA to issue subpoenas in order to determine whether a firm's practices are in compliance with the FEA Regulatory Program was first upheld by the Temporary Emergency Court of Appeals in U.S. v. Empire Gas Corp., 547 F. 2d 1147 (T.E.C.A. 1976) and again in FEA v. Port Arthur Towing Co., ___ F.2d ___ (T.E.C.A. 1977). Similar cases seeking enforcement of FEA subpoenas have been filed in other jurisdictions. See, e.g., U.S. and Burch v. Bell (C.A. No. CV 175-148, S.D. Ga.).

Although the FEA has adequate authority under both the FEAA and the EPAA to issue investigative subpoenas, only under the EPAA does the Administrator or his delegate have explicit authority to confer an oath. 1/ Because the Task Force believes that the integrity of the investigative process can be enhanced when the person under examination is subject to the sanctions of 18 U.S.C. 1621 (federal perjury provisions), as well as 18 U.S.C. 1001 (federal false statements provisions), it recommends that a procedure be

---

1/ The Task Force does recognize, however, that while FEAA Section 13(e)(1) makes no reference to the administration of an oath, the conferees in their Report on H.R. 11793 (the bill adopted by the Congress in enacting the FEAA) concluded that both H.R. 11793 and the Senate amendment thereto gave the administrator, "extensive information gatherting powers, including the right . . . to administer oath . . ." (FEG ¶10585, p. 10,581.)

initiated to assure that every subpoena issued specifically cite as its statutory basis both FEAA Section 13(e)(1) and EPAA Section 5 — which, in turn, incorporates by reference the subpoena authority of ESA Section 206.

In accordance with the provisions of 10 CFR 205.201 matters relating to investigative subpoenas have been required to conform to the provisions of Section 205.8 which, among other things, sets forth the procedures for issuing and serving such subpoenas. While the issue and service provisions of Section 205.8 do not appear to be overly burdensome, the procedures provided in Section 205.8(h) may create difficulties as the Agency begins to habitualize the procedure of relying upon compulsory process for gathering investigative information.

Section 205.8(h) creates a procedure for quashing or modifying administrative and, by virtue of Section 205.201, investigative subpoenas. Although there may be two competing interests to be served when issuing a compulsory process in the course of an investigation -- the prompt provision of information, on one hand, and procedural fairness on the other — the provisions of Section 205.8(h) may serve to overly frustrate the investigative process. Those provisions provide, among other things, for an initial motion to quash or modify addressed to the issuing officer, with an appeal of right to the ultimate supervisor of the issuing office and an opportunity for certiorari review to the Office of Private Grievances and Redress. Moreover, with respect to the first two layers of review, which may be taken as a matter of right, the reviewing officer is required to base a denial on a "statement of facts and conclusions of law" (Section 205.8(h)(1)). While the Task Force believes the maintenance of both the

appearance and fact of procedural fairness are critical aspects of any governmental enforcement program, the procedures of Section 205.8(h) appear to go well beyond what is needed and manifests a lack of confidence by the Agency in the integrity of its investigative staff.

Procedural fairness can be assured by alternative means which would not so frustrate the investigative process. For example, the Administrator could adopt regulations more carefully delineating who may exercise the authority to issue subpoenas and the circumstances under which such authority should be exercised. In the view of the Task Force, so long as an attorney — whether in Compliance or General Counsel — is in some way involved in the issuance of the subpoena, procedural fairness can be satisfied. Moreover, additional safeguards are provided by existing procedures which require that court actions to enforce investigative subpoenas be routed through Regional Counsel.

Although the procedures of Section 205.8(h) should be withdrawn altogether, because the Section has specific application to administrative proceedings, there might be some utility to preserving some aspects of the provision with respect to subpoenas other than those issued in the investigative process. Accordingly, at a minimum it should be made clear that none of the provisions of Section 205.8(h) are applicable to investigative subpoenas.

A further investigative mechanism available to the FEA pursuant to Section 13 is the Special Report Order (SRO). Section 210.91 of the FEA Regulations which provides for the issuance of SRO's state that "[w]henever

the FEA considers it necessary for the effective administration of the FEA, it may require any firm to file special or separate reports, setting forth information relating to the FEA Regulations. . . ." In cases in which a firm's available records are insufficient to demonstrate compliance with the provisions of the FEA Regulations, the firm may be required to submit adequate records in response to an SRO. An SRO may also direct a firm to formulate documents which are not available. In contrast, a subpeona may only be used to compel the production of documents which are already in existence.

The FEA's authority to issue an SRO to an individual firm has been challenged by the plaintiff in Crown Central Petroleum Corp. v. FEA (C.A. No. N76-681, D. Md.). In that proceeding, the Crown Central Petroleum Corp. (Crown) has sought judicial review of the FEA's determination in Crown Central Petroleum Corp., 3 FEA Par. 87,018 (April 7, 1976), in which the FEA Office of Private Grievances and Redress declined to rescind an SRO which the FEA Compliance staff had issued to Crown. The SRO directed Crown to file information concerning its classes of purchasers and was intended to elicit facts which the FEA had determined to be essential to an audit of the firm's pricing practices. The Office of Private Grievances and Redress upheld the SRO on the grounds that the Order was not unreasonable or discriminatory, nor was it improper for the FEA to direct the firm to file a document which is not generally required to be filed by all similarly situated firms. A broad-based challenge to the FEA's authority to issue SRO's has also been raised in Powerine Refining Co. (C.A. 77-1873 L.E.W., C.D. Cal.).

The regulatory provisions governing the issuance of SRO's provide detailed procedures for their administrative review. See 10 CFR 210.91(b)-(d). A firm which is ordered to file a special report may submit to the FEA official that issued the order an application to quash or modify the order. Since the review procedures for a denial of such a request are the same as the review procedures for a denial of a request to quash or modify a subpoena the Task Force has concerns paralleling those articulated above. While a Special Report in some instances may have greater consequences upon the recipient than would an investigative subpoena and, while it appears that FEAA Section 21(b) is more clearly applicable to such orders, there does not appear to be any justification for maintaining the complex review procedures presently provided for in FEA's regulations.

It is important to note that the FEA may not use a Remedial Order or a Notice of Probable Violation (NOPV) as a discovery device during the course of an audit or investigation. By the time a Remedial Order has been issued, the FEA should have reached a point in a compliance investigation where further factual material is not necessary in order to determine whether or not the violation of the FEA Regulations has occurred. In Koch Industries, Inc., 2 FEA Par. 80,580 (May 2, 1975), the FEA Office of Exceptions and Appeals held that under the provisions of Section 205.192, a Remedial Order should not properly be used as a discovery device in order to develop evidence on which to base a finding that a violation of the price regulations has occurred. In Wall Street Journal, 2 FEA Par. 80,588 (March 21, 1975), the FEA held that in view of the various methods of obtaining information in the course of a compliance investigation which are available under the authority of Section 13

of the FEAA, the gathering of information regarding probable violations of the regulations should be completed prior to the issuance of an NOPV. In Wall Street Journal the FEA further held that an NOPV should contain a full statement of the factual basis for the agency's conclusion that a violation of the regulations was believed to have occurred and that an NOPV should only be issued after a significant stage of the investigation is completed. However, the limitation of the use of an NOPV or a Remedial Order does not mean that the FEA cannot require the submission of further information including an SRO which would permit the calculation of the precise magnitude of the violation or assess compliance with the Order.

With respect to any of the information gathered through the use of the powers discussed above, the FEA is authorized to require that the material be submitted under oath. Prior to the questioning of witnesses who are subject to such investigations, investigators may be required to apprise the subject of their rights including those against self-incrimination. If the person, after being advised of these rights elects to waive them, the investigator may, depending upon the circumstances, have the subject execute a written waiver. False statements in any submission of information to the FEA may subject the person who made the statements to criminal sanctions under the provisions of 18 U.S.C. Section 1001. When an oath is administered the provisions of 18 U.S.C. 1621 are also applicable.

D. FEA Investigative Procedures

1. Audits

The type of records, reports and investigative devices discussed in the preceding subsections are usually used by the FEA during the course of an

audit of an individual firm. While the various FEA reporting programs assist the agency in monitoring industry-wide compliance with the FEA Regulations, and industry-wide movements in prices, the audit is the primary means available to the FEA to evaluate an individual firm's compliance with the FEA Mandatory Petroleum Allocation and Price Regulations. The FEA's authority to conduct audits of individual firms is a necessary component of the agency's statutory mandate to administer and enforce the provisions of the FEA Regulatory Program.

The general procedures followed by FEA personnel in the conduct of an audit are described in Section 3.300 of the FEA Compliance Manual. As an initial matter, it is important to note that all FEA auditors are required to have a familiarity with accounting and auditing procedures as well as a thorough knowledge of the FEA Regulations. In most instances, an auditor's first responsibility after being assigned a case is to contact the firm by telephone or by certified mail in order to inform the firm that an audit will be performed and to request that the firm provide work space for the auditor and make available to him the records which will be necessary to conduct the audit.

In most cases, the FEA has found that the written documents provided by a firm during the intial audit are not sufficient by themselves for a determination to be reached concerning the firm's compliance with the applicable FEA Regulations. Accordingly, the auditor must conduct interviews with certain employees of the firm in order to supplement the written record. After the completion of an audit, the auditor reduces his findings

to a written report which summarizes the information and conclusions developed during the course of the audit. After reviewing the auditor's report and the full audit file, the responsible FEA Compliance personnel may decide that an additional audit should be conducted, or that a formal compliance proceeding should be initiated.

2. Compliance Practices

In order to provide guidance to the Regional Compliance Offices in the allocation of resources and manpower to both new and ongoing audits and investigations, the National Office of Compliance issues quarterly program guidance. A system of prioritizing audits is done on the basis of four lettered categories, A through D with Category A having the highest priority and Category D having the lowest. Category A is reserved solely for Special Investigations, which are those audits in which there is credible evidence to suspect a willful violation of the FEA Regulations or of a Federal statute. Category B includes those audits which require intensive management due to the age and dollar amount of the violations, or because the assignment has special interest to an external group, such as a Congressional Committee. Category C consists of the normal ongoing assignments in which a willful violation is not suspected, and intensive management is therefore not necessary. Category D audits are those for which audit work has been suspended for a valid reason. An audit will be classified Category D if it is considered by a Regional Compliance Office to be lower in priority than other ongoing audits.

3. Complaints

Under the provisions of the FEA Administrative Procedures and Sanctions Regulations, any person may file a complaint with the FEA when that individual has reason to suspect the existence of a violation of the FEA Regulations. The provisions of 10 CFR, Part 205, Subpart N, govern the filing of any such complaint. When a complaint is received, it is reviewed by the FEA in order to determine if there is reason to believe that a violation has in fact been committed. During the course of the initial review of a complaint, it is often necessary to contact the complainant and request further information in relation to the alleged violation. If the initial review indicates a likelihood that a violation has been committed, the case is investigated or audited as workload and compliance priorities permit. If the reviewer concludes that the complaint is unwarranted the complainant is so advised.

4. Referrals

Information concerning possible violations of the FEA Regulations is often referred to the FEA Compliance staff from the FEA Office of Operations, and the FEA Office of Exceptions and Appeals. In the course of their work those offices often discover possible violations of the FEA Regulations. This information is referred to the FEA Compliance staff and is reviewed initially by the Office of Compliance Case Resolution. If it is determined from this initial review that further audit work or investigation is warranted in view of the factual situation present, the case is referred to the Office of Compliance Operations. The Office of Compliance Operations then assigns the case a priority classification, and the firm is audited as workload and compliance priorities permit.

5. Compliance Manual

The rules and guidelines to be followed by FEA auditors and other Compliance personnel are set forth in the FEA Compliance Manual (the Manual). The Manual reviews the entire compliance process and provides detailed guidelines and standards for program development, program operations, case resolution, report and control systems, and administrative activities. Although a component of the Federal Energy Guidelines system, the Manual is designed for use by FEA personnel only, and is made available to the public only in expurgated form. The development of the rules and guidelines contained in the Manual has been an ongoing process. Proposals for revisions of FEA compliance procedures generally originate at all levels of the compliance process, i.e., area office personnel, regional office personnel, and national office personnel. Any proposed revisions of Compliance procedures are initially reviewed by the Office of Compliance Policy and Planning. If accepted by this Office, a proposed revision is reviewed by the Assistant General Counsel for Compliance, the various Compliance Office Directors, and finally, the Director of Compliance of the FEA. If the revision is adopted, it is incorporated into the Manual.

6. Common Audit Approach

As one part of the Compliance Manual, the FEA has developed a "common audit approach" in order to insure uniformity in the conduct and evaluation of all FEA audits. The "common audit approach" divides the auditing procedure into six stages: initial planning; preliminary audit; detailed audit planning; review and approval of detailed audit plan; detailed audit

verification; and reporting. During the initial planning stage, the auditor reviews all applicable FEA Regulations and Rulings and available background material concerning the firm and the industry. The auditor then makes the initial contact with the firm at which time the firm is requested to make certain material available for the audit. As the final step in the initial planning stage, the auditor prepares a preliminary audit plan.

During the preliminary audit, the auditor interviews employees of the firm and conducts selected tests on the data which has been provided. While the selected tests do not constitute a detailed audit, they should be sufficient to enable the auditor to reach an initial determination concerning the firm's compliance with the FEA Regulations. It is important to note than an audit is not intended to encompass a reconstruction of a firm's records. Maintaining records is a firm's responsibility, and if a firm has failed to meet this responsibility, it may be necessary to issue a Special Report Order (SRO) to require the firm to assemble the requisite documentation of its supply and pricing practices. If after conducting a preliminary audit, the auditor concludes that no violation has occurred, the audit is terminated and a final audit report is prepared. I , on the other hand, the auditor initially determines on the basis of the preliminary audit that a violation has occurred, he proceeds with the preparation of a detailed audit plan.

The detailed audit plan is intended to serve as a guide to the Compliance personnel who will actually perform the audit. Therefore, it contains a brief description of the preliminary audit results, a step-by-step plan for

conducting the detailed audit, an estimate of the staffing requirements for each step of the audit, and recommendations for the use of statistical sampling techniques. The detailed audit plan must be reviewed and approved by the Area Manager before it can be implemented. In addition, certain audit plans must be submitted to the National Office of Compliance Operations for approval prior to the performance of the audit. After the audit plan is approved, the audit is conducted and the results are communicated to FEA management in the form of an audit report. On the basis of this audit report, appropriate compliance action is instituted.

The common audit approach which is summarized above is utilized by the FEA in conducting all audits of firms in the petroleum industry. The common audit approach is applied in the six standard work programs contained in the Compliance Manual which provide guidance to FEA personnel in conducting audits of firms in each of the sectors of the petroleum industry. Audits of crude oil producers are generally coordinated and conducted by the FEA at the Regional and Area level. Refinery audits are performed under the Refinery Audit Review Program (RARP), which emcompasses the ongoing audit of approximately 35 major refiners, approximately 110 smaller refiners, and 123 natural gas processors.

III. FEA ADMINISTRATIVE PROCEEDINGS -- FORMAL ENFORCEMENT ACTIONS

A. Overview

Following the completion of an FEA audit where a possible violation of the FEA Regulations has been identified, the FEA generally initiates

formal enforcement proceedings against a firm by issuing a Notice of Probable Violation (NOPV). 1/ The NOPV is a written statement of charges to which the firm is entitled to respond; it does not require the firm to undertake immediate remedial action since it represents only the FEA's preliminary determination that a violation has occurred. If, following the issuance of an NOPV, the firm expresses a willingness to voluntarily comply, the FEA may at this point prepare a Consent Order. A Consent Order is a written document in which the firm agrees to take specified remedial action. Once it is signed by the firm and the FEA, the Consent Order has the effect of a final agency order and, unless a proceeding to modify or rescind it is initiated, is generally the final administrative proceeding involving the violation or violations which the FEA audit disclosed.

If the firm which appears to be in violation of the FEA Regulations is not willing to utilize the Consent Order procedure, and its response to the NOPV fails to demonstrate that the alleged violation did not occur, the FEA will issue a formal remedial order to the firm. 2/ A remedial order is a written document in which the agency makes an affirmative finding that a violation has in fact occurred and directs the firm to take specific action in order to remedy the particular violation. In certain emergency situations the FEA may initiate enforcement proceedings against a firm by issuing a remedial order for immediate compliance instead of a notice of probable violation.

1/ When the FEA seeks to disallow costs which it determines is in excess of the proper measurement of costs, it may issue a Notice of Probable Disallowance ("NOPD").

2/ In resolving a matter where an NOPD has been issued the FEA may issue an Order of Disallowance ("OD") which is a form of Remedial Order.

A firm which has received a remedial order may seek to have that determination reversed through an administrative appeal of that order. In the event the appeal is denied, the firm may seek judicial review. At any time, a firm may also file an Application for Exception based on a claim that the regulatory provision with which it has been charged is causing serious hardship or gross inequity. Finally, the firm may at any time request an interpretation under the provisions of 10 C.F.R. Part 205, Subpart F. See Shell Oil Co., 3 FEA Par. 80,545 (January 6, 1976).

B. Authority for Enforcement Actions.

The authority of the FEA to issue NOPVs and remedial orders is derived from two basic sources: The Economic Stabilization Act and The Federal Energy Administration Act. In Section 203(a) of the Economic Stabilization Act of 1970, P.L. 91-379, as amended, the President was granted the authority to "issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to -- (1) stabilize prices, rents, wages and salaries. . . ." The President delegated his authority to implement the provisions of the Economic Stabilization Act to the CLC.

In promulgating its Phase IV Price Procedures in accordance with the provisions of the Economic Stabilization Act, the CLC established procedures for the issuance of NOPVs and remedial orders. The provisions of 6 C.F.R. 155.83 stated that:

> "The Council may begin proceedings under this subpart (subpart E) by issuing a notice of probable violation if the council has reason to believe that a violation has occurred or is about to occur."

In addition, Section 155.81 of the CLC Regulations defined "remedial orders" as:

> "an order requiring a person to cease a violation or to take action to eliminate or to compensate for the effects of a violation, or both, or which imposes other sanctions."

Pursuant to the provisions of Section 155.82, the CLC was empowered to commence proceedings by service of either a notice of probable violation or by issuing a remedial order.

In Section 205 of the Economic Stabilization Act, the Congress explicitly granted to the CLC the authority to assure compliance with its enforcement orders by bringing an action in the appropriate federal district court:

> "Whenever it appears to any agency of the United States, authorized by the President to exercise the authority contained in this section to enforce orders and regulations issued under this title, that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation or order under this title, it may in its discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the agency, any such court may also issue mandatory injunctions commanding any person to comply with any regulation or order under this title." Economic Stabilization Act of 1970, P.L. 91-379, Section 205. (Emphasis added.)

On December 22, 1971, the Congress amended Section 205 of the Economic Stabilization Act (P.L. 92-210) and renumbered as Section 209. The amended provision, now Section 209 of the Act, required that in order to ensure compliance with its orders, the CLC could request that the Attorney General file an injunction in the appropriate federal district court.

The amendment also empowered the court to "order restitution of moneys received in violation of any such order or regulation." 1/

On November 27, 1973, the Congress enacted the EPAA which directed the President to promulgate price controls on crude oil, residual fuel oil and refined petroleum products. In addition, in Section 5(a)(1) of that legislation, the Congress expressly incorporated many of the provisions of the Economic Stabilization Act. Specifically Section 5(a)(1) of the EPAA provides:

> "[S]ections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation promulgated under Section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act

---

1/ Section 209 of the Economic Stabilization Act provides in full that:

> "Whenever it appears to any person authroized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation." Economic Stabilization Act of 1970, P.L. 91-379, as amended by P.L. 92-210, Section 209.

> of 1970; . . . ." Emergency Petroleum Allocation Act of 1973, P.L. 93-159, as amended by P.L. 94-163. 1/

Thus, Congress implicity--particularly through the incorporation of ESA Section 209 which provides for the enforcement of ESA Section 203 orders--included in the authority granted pursuant to the EPAA the authority to issue orders, and to ensure that those orders are enforced through the Attorney General, which had been provided to the CLC in the Economic Stabilization Act.

Furthermore, in the conference report of the EPAA, the Congress expressly indicated its intent that the regulations which had been promulgated by the Cost of Living Council (including the procedural regulations) would properly form the basis for the regulations to be adopted pursuant to the provisions of the EPAA. The conference report stated:

> "The committee wishes to emphasize that the pricing controls called for in this legislation may, in those circumstances where pricing controls established pursuant to other federal authority are consistent with the requirements and objectives of this Act, merely confirm those controls in the regulations to be promulgated under authority of Section 4 of this Act. It is contemplated, for example, that the price controls established by Phase IV under authority of the Economic Stabilization Act, would continue in effect unless and until required to be modified by the price regulation required to carry out the purposes of this Act. As a matter of administrative convenience the President may wish to continue to exercise federal pricing controls through the Cost of Living Council and may pursuant to Section 5(b), assign to that agency responsibility for administering the price controls called for in this Act." H.R. Rep. No. 93-628, 93rd Cong., 1st Sess. (November 10, 1973) at p. 26.

Section 5(a)(1) of the EPAA as it was originally promulgated in P.L. 93-159, provided that Sections 205 through 211 of the Economic Stabilization Act should be incorporated into EPAA. Section 5(a)(1) was amended in P.L. 94-163 by striking out "sections 205 through 211" and inserting "sections 205 through 207 and sections 209 through 211.

Clearly, in contemplating that the President might delegate to the Cost of Living Council the responsibility for administering the price controls called for under the EPAA, the Congress expressed its intent that the compliance methods used by CLC to assure compliance with its regulatory program, including the utilization of NOPVs and remedial orders as a part of its enforcement process, should properly be continued. When the Federal Energy Office was established to administer the EPAA, it adopted the enforcement procedures which the CLC had utilized, including the use of NOPVs and remedial orders. 1/ See 10 C.F.R., Part 205, Subpart O.

Furthermore, the Congress has had numerous opportunities to review the enforcement procedures of the FEA. On four occasions, the Congress has extended the regulatory authority of the FEA under the EPAA. See Pub. L. 93-511 (December 5, 1974); Pub. L. 94-99 (September 29, 1975); Pub. L. 94-133 (November 14, 1975); and the Energy Production and Conservation Act of 1975, Pub. L. 94-163 (December 22, 1975). At the time of each decision to extend the FEA's authority to act under the EPAA, the Congress has certainly been aware of the manner in which the FEA has been enforcing its prices and allocation regulations, including the issuance of NOPVs and remedial orders. Nevertheless, the Congress has never attempted to further circumscribe the scope of the FEA's enforcement authority.

1/ In Executive Order 11748 (December 6, 1973) the President delegated all authority vested in him under the EPAA and ESA Section 203(c) to the Federal Engergy Office ("FEO"). Similarly, in Executive Order No. 11790 the President delegated to the FEA his powers under the EPAA and ESA Section 203(a) to the extent that ESA Section 203(a) authority remains available under the provisions of ESA Section 218.

In view of these extensions of the EPAA without any substantive amendment to the statutory provisions discussed above, the Congress has confirmed the authority of the FEA to use NOPVs and remedial orders as tools in its enforcement process. In fact, it should be noted that during 1975, at the request of Senator Kennedy, Chairman of the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, the Congress directed its own investigation of the FEA's enforcement of its price regulations. The 1975 Congressional investigation studied all of the compliance methods utilized by the FEA, including the issuance of NOPVs and remedial orders. Following the Kennedy investigation, the Congress determined that the FEA's enforcement authority should be limited in only one respect. In Section 106 of the Energy Conservation and Production Act which it promulgated in 1976 (Pub. L. 94-385, August 14, 1976), the Congress prohibited the issuance of a remedial order to certain types of firms when that order is based upon a retroactive application of a regulation or ruling. That amendment is the only modification which the Congress had adopted concerning the enforcement procedures which the FEA has employed since the promulgation of the EPAA in 1973.

The second basic source of FEA's authority to issue NOPV's and Remedial Orders proceeds from the Federal Energy Administration Act. Under Section 7(c) of the FEAA, the Administrator of the FEA is authorized to "promulgate such rules, regulations, and procedures as may be necessary to carry out the functions vested in him. . . ." Among other functions, the Administrator is directed to:

> . . . promote stability in energy prices to the consumer, promote free and open competition in all aspects of the energy field, prevent unreasonable profits within the various segments of the energy industry, and promote free enterprise. FEAA § 5(b)(5), 15 U.S.C. § 764(b)(5) (1976).

Similarly, under Section 5(a)(2) of the FEAA, the Administrator is requested to assume any responsibility that is "delegated to him by the President. . . ." 15 U.S.C. §764(a)(2) (1976). On June 27, 1974, the President delegated to the Administrator of FEA all authority which was vested in the President under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760(h) (1976) ("EPAA"). Executive Order No. 11790, 39 F.R. 23185 (June 1, 1973). The authority of the Administrator to issue and enforce price and allocation regulations under the EPAA subsequently was extended when Congress passed the Energy Policy and Conservation Act § 461, 12 U.S.C.A. §1904 (note (Supp. 1977) ("EPCA"). 1/ Accordingly, since the Administrator can promulgate procedures necessary to enable him to carry out his functions under the FEAA, and since one of his functions is to administer the price and allocation regulations promulgated under both the EPAA and the EPCA, the Administrator can promulgate regulations setting forth compliance procedures necessary for the enforcement of FEA price and allocation regulations.

Two of the compliance procedures established by the FEA are the issuance of NOPV's and remedial orders to resolve compliance actions. Under Sections 205.2 and 205.191, the FEA's regulations speak, respectively, of remedial orders and NOPV's in precisely the same terms as had the CLC in its rules adopted pursuant to the authority of ESA Section 203.

As will be discussed in detail in a subsequent section, a firm may seek judicial review of a remedial order. In only one case, however, in which a recipient of a remedial order has sought judicial review has the authority

---

1/ Although the EPCA was signed on December 22, 1975, six days after the EPAA expired, Congress specifically intended for the EPCA to be effective retroactively to December 15, 1975. EPCA § 463, 12 U.S.C.A. §1904 (note) (Supp. 1977). Therefore, there was no break in the effectiveness of the regulations promulgated under the EPAA.

of the FEA to issue remedial orders been challenged. Shell Oil Co. v. Zarb, C.A. No. 76-52 (D. Del.) That case is currently pending in the United States District Court for the District of Delaware. Although briefs have been filed with the Court by both parties, no decision has yet been rendered in that case. In other litigation, the federal district courts have upheld remedial orders which were issued by the FEA when they have been shown to be based upon substantial evidence. See, e.g., Wentz Heating and Air Conditioning Co. v. FEA, 410 F. Supp. 1155 (D. Nev. 1976); and Banks Enterprises, Inc. v. FEA, ___ F. Supp. ____ (D. Wyo., 1976).

As indicated above, the FEA's authority to issue NOPVs and remedial orders derives in part from authority originating in the Cost of Living Council which was redelegated to the Federal Energy Office following the enactment of the EPAA in late 1973 and, ultimately the FEA. However, the Cost of Living Council did not use a consent order procedure in connection with its compliance and enforcement activities. The addition of the consent order to the panoply of FEA's enforcement procedures originated in a Notice of Proposed Rulemaking which the agency issued on May 9, 1975. 40 Fed. Reg. 20956 (May 14, 1975). In explaining the reasons for the proposed addition of the consent order proceeding, the FEA stated that:

> "In the past, many firms which have been under investigation by the FEA have offered for various reasons to undertake that remedial action which would have been ordered by the FEA if the proceeding had progressed to the issuance of a remedial order, and the FEA has in many cases accepted such orders of settlement as being in the public interest.
>
> Those settlements have ordinarily been formalized in written agreements which the FEA believes are binding on the parties and have the same force and effect as a final order of the agency. However, such written agreements have never been expressly provided for in the procedural regulations.

> The absence of a consent order procedure in the FEA regulations has created some uncertainty as to the status of outstanding compliance agreements and has resulted in certain undesirable inconsistency in the use of voluntary settlements of compliance cases." Id. at 20957.

The present regulations governing the procedure for consent orders were published by the FEA in final form at the conclusion of the rulemaking on August 22, 1975. 40 Fed. Reg. 36760 (August 22, 1975); 10 C.F.R. 205.197. Section 205.197 reads in pertinent part as follows:

> (a) Notwithstanding any other provision of this Subpart, the FEA may at any time resolve an outstanding compliance investigation or proceeding, or a proceeding involving the disallowance of costs pursuant to § 205.194 of this Subpart, with a consent order. A consent order shall be the exclusive means besides a remedial order for resolving compliance proceedings in which the FEA has issued a notice of probable violation or a notice of proposed disallowance . . . . A consent order shall, . . . contain a written statement setting forth the relevant facts forming the basis for the order.
>
> (b) A consent order is a final order of the FEA having the same force and effect as a remedial order issued pursuant to §205.194, and may require one or more of the remedies authorized by §205.195 and §211.84(d)(3). . . .

As is the case with the other formal enforcement procedures which the FEA adopted from the CLC, the Congress was clearly aware of the fact that the FEA has also been using consent orders since the promulgation of 10 C.F.R. 205.197 in August 1975. In view of the fact that the Congress has reenacted the FEA's enabling legislation on the several subsequent occasions enumerated above without specifically indicating its disapproval of the practice, it can be concluded that the use of consent orders has been found to constitute a proper exercise of the agency's statutory authority. Regarding consent orders as "compliance procedures" also implicates the FEA's authority under FEAA Section 7(c) as discussed above.

C. Enforcement Proceedings.

1. NOPVs

The first step in a formal enforcement proceeding is the issuance of a Notice of Probable Violation (NOPV). Section 205.190(b) of the FEA's Administrative Procedures and Sanctions Regulations provides that:

> "When any report required by the FEA or any audit or investigation discloses, or the FEA otherwise discovers, that there is reason to believe a violation of any provision of this chapter, or any order issued thereunder, has occurred, is continuing or is about to occur, the FEA may conduct proceedings to determine the nature and extent of the violation and may issue a remedial order thereafter. The FEA may commence such proceeding by serving a notice of probable violation or by issuing a remedial order for immediate compliance." 10 C.F.R. 205.190(b); 39 Fed. Reg. 32262 (September 5, 1974).

As defined in Section 205.2, the term "notice of probable violation" means "a written statement issued to a person by the FEA that states one or more alleged violations of the provisions of this chapter or any order issued pursuant thereto." An NOPV is to be issued only at the conclusion of a significant stage of an investigation and is designed to serve as a formal statement in which a person is apprised of the nature of the violation which he has allegedly committed. Wall Street Journal, 2 FEA Par. 80,558 (March 21, 1975). The NOPV also informs the person of his opportunity to respond to the charges. The FEA has stated that, in order to satisfy due process requirements:

> ". . . the charges as specified in the NOPV must be set forth with sufficient particularity so as to inform the recipient of the specific course of improper conduct in which he has allegedly engaged and provide him with sufficient information with respect to the allegations so that he may prepare a response to the charges." Wall Street Journal, supra.

The FEA Regulations provide that a person to whom an NOPV is issued may file a reply within ten days of its service. 10 C.F.R. 205.191(b).

If no reply to the NOPV is filed within the ten day period and the FEA has not granted an extension of time in which to respond, the person to whom the NOPV is issued is deemed to have conceded the accuracy of the factual allegations and legal conclusions set forth. 10 C.F.R. 205.191(f). After the expiration of the ten day period specified, if the FEA concludes that no violation has occurred, is continuing, or is about to occur, or that the issuance of a remedial order would not otherwise be appropriate, the NOPV is rescinded. 10 C.F.R. 205.191(g). Since it is not a final agency action, an NOPV is not subject to appellate review. See Getty Oil Co., 5 FEA Par. 80,575 (March 16, 1977).

2. Remedial Orders

Following the issuance of an NOPV, if the agency concludes that a violation has occurred, the next step in the formal enforcement proceeding is the issuance of a remedial order to the firm. 10 C.F.R. 205.192(a). A remedial order, as defined in Section 205.2, is "a directive issued by the FEA requiring a person to cease a violation or to eliminate or to compensate for the effects of a violation, or both." A remedial order directs a firm to take a specific action in order to remedy a particular violation. The remedial order which is issued will normally contain much of the same information that was included in the NOPV which preceded it, summarize the arguments which the firm presented in its response, if applicable, and make findings of fact and conclusions of law with respect to all of the elements that are essential to support the determination that a violation has occurred.

In order to ensure that a firm is fully informed of the basis for the charges against it, the FEA has determined that a remedial order must set forth the relevant facts and the legal basis of the order. 10 C.F.R. 205.192(a).

To avoid any violation of a party's right to due process of law, the FEA has held that:

> "[w]hile it is certainly not required that an FEA remedial order inlude a recital of all of the evidence which leads to a determination that a violation of FEA Regulations has occurred, such an order should contain a reasonably complete indication of the reasons which lead the FEA to reach a particular conclusion and the factual findings which support that conclusion. . . .
>
> The factual evidence [should be] sufficiently specific to afford the appellant and any reviewing body a clear understanding of the basis for the determination which was reached." Koch Industries, Inc., 2 FEA Par. 80,580 (May 2, 1975) at 90,763-4.

The United States Temporary Emergency Court of Appeals has also commented upon the requirement that a remedial order contain the relevant facts and legal basis of the order:

> "[Section 205.192(a)] obviously contemplates the recitation of greater facts justifying the imposition of penalties for the violation alleged in the Remedial Order than would be set forth in a Notice of Probable Violation. Section 205.19 of 10 CFR, which governs the issuance of Notices of Probable Violations, sets forth no such requirement of a written opinion. Actually, 10 CFR §205.191 provides for the party an opportunity to request a hearing. The purpose of such provisions is quite clear. Before issuing a Remedial Order with which compliance is mandatory, the FEA must gather all facts and information available as to the alleged violation and allow the party an opportunity to present its side in a reply letter and at a conference with the FEA. These additional fact findings then may or may not constitute facts justifying the issuance of a Remedial Order; but if they do, 10 CFR §205.192(a) requires the statement of all such relevant facts supporting the issuance of the Remedial Order." Atlantic Richfield Company v. Frank G. Zarb, et al., 532 F. 2d 1362 (T.E.C.A. 1976).

In a remedial order the FEA will also specify the corrective measures which should be taken in order to remedy the violations which have been found to exist. See Coastal States Gas Corporation, 3 FEA Par. 80,637 (May 27, 1976). See also, Section VI below. It should also be noted that a remedial

order is generally effective upon its issuance, unless it is stayed. 10 C.F.R. 205.192(b). Finally, a remedial order may be referred at any time to the Department of Justice for appropriate action in accordance with the provisions of 10 C.F.R., Part 205, Subpart P. 10 C.F.R. 205.192(c).

In certain emergency circumstances, the FEA may intitiate an enforcement proceeding by issuing a remedial order for immediate compliance. Under the provisions of Section 205.193(a), the FEA may issue a remedial order for immediate compliance if it finds that:

(1) there is a strong probability that a violation has occurred, is continuing or is about to occur;

(2) irreparable harm will occur unless the violation is remedied immediately; and

(3) the public interest requires the avoidance of such irreparable harm through immediate compliance and waiver of the procedures afforded under §§205.191 and 205.192.

These findings, as well as a written statement of the relevant facts and the legal basis for the order, must be included in the remedial order for immediate compliance. 10 C.F.R. 205.193(b). The FEA is required to serve a remedial order for immediate compliance upon the person to whom it is issued by telex or telegram, with a copy sent by registered or certified mail. Id.; see also Marathon Oil Co., 2 FEA Par. 80,669 (August 29, 1975). A remedial order for immediate compliance is effective upon issuance and since it is generally intended for use in emergencies, it is not preceded by the issuance of a NOPV. However, Section 205.193(d) does provide that if the FEA determines, after having issued an NOPV, that the criteria specified in Section 205.193(a) are satisfied, the agency may issue a remedial order for immediate compliance even though the ten day period for responding to an NOPV provided for in Section 205.191(b) has not elapsed.

3. Notices of Proposed Disallowance and Orders of Disallowance

In addition to the general enforcement procedures which are discussed above, the regulations also provide a specific procedure pursuant to which the FEA may issue Notices of Proposed Disallowance (NOPD) and Orders of Disallowance (OD) to integrated refiners with respect to the allocation of costs between the affiliated entities which compromise the regulated firm. Under Section 3(b)(2)(A) of the EPAA, the FEA is directed to promulgate price regulations which generally provide for the passthrough of net increases in the cost of crude oil on a dollar-for-dollar basis. For purposes of the FEA price regulations which are applicable to refiners, transactions between affiliated entities may be used to calculate increased costs. 10 C.F.R. 212.83(b). However, Section 212.83(b) also provides that "whenever a firm uses a landed cost which is computed by use of its customary accounting procedures, the FEA may allocate such costs between the affiliated entities if it determines that such allocation is necessary to reflect actual costs of these entities or the FEA may disallow any costs which it determines to be in excess of the proper measurement of costs." 41 Fed. Reg. 15330 (April 12, 1976), [emphasis added]. 1/ In Section 212.84, the FEA has prescribed the standards that will be applied in determining whether landed costs computed by refiners with respect to crude oil imported from foreign affiliates will be disallowed.

1/ Although the provisions of Section 212.83(b) permit the disallowance of any costs which are found to be excessive, the FEA has confined the use of disallowance proceedings to the context of "transfer pricing" where domestic refiners account for the cost of imported "equity" crude oil which they purchase in transactions with an affiliated international entity.

The regulatory provisions which govern the issuance of an Order of Disallowance are set forth in 10 C.F.R. 205.194 of the FEA Procedural Regulations. Pursuant to the provisions of those regulations, the FEA formally initiates a disallowance proceeding by issuing a Notice of Probable Disallowance (NOPD) to a particular firm. Section 205.194(a). Section 205.194(c) requires that the NOPD contain a recitation of facts relevant to the act or transaction in question. Within ten days of service, or a longer period of time if good cause is shown, the recipient is entitled to submit a written response to the NOPD, Section 205.194(b), and to request a conference regarding the matters alleged. Section 205.194(e). If the recipient fails to respond in a timely manner to the NOPD, the firm is deemed to concede the factual allegations and the legal conclusions contained therein, and the NOPD automatically becomes an Order of Disallowance. 10 C.F.R. 205.194(f). If the recipient does submit a reply, the FEA may, after consideration of the response, issue an approriate order. 10 C.F.R. 205.194(g).

If the FEA finds that for any reason the issuance of an Order of Disallowance would not be appropriate, or that the amount of the proposed disallowance should be modified, the agency is required to issue a written order indicating that the NOPD is rescinded or modified, and setting forth, where appropriate, any modification and the reasons therefor. Section 205.194(h). An Order of Disallowance is effective upon issuance and remains in effect unless stayed, suspended, modified or rescinded, notwithstanding the filing of an application for modification or rescission. Section 205.194(i). An Order of Disallowance is an action from which an administrative appeal may be taken pursuant to 10 C.F.R., Part 205, Subpart H. However, no appeal may be taken from an NOPD, since it is not a final agency determination.

The FEA has issued two sets of NOPDs. In 1975, the agency issued NOPDs to 43 refiners, alleging that those firms had benefitted from the recovery of excessive amounts of landed crude oil costs as a result of transfer pricing transactions with their respective international affiliates. In April 1977, the FEA rescinded the earlier NOPDs and issued a revised series of NOPDs to 20 firms, each of which was accompanied by a proposed Order of Disallowance which would become effective if no reply were made, or if the FEA ultimately deemed the issuance of an order of disallowance to be appropriate. To date, 17 of the 20 firms have responded to the notices, challenging their validity and the particular factual allegations contained therein. The three remaining firms have been granted extensions of time to reply and are expected to submit comments in the near future. Conferences involving the NOPDs are being scheduled with those firms which have requested an opportunity to make an oral presentation. No Orders of Disallowance have been issued as yet by the FEA, nor have any proceedings involving proposed disallowances been the subject of administrative appeal or judicial review.

4. Consent Orders

In addition to the mechanisms discussed above for securing compliance with FEA regulatory requirements, the FEA's Administrative Procedures and Sanctions Regulations also provide for the issuance of consent orders. The term "consent order" is defined in Section 205.2 as "a document of agreement between FEA and a person prohibiting certain acts, requiring the performance of specific acts or including any acts which FEA could prohibit or require pursuant to §205.195." As discussed briefly above, a consent order is intended to operate as a final voluntary settlement of

an enforcement proceeding, resolving an outstanding dispute. The consent order procedure provides a means for finalizing a compliance action in which a party may be willing to undertake specific remedial action while not formally conceding that it has in fact violated the provisions of the FEA Regulations.

When a proposed consent order involving sums of at least $500,000 has been signed by both the person to whom it is addressed and the FEA, the FEA will publish a notice of the proposed consent order in the Federal Register and provide at least a 30 day period of time for public comments. 10 C.F.R. 205.197(c). Once the comment period has elapsed, the FEA may withdraw its agreement to the proposed consent order, attempt to negotiate a modification, or issue the order as proposed. Id. Consent orders which are modified as a result of public comment are often republished in the Federal Register for further comment. The FEA is required to publish in the Federal Register a notice of any action which is taken with respect to a proposed consent order. Id.

A consent order is a final order of the agency, having the same force and effect as a remedial order or an order of disallowance. 10 C.F.R. 205.197(b). It becomes effective no sooner than 30 days after its publication in the Federal Register, although the FEA may make a consent order effective immediately if deemed necessary in the public interest. Id. However, a consent order involving a sum which is less than $500,000, exclusive of penalties, will become effective when it is signed by the person to whom it is issued and the FEA and will not be subject to the provisions relating to publication of notice in the Federal Register unless the FEA determines otherwise. Id. A consent order may not be appealed and each consent order

into which the FEA enters must contain an express waiver of a right to appeal or a right to judicial review. Id. Although a consent order is not subject to appellate review the FEA's Office of Exceptions and Appeals stated in Norman Waddell, 5 FEA Par. 83,090 (February 28, 1977), that:

> ". . . in certain instances . . . where a claim is made in the context of an Application for Exception that a serious hardship or a gross inequity arises as a result of FEA regulations which in turn have been taken into account in a Consent Order, it may nevertheless be useful for the FEA to exercise its discretion to consider the effect of the Consent Order on the applicant."

A consent order, therefore, may be modified or rescinded at the discretion of the FEA upon petition by the person to whom it was issued. 10 C.F.R. 205.197(d). The FEA may also rescind a consent order upon the discovery of new evidence which is materially inconsistent with the information upon which the agency accepted the consent. Id. Finally, if it appears to the FEA that the terms of a consent order which has become effective have been violated, the agency may refer the matter to the Department of Justice for appropriate action in accordance with 10 C.F.R., Part 205, Subpart P. 10 C.F.R. 205.197(f).

Thus, it may be seen that FEA currently uses consent orders in much the same way as it uses remedial orders to resolve outstanding compliance proceedings. Like remedial orders, the remedies that may be imposed in a consent order include those authorized under Sections 205.195 and 212.84(d)(3): refunds of overcharges, roll backs in prices, compensation to third parties for administrative expenses, disallowance costs, and such other remedies as

the FEA determines to be necessary to eliminate or to compensate for the effects of a violation. Each of these remedies serves the dual purpose of relieving a violator of excessive recoveries and of compensating consumers of petroleum products for injury arising from specific violations of FEA regulations.

The regulations describing appropriate remedies, however, do not suggest that FEA can enter into a consent agreement providing for remedial action which does not compensate for the full amount of a violation or which does not fully disgorge a violator of unlawful overcharges. With respect to refunds which may be ordered, Section 205.195 specifically provides that they be "equal to the amount (plus interest) charged in excess of those amounts permitted under Part 212," although the intent may be that the remedy may require refunds up to such amount. In view of the regulatory language suggesting that refunds be equal to the amount of overcharge, and in view of the stated compensatory purposes of FEA remedial actions, FEA does not presently compromise the amount of a violation when entering into a consent order. Indeed, the agency has taken the position in the FEA Compliance Manual that remedies for overcharges, as opposed to a penalties, may not be compromised:

> It is extremely important to distinguish between the remedy imposed for a particular violation (e.g., refund, rollback, bank adjustment) and the penalty that may be warranted as a result of the violation. The compliance remedy corrects the harm caused by the violation. Such a remedy is not, however, and should not be considered a penalty. Similarly, a penalty is not a substitute for a remedy and should not be considered a "refund" to the U.S. Treasury on behalf of victims that are not identifiable. A penalty is a form of punishment which does not directly aid the victims of the violation but is

> designed as retribution and a deterrent against future non-compliance with FEA's regulatory requirements. The FEA can enter a binding order imposing a remedy, but it can only "compromise" a civil penalty. Under no circumstances can a remedy be "compromised." FEA Compliance Manual, §5.700.01. (Emphasis supplied).

Although FEA does not presently compromise the amount of a violation in a consent order, experience in the enforcement of FEA regulations has suggested that the ability to enter into a compromise to settle a compliance proceeding would enhance FEA's compliance program. At present, FEA compliance procedures do not recognize certain enforcement strategies that are available to most prosecutors. Specifically, in resolving compliance cases, FEA does not presently take into account such considerations as the likelihood of ultimate success on the merits in those cases where a legal or factual question is genuinely in dispute; the anticipated delay before a final resolution of a case is obtained; and of the time and manpower necessary to resolve the issues in a case. Paul J. Mode, Jr. has highlighted FEA's lack of enforcement flexibility in his comment to the Compliance Task Force:

> Even if the [FEA] believed it had only a 50 percent chance of eventual success and faced four years of litigation, it would reject an offer by a regulated firm to settle immediately by paying 75 percent of the refund sought; as set out above, the FEA's policy is that "[u]nder no circumstances can a remedy be 'compromised.'"

In effect, FEA currently is expected to seek recovery for the full amount of a violation even though, after weighing all practical and legal considerations, the agency might reasonably conclude that the public interest would be better served through the compromise of a violation.

Recognizing public benefits that can derive from the ability to compromise civil penalties, the question to be addressed is whether FEA could now amend its regulations to establish procedures for the compromise of the violation amount. Under the broad FEA authorities to develop compliance procedures, it could be argued that Congress intended for FEA to develop procedures that the agency deems necessary to administer the price and allocation programs under the EPAA and the EPCA. Indeed, FEA itself developed its current compliance proceedings which include notices of probable violation, remedial orders, and consent orders. Having originated the regulations governing consent orders, FEA ought to be able to amend those regualtions in light of its enforcement experience and the broad grant of authority under which it operates. Moreover, since an action brought by the Department of Justice on behalf of FEA in a federal district court to enforce a remedial order can be resolved through a settlement involving a compromise, it would not be unreasonable for FEA compliance personnel to exercise similar authority to effect a compromise of violation amounts in the negotiation of a consent order.

Although FEA's authority to establish enforcement procedures is very broad, other sections of the FEAA indicated a Congressional intent to establish separate procedures by which remedial action ordered by the agency could deviate from actual violation amounts. Section 21 of the FEAA, 15 U.S.C. §780 (1976) requires the Administrator of FEA to establish an Office of Private Grievances and Redress to consider requests for relief from FEA orders, rules, or regulations:

> (b) Any person, adversely affected by any order, rule, or regulation issued by the Administrator in carrying out the functions assigned to him under this Act, may petition the Administrator for special redress, relief, or other extraordinary assistance, apart from, or in addition to, any right or privilege to seek redress of grievances provided in section 7.

Section 7 of the FEAA, referred to in the above-quoted section, reads in part as follows:

> (d) Any office or agency authorized to issue the rules, regulations or orders described in paragraph (A) [having the effect of a rule] shall provide for the making of such adjustments, consistent with the other purposes of this Act, as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens and shall, by rule, establish procedures which are available to any person for the purpose of seeking an interpretation, modification, rescission of, exception to, or exemption from, such rules, regulations, and orders. 15 U.S.C. §766(i)(1976).

Pursuant to these two sections, regulations were promulgated establishing procedures for obtaining exception relief (10 C.F.R. §205, Subpart D), exemption relief (10 C.F.R. §205, Subpart E), and modification or rescission of an FEA order (10 C.F.R. §205, Subpart J). Through these procedures, remedial action which is ordered in a compliance proceedings can be modified in those cases where a violator can demonstrate special hardship or inequity. Since Congress specifically provided for these procedures by which the amount of a violation can be reduced or otherwise modified, some may question whether it intended for FEA's compliance procedures to include authority to compromise the violation amount in a consent order.

FEA procedures to compromise the amount of a violation, if implemented, however, would not conflict with the standards applied by the Office of Exceptions and Appeals or by the Office of Private Grievances and Redress. In compromising a violation amount, FEA would weigh the benefits to the consumer of complete compensation for harm resulting from a violation, against such practical considerations as the strength of FEA's case, the wisdom of committing the necessary agency resources to ultimately resolve the issues in a case, and the likelihood that an FEA order in a particular case would be upheld in an appeal to the federal courts. These practical considerations do not focus upon hardship or inequity to the violator — the prerogatives of FEA's Office of Private Grievances and Redress. Rather, they focus upon factors related to the impact of continued enforcement proceedings upon the agency and would be designed to enhance compliance efforts by giving FEA more flexibility to develop enforcement strategies.

Many potential objections to FEA's exercise of compromise authority could be overcome by the implementation of strict procedural safeguards to assure that the ability to enter into a compromise would not be abused. For example, the text of the consent order in which the amount of violation has been compromised could explain the positions taken both by FEA and by the violator. Such a detailed explanation would serve two functions. First, the requirement to list significant considerations would assure

that FEA compromised the amount of a violation only in those cases where a reasonable rationale could be demonstrated for doing so. Second, as these considerations would be published in the Federal Register as part of the notice of a proposed consent order -- an existing practice with respect to which the Task Force has stated its views above -- interested persons could be notified that FEA intended to compromise the amount of a violation and could submit relevant comments to be considered by FEA before the compromise became final.

The major criticism of implementing the authority to compromise the amount of a violation is that the FEA is neither the injured party nor the direct beneficiary of restitution. Although a compromise which would neither fully compensate for harm caused by a violation nor fully disgorge the violator of its unjust enrichment, since a compromise would not prejudice private causes of action against a violator nothing would prevent an aggrieved person from bring a civil suit against the violator to seek full recovery for the violation.

D. Retroactive Amendments to FEA Regulations.

In August 1976, the Congress amended Section 7 of the Federal Energy Administration Act of 1974, Pub. L. 93-275, by adding a provision which limited the authority of the Administrator of the FEA to retroactively enforce FEA rules and regulations against those engaged solely in the business of marketing petroleum products. The amendment, known as the Findley Amendment, provides:

"The Administrator or his delegate may not exercise discretion to maintain a civil action (other than an action for injunctive relief) or issue a remedial order against any person whose sole petroleum industry operation relates to the marketing of petroleum products, for any violation of any rule or regulation if —

(1) such civil action or order is based upon retroactive application of such rule or regulation or is based upon a retroactive interpretation of such rule or regulation; and

(2) such person relied in good faith upon rules, regulations, or rulings interpreting such rules or regulations, in effect on the date of the violation." Energy Conservation Act, Pub. L. 94-385, Section 106 (August 14, 1976) (ECPA).

According to the Conference Report which accompanied the ECPA, the Congress intended that this provision would "provide relief to businesses which have been subjected to seemingly endless changes in rules and regulations by the FEA and to penalties arising from those changes made after the original effective date of such rules and regulations." Fed. Energy Guidelines, CCH ¶10,521, at p. 10,482. The conferees noted that the retroactive application of subsequent amendments to rules and regulations has frequently subjected small marketers to unnecessary and unjust burdens.

The principal issue in any case which involves the application of a regulatory provision which has been amended, and which is being applied to a prior period, is whether the change constitutes a clarification of the manner in which a rule or regulation was always intended to apply or, on the other hand, constitutes a significant deviation from prior law. In the Conference Report, the conferees acknowledged the distinction between

substantive changes and mere clarifications. The conferees stated that the amendment is not intended to "provide marketers with the means to challenge all enforcement actions based upon arguably ambiguous rules, regulations or rulings or upon clarifying amendments thereto. It is intended to apply where the agency has officially taken one position then changes its mind and takes another." Id.

In several previous Decisions and Orders, the FEA Office of Exceptions and Appeals has considered the retroactive application of changed regulations and has discussed the difference between a change and a clarification. In Phillips Petroleum Co., 2 FEA Par. 80,599 (May 30, 1975), for example, Phillips contended that the September 1, 1974 amendment to 10 C.F.R. 212.83(e) constituted a substantive change in the regulations and that the application of the amended regulations to the firm during a period prior to September 1, 1974 was therefore improper.

In considering this contention, the FEA noted that the September 1, 1974 amendment merely made explicit a requirement that had previously been implicit in the regulations. The FEA stated that if Phillips' interpretation of the regulatory provisions as they existed prior to September 1, 1974 were accepted, the result of the application of the provisions during that period would be contradictory to the clear intent of the provisions of Section 212.82 and 212.83. Moreover, Phillips' interpretation would also result in a conflict with the provisions of Section 4(b)(1)(F) of the EPAA.

In view of these considerations, the FEA determined the Phillips' contention should be rejected. Nevertheless, the FEA did consider

whether a showing that the FEA regulatory requirements had been retroactively applied would be sufficient, by itself, to establish that an error had occurred as a matter of law. In doing so, the FEA discussed at length the concept of retroactivity in administrative law and surveyed several important court decisions, including Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947), which held that within certain bounds agencies should be permitted to adopt rules with retroactive effect. One of these decisions, Retail, Wholesale & Dep't Store U. v. NLRB, 466 F. 2d ___ (D.D.C., 1972), listed five factors which the FEA applied to the situation presented by the Phillips case in order to determine the validity of the retroactive application of the regulatory provisions. These five factors are:

> "(1) whether the particular case is one of first impression;
>
> (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law;
>
> (3) the extent to which the party against whom the new rule is applied relied on the former rule;
>
> (4) the degree of the burden the retroactive order imposes on a party; and
>
> (5) the statutory interest in applying the new rule despite the reliance of a party on the old standard." Philips Petroleum Co., supra, at p. 80,833.

These factors appear to express the same position which the congressional conferees stated with respect to Section 106 of the ECPA in amending Section 7 of the Federal Energy Administration Act of 1974. Thus, retroactive changes which indicate that the agency has changed settled law are

condemned, but retroactive changes which settle an area of law that was formerly unsettled are generally condoned.

The rationale which the FEA set forth in the Phillips decision has been followed in subsequent cases in which similar issues have been raised. Alpine Butane Co., Inc., 5 FEA Par. _____ (May 27, 1977); Standard Oil Co. of California, 5 FEA Par. 85,043 (March 9, 1977). In Alpine Butane, the firm attempted to buttress its claim that the regulatory provision has been changed and was therfore being unjustifiably applied to it by contending that the retroactive action by the FEA contravened the provisions of Section 106 of the ECPA. In determining that the argument advanced by Alpine Butane was without merit, the FEA utilized the rationale which it had established in the Phillips decision and concluded that the Act had not been violated since the change in the regulation was only a clarification. Consequently, the FEA found that the application of the clarified provision to the firm during a period of time prior to the clarification did not involve any retroactive action by the agency.

Although Section 106 of the ECPA clearly provides that it is applicable only to those persons whose sole petroleum industry operation relates to the marketing of petroleum products, the FEA has applied the principles of Section 106 in other cases. In Gulf Oil Corp., 5 FEA Par. 80,593 (April 8, 1977), the firm asserted that the manner in which a remedial order applied the term "transaction" to the factual situation presented in that case represented a material departure from prior FEA practice and that the FEA had, therefore, engaged in a rulemaking without complying with applicable statutory requirements. The FEA determined,

however, that this assertion was incorrect since a review of the applicable regulations, and the subsequent ruling which interpreted the term "transaction," indicated that the remedial order was consistent with the language of the regulations to which it referred. It appears, therefore, that even if Section 106 had been applicable in the Gulf case, the FEA would not have concluded that the remedial order violated that section since it found that the order was not based upon a retroactive interpretation of the regulations.

IV. FEA ADMINISTRATIVE PROCEEDINGS -- REMEDIES

As previously discussed, the Congress has delegated to the President broad authority to promulgate the regulations which are necessary to promote to the maximum extent possible the national energy objectives set forth in Section 4(b)(1) of the EPAA. In this regard, the Congress stated that "Administrative flexibility is a prerequisite and, consequently, the Conference Committee has decided to recommend that the Executive be assigned the responsiblity for crafting the program pursuant to congressionally defined (through generally stated) objectives." H.R. No. 93-531, 93rd Cong., 1st Sess., U.S. Code Cong. & Ad News 2582, 2589 (1973). Section 5 of the EPAA inferentially incorporates the authority previously set forth in Section 203 of the Economic Stabilization Act of 1970 (the ESA) with respect to the regulation of the petroleum industry. And, ESA Section 203 states, the "The President is authorized to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations . . . ." In the three and one-half years since the EPAA was enacted, the federal courts

have also recognized the need for a program marked by the exercise of broad discretion. See, e.g., Powerine Oil Co. v. FEA, 536 F.2d 378 (T.E.C.A. 1976); Delta Ref. Co. v. FEA, ___ F. Supp. ___, Fed. Energy Guidelines Par. 26,069 (D.D.C. February 22, 1977); Air Transport Assn. of America v. Federal Energy Office, 381 F. Supp. 437 (D.D.C. 1974), aff'd, 520 F.2d 1339 (T.E.C.A. 1975).

The type of broad authority delegated by the Congress and upheld by the courts extends, of course, to the issuance of orders which are necessary to insure compliance with the FEA mandatory petroleum price and allocation regulations. In designing the procedures and mechanisms necessary to insure compliance with its general regulatory requirements, the FEA has utilized a number of remedial actions in order to prevent or correct violations of the regulatory scheme. These remedies may include price reductions, refunds of previous overcharges (plus interest), and "such other actions as the FEA determines is necessary to eliminate or to compensate for the effects of a violation. . . ." 10 C.F.R. 205.195(a).

As a general rule, where the FEA determines that a violation of the price regulations has occurred, the remedy which is prescribed is intended insofar as possible to make full restitution to the parties who were injured by the violation. Thus, in a decision involving an appeal of a remedial order issued to the Shell Oil Company, the Office of Exceptions and Appeals stated that the particular remedy which a firm is directed to undertake to correct for

previous overcharges should be designed to further the following objectives:

(1) The benefit of the remedial action should inure wherever possible to the category of purchaser that was overcharged;

(2) Where ultimate consumers were overcharged the manner of restitution should be designed to result in actual price reductions to the category of consumers;

(3) The refunds or price reductions ordered should be implemented so as to avoid market disruptions;

(4) The firm that violated the FEA Regulations should not be permitted to benefit from the remedial action it undertakes by enhancing its market share or good will. Shell Oil Co., 3 FEA Par. 80, 545 (January 6, 1976)

In addition to the principles stated in the Shell Oil Co. decision, the Office of Exceptions and Appeals has also recognized the fact that the remedy prescribed in a remedial order should not have such a severe adverse impact upon the violator as to threaten its continued economic viability, and nullify its capability to effect restitution for the violation. Braden-Zenith, Inc., 5 FEA Par. 80,552 (January 14, 1977). Where it is not possible to design a specific remedial action which will advance all of these objectives, the FEA must exercise its discretion to determine the manner in which the various objectives will best be furthered in view of the facts of each case. In the sections which follow, the specific remedies which the FEA has utilized in specific cases are described in greater detail.

A. Refunds of Overcharges.

The most common remedy utilized by the FEA to redress a violation of the price regulations is to require refunds. Refunds are rebates given to identifiable customers to compensate them for past overcharges. The refund may be in cash or take the form of a credit invoice or memorandum. The refund procedure is especially desirable because it insures that those customers who have been harmed by overcharges will receive direct restitution. Since the refund is such an effective method of redressing a violation, it is generally used whenever the customers which have been overcharged are identifiable. In directing refunds to be made, the FEA requires that the firm making refunds pursuant to an FEA order notify by letter all of its customers which have been overcharged as to the purpose of the refund, the dates that overcharges occurred, the type and amount of products on which the overcharges occurred, and the manner in which the amount of the refund to be made was calculated. The firm which has been directed to make refunds is also required to certify to the FEA that the requisite refunds have been made to its customers. FEA Compliance Manual, CCH Fed. Engergy Guideliens, Par. 54,951.

B. Price Rollbacks.

The FEA may also direct a firm to prospectively reduce the prices which it charges for covered products. Price rollbacks are designed to ensure that the public will obtain a current price reduction to offset the previous overcharge avenues obtained by the violator. These rollbacks

are generally effected by ordering a firm to charge a specific price level which is less than the maximum lawful price which can be charged for the product concerned under the regulations. Where a firm is already selling covered products at less than maximum lawful prices, a rollback is generally ordered from its current selling price as of the effective date of the rollback requirement. Where the FEA determines that the current selling price is not an appropriate base from which the rollback should be made (e.g., where the seller raised or might raise its prices in anticipation of the rollback), some other prior selling price is used so as to make the rollback meaningful and effective.

The FEA generally utilizes a rollback of prices as a remedy in cases in which a firm has been found to have overcharged customers for a covered product, but the individual customers which have been overcharged are not identifiable. See Shell Oil Co., supra. Since a direct cash refund is not possible in cases in which the overcharged customers are not identifiable, the revenues which the firm improperly obtained are returned to the marketplace in the form of a price rollback. However, the rollback is designed to prevent the violating firm from gaining a price advantage over its competitors. As a general rule, in order to prevent the violating firm from gaining a significant price advantage over its competitors, the rollback which is ordered is limited to a reduction in price of gasoline, for example, of not more than two cents per gallon. FEA Compliance Manual, CCH Fed. Energy Guidelines, Par. 54,952.

C. Reimbursement of Interest.

In cases in which the FEA determines that a firm has overcharged its customers in the sale of covered products, it is appropriate that the FEA also determine the actual costs to the customers of those overcharges and require that he receive full compensation for those costs. Obviously, the costs to a firm which was overcharged not only includes the amount of the overcharge itself, but also an amount necessary to compensate the firm for the loss of the use of those funds since the time of the overcharge. The FEA therefore requires firms which are found to be in violation of the provisions of the FEA Price Regulations to calculate an amount representing the interest on the amount of overcharges, computed from the date of the overcharges to the date of restitution, and to add this amount to the overcharges which are to be refunded. The FEA also requires the firms to file periodic reports with the FEA that state the amount of total violation and amount of interest refunded to that date through either direct cash refunds or price rollbacks. See Koch Industries, Inc., 2 FEA Par. 80,580 (May 2, 1975); Atlantic Richfield Co., 4 FEA Par. 80,536 (September 24, 1976), and General Crude Oil Co., 4 FEA Par. 80,552 (October 22, 1976).

In order to ensure uniformity of treatment in the calculation of the amount of interest to be refunded, the FEA considers the annual rate of interest applicable during the period of the violation to be the rate of interest which would have been imposed by the Internal Revenue Service in the computation of tax liability during that

period. Thus, a rate of 6% is applied to amounts outstanding before July 1, 1975, a rate of 9% is applied to amounts outstanding between July 1, 1975 and January 31, 1976 and a rate of 7% is applied to amounts outstanding during any period of time after February 1, 1976.

Interest is computed from the date of the overcharge to the effective date of restitution. However, in those cases in which the FEA determines that it is not practically possible to determine the specific date upon which an overcharge commenced, the FEA, may for the purpose of computing interest, treat all overcharges in a given month as having occurred on the last day of that month.

Since interest is always an integral part of refunds and rollbacks, it is included in every compliance action involving either of those remedies. The FEA attempts to impose interest in an equitable manner in order to make clear that it is not to be considered punitive in nature or an attempt by the FEA to assess civil or criminal penalties. FEA Compliance Manual, CCH Fed. Energy Guidelines, Par. 54,957.

D. Compensation to Third Parties for Administrative Expenses Incurred in Effectuating Remedies.

Pursuant to the provisions of Section 205.195(a), the FEA may also require a firm which has been found to have violated the FEA Regulations to compensate third parties for the expenses which those parties incur in effectuating the remedial action ordered by the FEA. This remedy is utilized primarily in circumstances in which the customers who have been overcharged must in turn pass through FEA ordered refunds or price rollbacks. In such cases, even though the customers of the violating

firm may have incurred administrative expenses in order to assure the effectuation of a complete and fair resolution of the compliance process, these customers will retain no benefit as a result of the resolution of the dispute. Therefore, in order to ensure that the customers of a violating firm are not unduly harmed by the agency's order, the FEA may direct that the respondent in the enforcement proceeding be ordered to make refunds, compensate its customers for the administrative expenses which they incur in passing through the refunded amounts to their ultimate customers. See 40 Fed. Reg. 40141 (September 2, 1975), and The Standard Oil Co., 4 FEA Par. 85,046 (December 6, 1976).

E. Ancillary Orders for the Pass-through of Refunds

Under the provisions of Section 205.195(b), the FEA may issue orders ancillary to a remedial order in which the recipient of a refund is required to pass through, either by means of direct refunds or price rollbacks, all or a portion of the refund to its customers. This remedy provides the means by which the FEA assures that refunds are channeled directly to the ultimate consumers who paid higher prices for covered products as a result of the initial overcharges. See 40 Fed. Reg. 40141 (September 2, 1975). See also The Standard Oil Co., 4 FEA Par. 85,046 (December 6, 1976); and Tenneco Oil Co., 5 FEA Par. 80,506 (December 21, 1976).

F. Adjustments to Banks of Unrecouped Product Costs

If a purchaser or an unidentifiable group of purchasers pays an unlawful price for covered prodcuts, FEA's action should result in a refund of the overcharged amount or a price rollback, as appropriate.

In those cases, the FEA has determined that a reduction of the seller's "bank" of unrecouped product costs does not constitute an appropriate administrative remedy. However, bank adjustments do constitute appropriate remedies under the following circumstances:

(1) To correct minor errors in computations; and

(2) To adjust a violation that consisted merely of an improper addition of costs to the "bank," but involved no actual pass-through of those costs to customers.

In addition, an FEA auditor may occasionally encounter other situations where it is in the best interests of all parties for FEA to permit a bank adjustment to remedy violative conduct. For example, when, during a pricing period, a firm has made relatively few sales of a product at too high a price and at the same time has sold the bulk of that product at prices less than its maximum lawful selling price. Because of the high prices on a few sales, the firm is precluded from banking increased unrecovered product costs for all sales made at less than its maximum lawful selling price. When these circumstances exist, substantial compliance can be achieved if the firm refunds (with interest) the excessive prices charged to the few customers and is allowed to recompute its bank based upon the revised prices. In situations involving more pervasive patterns of violative conduct, the firm is not given the alternative of making a bank adjustment. FEA Compliance Manual, CCH Fed. Energy Guidelines, Par. 54,953.

G. Correction of Business Practice.

The FEA Regulations provide that a firm must generally retain the normal business practices which it had during a specified base period. When a firm illegally changes its normal business practice, the FEA requries that the firm rescind the new business practice and either return to the earlier business practice or create a new business practice that does not violate the regulations. Examples of violations for which a correction of business practice would be appropriate are changes in credit policy, payment terms or business hours. FEA Compliance Manual, CCH Fed. Energy Guideliens, Par. 54,955. See also General Crude Oil Co., 4 FEA Par. 80,552 (October 22, 1976), and Atlantic Richfield Co., 3 FEA Par. 80,522 (December 12, 1975).

In addition, the FEA may require that excessive financial charges incurred by the injured party as a result of an improper change in business practices must be refunded to that party. An example of the use of this remedy arises where a firm's improper change in payment terms results in its customers incurring costs to obtain letters of credit prior to making purchases from the firm. In cases in which the letter of credit requirement is found to be a violation of the FEA Regulations, the FEA will order that the firm compensate its customers for the costs of obtaining the letters of credit. See example in Samples of Properly Formatted Remedial Order, FEA Compliance Manual, CCH Fed. Energy Guidelines, Par. 54,654.05.

H. Reallocation of Supplies.

When a firm violates the FEA Allocation Regulations by refusing to supply a base period volume to a customer or by not fulfilling other supply obligations under the regulations, the applicable remedy is a reallocation of product supplies. The firm which as been found to be in violation of the FEA Regulations is generally ordered to supply the customer in the future with not less than the volume of product to which it is entitled in accordance with the provisions of the regulations and, in addition, to provide any additional supplies which may be necessary to compensate the customer for any shortage in supply that it may have suffered in the past as a result of the violation. The latter remedy is not applied when the customer has been able to obtain adequate supplies from alternate sources during the period of the past violations. FEA Complaince Manual, CCH Fed. Energy Guideliens, Par. 54,954. See also Texaco Inc., 2 FEA Par. 80,701 (October 6, 1975). The remedy of a directed reallocation of supplies is also employed by the FEA in cases in which a firm has failed to comply with the provisions of the FEA's Crude Oil Allocation Program and is therefore ordered to sell crude oil to another firm in order to make restitution. See Texas Asphalt and Refining Co., 3 FEA Par. 80,617 (April 16, 1976).

I. Correction and Resubmission of Required Reports

The FEA requires many firms in the petroleum industry to submit reports on a variety of issues. When a firm fails to submit a required form, or fails to resubmit a corrected form as directed by the FEA,

the FEA may require that the firm submit the appropriate form to the agency within a specified time period. This remedy is used primarily with respect to the Form P-110-M-1 (formerly Form FEO-96), the Refiner's Monthly Cost Allocation Report. The FEA employes this remedy whenever the original report contains computational errors, when the company has simply failed to submit the required report, or when the FEA determines that corrections must be made on the form in connection with other remedial action which has been ordered by the FEA. FEA Compliance Manual, CCH Fed. Energy Guidelines, Par. 54, 956. See, e.g., Coastal States Gas Corp., 3 FEA Par. 85,020 (March 11, 1976); Coastal States Gas Corp., 3 FEA Par. 80, 637 (May 27, 1976); Tesoro Petroleum Corp., 5 FEA Par. 80,611 (April __, 1977); and Tenneco Oil Co., 5 FEA Par. _____ (June 17, 1977).

J. Revocation and Suspension of Allocations and Licenses Issued Under the Oil Import Program.

Under the provisions of 10 C.F.R., Part 205, Subpart T, the FEA Director of Oil Imports may revoke or suspend an oil import allocation or license issued pursuant to the provisions of 10 C.F.R., Part 213. An order revoking or suspending an allocation or license may be issued upon a finding that a firm has violated the terms of Proclamation No. 3279, as amended, the provisions of Part 213, or the provisions of allocations and licenses issued pursuant to Section 213. See, Section 205.250(b)(2). Cf., Algonquin Gas Transmission Co.; Texas Asphalt and Refining Co.; Time Oil Co., 5 FEA Par. 87,033 (April 8, 1977).

K. Other Remedies

Section 205.195(a) of the FEA Procedural Regulations further provides that the FEA may require a firm "to take such other actions as the FEA determines [are] necessary to eliminate or to compensate for the effects of a violation or any cost disallowance. . . ." Such other actions may include directing a firm to make refunds directly to any ultimate purchasers of the products involved, notwithstanding that those purchasers received the products from an intermediate distributor. This remedy is intended to insure that, in the event price controls expire and intermediate distributors are not required to pass-through refunds, the refunds may still be made directly to the ultimate consumers who paid higher prices as a result of the initial overcharges. Section 205.195(a) also states that the FEA may require that a firm to whom an order has been issued maintin its prices at certain designated levels, notwithstanding the presence or absence of regulatory controls on the prices of the firm's products. This remedy is also designed to ensure that, in the absence of price controls, refunds may nevertheless be made to the ultimate consumer which bore the costs of the overcharges. See 40 Fed. Reg. 40141 (September 2, 1975).

L. Refunds to the United States Treasury

The FEA's definition of remedial orders in Section 205.2 manifests an FEA policy to resolve compliance actions through compensation of persons that are harmed by a violation of FEA regulations. Indeed, the FEA Compliance Manual, §5.700.01, expressly notes that a "compliance remedy

corrects the harm caused by the violation." Thus, to date, FEA's remedial actions have had a restitutional effect -- compensating for harm done by a violator of FEA regulations.

Although there is no express authority in FEA's enabling legislation to permit payment of refunds to the Treasury, such authority may be implied from exsiting statutes. Thus, Section 5(b)(5) of the FEAA, 15 U.S.C. §764(b)(5) (1976), directs the Administrator of FEA to "prevent unreasonable profits within the various segments of the energy industry. . . ." Based upon this authority and its broad grants of authority under the EPAA, FEA should be able to require disgorgement from a violator of any unjust enrichment and remit those amounts to the Treasury in situations where the Agency cannot achieve the goal of compensating the victims of such unlawful gains.

Notwithstanding its broad grants of authority, some may question FEA's power to order refund payments to the United States Treasury. Section 5(a)(3) of the EPAA, 15 U.S.C. § 754(a)(3) (1976), subjects a violator of FEA regulation to civil penalities up to a maximum of $20,000 for certain types of offenses. 1/ Since civil penalties deal with the vindication of a public right, monies collected as payment for a civil penalty are deposited directly into the United States Treasury. Such payments are made after the amount of the civil penalty to be assessed has been considered in a court action filed by the Department of Justice

---

1/ Prior to December 15, 1975, the EPAA incorporated the penalty provisions of section 208 of the ESA, 12 U.S.C.A. § 1904 (note) (Supp. 1977) which established a maximum civil penalty of $2,500 for each violation.

pursuant to ESA Section 209 which is incorporated into the EPAA at Section 5. By including these penalty provisions in the EPAA, Congress established a procedure in which monies collected as a consequence of violating FEA regulations would be paid to the United States Treasury. One could argue that had Congress intended similar payments to be made to the Treasury through administrative proceedings to disgorge a violator of excess amounts recovered through overcharge, it would have stated so expressly. On the other hand, it would be incongruous for Congress to have prescribed a penalty while denying the Agency any power to disgorge the unjust gain merely because the victims of unlawful act cannot be compensated. In certain cases, the net effect would be the very opposite of a penalty.

A second argument that might be made is that remedial payments to the United States Treasury might tend to compromise private actions against a violator of FEA regulations. Under ESA Section 210, which is incorporated into EPAA Section 5, persons suffering a legal wrong because of a violation may bring an action against the violator in a federal district court:

> In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:
>
> (1) an amount not more than three times the amount of the overcharge upon which the action is based, or
>
> (2) not less than $100 or more than $1,000. . . .
>
> ESA §210, 12 U.S.C.A. §1904 (note) (Supp. 1977).

Particularly with respect to the provision of the treble damage action, recoveries in such private actions are intended not only to penalize the violator, but also to relieve him of excess amounts recovered from overcharges.

If FEA has already disgorged the violator of its unlawful recoveries through refund payments to the Treasury, the violator might argue that if sued in a private action he might be required to pay twice for the same violation--a result not contemplated by Congress in the EPAA. Of course, in such an instance the court could permit a setoff to the extent of amounts already paid by the overcharging party. Moreover, the argument misses the point that payments to the Treasury would usually be ordered in those situations where individual parties — who are potential plaintiffs -- may not be identified for refund purposes. This problem could also be solved by creating an escrow account for a reasonable period of time to allow customers to perfect claims of injury.

M. Impact of Product Decontrol

Any decision by the Congress or the Administration to decontrol the pricing and allocation of petroleum products should not significantly impact upon the ability of the Agency to order appropriate remedial relief where the circumstances warrant. Thus, even if refined products were released from all federal price controls, the Agency could still order refunds to identifiable purchasers to compensate for prior violative conduct. In situations where disgorgement is called for but injured consumers cannot be easily identified, the Agency could still order price freezes or rollbacks to compensate the marketplace generally and deprive the violators of their unjust enrichment. Such administratively ordered freezes or rollbacks, when done to resolve an outstanding enforcement proceeding, would not be inconsistent with a regulatory decontrol program. Finally, in appropriate circumstances, unlawful overcharges from prior periods could be remitted to the U.S. Treasury.

V. REVIEW OF FEA ENFORCEMENT ORDERS

By reaching a formal determination that a particular violation of the FEA Regulations has occured and by directing appropriate corrective action, the issuance of a Remedial Order generally marks the conclusion of the FEA compliance process. However, the FEA Regulations establish procedures by which an aggrieved party may challenge the validity of the Remedial Order in a further administrative proceeding. In this manner the FEA extends an opportunity for a meaningful review of the Remedial Order by an FEA Office that is separate from the issuing Office.

This independent adminstrative review not only protects the affected firm but also serves the public interest by furnishing the FEA an occasion to rectify any errors or improprieties that may be reflected in the Remedial Order. Furthermore, if the administrative review results in an adverse determination to the appellant, thus sustaining the Remedial Order, the statutes under which the FEA operates ensure the aggrieved party a right to further challenge the provisions of the Remedial Order by seeking judicial review. Nevertheless, the scope of judicial review delineated in those statutory provisions limits the extent to which a firm may contest the validity of an FEA Remedial Order before the courts.

A. Administrative Review

The principal means by which a firm may seek relief from the obligation to comply with a Remedial Order is to file an Appeal

pursuant to Subpart H of the FEA Procedural Regulations, 10 C.F.R. Part, 205, Subpart H. 1/ The FEA's consideration of those administrative appeals is governed by those regulatory provisions rather than the provisions of the Administrative Procedure Act, as amended (APA), 5 U.S.C. 551 et seq. (1970), which relate to agency adjudications. Section 5 of the EPAA, as amended, incorporated ESA Section 207(a), so as

---

1/ The FEA Regulations provide two additional types of administrative proceedings through which a firm may obtain relief from the provisions of a Remedial Order. These proceedings may be initiated by filing an Application for Modification or Rescission pursuant to Subpart J of the FEA Procedural Regulations and an Application for Exception pursuant to Subpart D of the FEA Procedural Regulations. Modification or Rescission is a remedy that may become available only after the conclusion of the administrative appeals process. Section 205.135(b)(1) explicitly provides that "[a]n application for modification or rescission of an order or interpretation shall be processed only if -- (i) the application demonstrates that it is based on significantly changed circumstances; and (ii) the 30-day period for filing an appeal has lapsed or, if an appeal has been filed, a final order has been issued."

In seeking an exception, a firm may not challenge the propriety of or the findings set forth in the Remedial Order itself but rather may request relief from the application of the underlying general regulations or rulings upon which the Remedial Order rests. See 10 C.F.R. 205.50(a)(1). Thus, for example, a retroactive exception may relieve a firm of its obligation to comply with the FEA Regulations during a past period, even though the firm's compliance with the applicable regulations during that time period may be the subject of a particular Remedial Order. A firm is not required, however, to defer filing a request for retroactive exception relief until after a Remedial Order has been issued to it. Instead, it may file its request at any time during the compliance process, and, in fact, the FEA encourages firm to submit exception applications as soon as they believe that they are incurring a serious hardship or gross inequity.

to apply the provisions of Section 207(a) to actions taken under the EPAA. According to Section 207(a), as incorporated by Section 5, the functions exercised under the EPAA, such as administrative review of Remedial Orders, are not generally subject to the provisions of the APA which relate to administrative adjudicatory proceedings. 1/

Section 205.108 and Section 205.196 of the FEA Procedural Regulations require that an Appeal of a Remedial Order be filed within ten days of the service of the Remedial Order. According to the Code of Federal Regulations, the identity of the FEA Office that is vested with jursidiction of an Appeal of a particular remedial order depends upon the identity of the Office that issued the order. Section 205.103 provides:

> (a) When the order upon which the appeal is based was issued by the FEA National Office, the appeal shall be filed with the Office of Exceptions and Appeals . . . .
>
> (b) When the Order upon which the appeal is based was issued by a Regional Office, the appeal shall be filed with that Regional Office . . . . 10 C.F.R. 204.103; 39 Fed. Reg. 32262 (September 5, 1974).

Nonetheless, in practice appeals from all remedial orders are heard by the Office of Exceptions and Appeals in Washington.

The FEA Regulations impose on the firm submitting an Appeal certain notice requirements that are designed to protect parties which may have an interest in the Appeal by affording them an opportunity to participate in the administrative review process. Section 205.104 states:

1/ However, under Section 207(a) the FEA must adhere to Section 6(d) of the APA, 5 U.S.C. Section 555(e) (1970), which requires the agency to provide prompt notice of the denial of an administrative appeal or other written request and to include in the notice a brief statement of the grounds for denial. For a description of the applicability of the judicial review provisions of the APA to action taken under the EPAA, see note 1, p. 97 infra.

> (a) The appellant shall send by United States mail a copy of the appeal and any subsequent amendments or other documents relating to the appeal, or a copy from which confidential information has been deleted in accordance with §205.9(f), to each person who is reasonably ascertainable by the appellant as a person who will be aggrieved by the FEA action sought, including those who participated in the prior proceeding. The copy of the appeal shall be accompanied by a statement that the person may submit comments regarding the appeal to the FEA office with which the appeal was filed within 10 days. . . .

Subsection (c) of Section 205.104 further protects interested parties by placing a duty upon the FEA to serve notice of the appeal upon all other readily identifiable persons who would be aggrieved if the Appeal were granted.

Sections 205.171 and 205.172 provide that a conference or hearing may be requested by the appellant or any person who might be aggrieved by approval of the Appeal. However, those regulatory provisions confer on the FEA considerable discretion to determine whether a conference or hearing will in fact be convened. See also 10 C.F.R. 205.170. The FEA may exercise its discretion to convene a conference or hearing, either upon request or upon its own initiative, whenever it determines that a conference or hearing will materially advance the proceeding. 10 C.F.R. 205.171; 10 C.F.R. 205.172. Nevertheless, in practice the FEA Office of Exceptions and Appeals adheres to a policy of granting an opportunity for an oral presentation, usually in the form of an informal conference, whenever a timely request for a conference or hearing by appellant or any interested party is received in connection with an Appeal.

Because a hearing or conference on an Appeal of a Remedial Order is generally held for the exchange of views rather than the taking

of evidence, the FEA does not usually make any formal report or findings in conenction with the hearing or conference. The Agency may, however, at its discretion, order that a verbatim transcript be taken of the conference or hearing. A transcript will generally be made in cases in which the FEA expects that the oral proceeding might involve the submission of legal arguments or evidence that will significantly supplement the documentary material already introduced in the case. In addition, the FEA may exercise its discretion to hold a public hearing, at which a transcript is required to be taken. 10 C.F.R. 205.173(b), (f). Even when the FEA does hold a hearing at which a transcript is taken, the manner in which the hearing is conducted rests in the discretion of the presiding FEA official. Section 205.172(f) states:

> The official conducting the hearing may administer oaths and affirmations, rule on the presentation of information, receive relevant information, dispose of procedural requests, determine the format of the hearing, and otherwise regulate the course of the hearing. 10 C.F.R. 205.172(f); 39 Fed Reg. 32262 (September 5, 1974).

Although the FEA's discretion to refrain from holding formal, trial-type evidentiary hearings with respect to Appeals has been challenged in the federal courts, the courts have sustained the constitutionality of the FEA's procedure. For example, in Wentz Heating & Air Conditioning Co. v. FEA, 410 F. Supp. 1155 (D. Neb. 1976), a firm whose Appeal of an amended Remedial Order was denied after a conference but without an adjudicatory hearing contended that the statutes and regulations establishing FEA procedures do not provide

for constitutionally adequate hearings and thereby deprived the firm of its rights to procedural due process under the Fifth Amendment. The court concluded, however, that appellant failed to raise a substantial constitutional issue:

> Although the petitioner was not afforded a full-blown, formal, adversary hearing at each stage of the proceedings, there was no deprivation of procedural due process. Procedural due process is a flexible concept which depends upon a balancing of the competing interests involved. F.C.C. v. WJR Radio Station, 337 U.S. 265 (1949); Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961). The procedural rights afforded by the Constitution to a particular person or business must be determined on a case-by-case basis. What is required under one set of circumstances may not be required under other circumstances. On two occasions the Temporary Emergency Court of Appeals has carefully weighed the competing interests involved and upheld the same or similar administrative procedures against allegations that they denied procedural due process. Carpenters 46 County Conference Committee v. Construction Industry Stabilization Committee, No. 9-26 (Em. App. 1975); Western States Meat Packers Association, Inc. v. Dunlop, 482 F.2d 1401 (Em. App. 1973). (See also Plumbers Local Union 419 v. Construction Industry Stablization Committee, 479 F.2d 1052 (Em. App. 1973), which held that the Economic Stablization Act was not subject to the procedural requirements of the Administrative Procedure Act.) Petitioner's allegations of a denial of procedural due process have been foreclosed by the Temporary Emergency Court of Appeals.

See also Atlantic Richfield Co. v. FEA, ___ F.2d ___, TECA No. 9-36, decided May 17, 1977.

Consistent with the scope of discretion conferred on FEA officials conducting hearings, the FEA Procedural Regulations grant the FEA broad authority to conduct investigations in appellate proceedings and do not restrict the sources from which the FEA can collect and receive evidence:

> The FEA may initiate an investigation of any statement in an appeal and utilize in its evaluation any relevant facts obtained by such investigation . . . . The FEA may solicit and accept submissions from third persons relevant to any appeal provided that the appellant is afforded an opportunity to respond to all third person submissions. In evaluating an appeal, the FEA may consider any other source of information. 10 C.F.R. 205.106(a)(1); 40 Fed. Reg. 36554 (August 21, 1975).

While the Section cited above ensures that the FEA may seek and consider all information pertinent to an Appeal, the appellant's interests are safeguarded by the provision that entitles it to an opportunity to respond to all third party submissions. This protection is enhanced by Section 204.104(d) which requires any person submitting comments to the FEA regarding an Appeal to send a copy of his comments to the appellant.

The filing of an Appeal may lead to one of several possible dispositions. If the appellant fails to provide the notice required by Section 205.104, Section 205.106(a)(2) expressly provides that the FEA may dismiss the Appeal without prejudice. The FEA regards the remaining procedural requirements set forth in Section 205.9 and Sections 205.100 through 205.105 as conditions that an appellant must satisfy in order to obtain a consideration of its Appeal on the merits. By failing to meet those requirements, an appellant again risks having its Appeal dismissed without prejudice. The FEA may also dismiss an Appeal with leave to amend if it determines that there is insufficient information upon which to base a decision and if, upon request, the necessary supplemental information is not furnished. If the failure to provide necessary required additional information is repeated or willful, the FEA may dismiss the Appeal with prejudice. 10 C.F.R. 205.106(a)(2).

In addition to dismissing Appeals in the situations described above, the FEA may summarily deny certain types of Appeals. According to Section 205.106(b)(1):

> An appeal may be summarily denied if—
>
> (i) it is not filed in a timely manner, unless good cause is shown; or

(ii) it is defective on its face for failure to state and to present facts and legal argument in support thereof, that the FEA action was erroneous in fact or in law, or that it was arbitrary or capricious. 10 C.F.R. 205.106(b)(10) 39 Fed. Reg. 32262 (September 5, 1974).

If the appellant fails to correct the deficiencies identified in the summary denial order, that order will become a final order of the FEA of which the appellant may seek judicial review. 10 C.F.R. 205.106(a)(3).

If, however, the Appeal is not subject to dismissal or summary denial, the FEA will consider it on its merits and issue an order in which the agency grants or denies the Appeal in whole or in part. In accordance with its determination, the FEA may direct that the remedial order be rescinded, modified, or left unchanged. See 10 C.F.R. 205.107(a). Section 205.107(b) requires that the order setting forth the FEA's substantive determination "include a written statement setting forth the relevant facts and the legal basis of the order." Section 6(d) of the APA, 5 U.S.C Section 555(e) (1970), which is the only provision of the APA relating to administrative adjudications which is applicable to FEA action taken under the EPAA, 1/ reiterates that prescription by requiring "a brief statement of the grounds for denial." Since the decisions that it renders on appeal are final agency orders, the FEA of course has not had occasion to issue a determination in which it considers the possible significance of a failure of an Appeal Decision to satisfy the requirement specified in Section 205.107(b).

Nevertheless, other subparts of the FEA Procedural Regulations concerning other types of proceedings contain provisions that are identical or similar to the requirement of Section 205.106(b) for "a written statement

---

1/ Supra, note ___.

setting forth the relevant facts and the legal basis of the order."

The principles that the FEA has established in decisions construing those provisions serve as a guide to interpreting the requirements specified in Section 205.107(b). According to those decisions, the requirement of a written statement setting forth the basis for an order is far more than a mere regulatory requirement. Instead, it has been construed as a fundamental requirement of procedural due process guaranteed to the appellant by the Fifth Amendment of the Constitution. In Gulf Oil Corporation, 1 FEA Par. 20,173, at 20,293-20,294 (November 6, 1974), the FEA discussed these principles in the following terms:

> "Section 205.36(b) of the current FEA regulations states: The order shall include a brief written statement summarizing the factual and legal basis upon which the order was issued. . . .
>
> It is an elemental concept of due process that a person that is adversely affected by governmental action be informed of the basis upon which the adverse determination was made. Where a right of appeal or a right to judicial review exists, this requirement is especially important since unless the person adversely affected is informed of the basis in fact or law of the determination, it is difficult if not impossible for both the person adversely affected as well as the reviewing body to determine whether the initial determination was based on an error of fact or law. The failure to comply with the provisions of Sections [sic] 205.36(a) that an order include a 'brief written statement summarizing the factual and legal basis upon which the order was issued' is not harmless error, it is an error of substance which goes to the heart of the regulatory process. When an order fails to comply with these requirements and the failure to do so is raised in a timely and proper manner on appeal, the initial order from which the appeal is taken should ordinarily be reversed and vacated."

Accord, Tenneco Oil Company, 5 FEA Par. 80,506, at 80,532 (December 21, 1976); Exxon Company, U.S.A., 4 FEA Par. 80,510 (July 23, 1976); Texas Asphalt and Refining Company, 3 FEA Par. 80,576 (February 13, 1976); Vl Oil Company, 2 FEA Par. 80,590 (May 9, 1975); Koch Industries, 2 FEA Par. 80,580 (May 2, 1975); Tenneco Oil Company, 2 FEA Par. 80,527 (February 4, 1975.

Section 205.106(b)(2) states:

"The FEA may deny any appeal if the appellant does not establish that —

(i) the appeal was filed by a person aggrieved by an FEA action;

(ii) the FEA's action was erroneous in fact or in law; or

(iii) the FEA's action was arbitrary or capricious." 10 C.F.R. 205.106(b)(2); 39 Fed. Reg. 32262 (September 5, 1974)

While the first of these three tests — standing -- is merely a threshhold condition to pursuing the Appeal and could not in itself warrant the approval of relief, one of the other two criteria must also be met to justify granting the Appeal. Furthermore, under the FEA Procedural Regulations, an appellant striving to demonstrate that a particular remedial order was erroneous or arbitrary is not necessarily limited to relying on the material that was considered in the compliance proceeding that led to the issuance of the contested remedial order. Instead, the appellant may base its contention that the Remedial Order is erroneous or arbitrary upon "significantly changed circumstances." See 10 C.F.R. 205.105(a). Section 205.105 defines "significantly changed circumstances" to mean:

"(i) the discovery of material facts that were not known or could not have been known at the time of the prior proceeding;

(ii) the discovery of a law, regulation, interpretation, ruling, order or decision on an appeal or an exception that was in effect at the time of the proceeding upon which the order or interpretation is based and which, if such had been made known to FEA, would have been relevant to the proceeding and would have substantially altered the outcome; or

(iii) a substantial change in the facts or circumstances upon which an outstanding and continuing order or interpretation affecting the appellant was issued, which change has occurred during the interval between issuance of the order of interpretation and the date of the appeal and was caused by forces or circumstances beyond the control of the appellant." 10 C.F.R. 205.105(a); 39 Fed. Reg. 32262 (September 5, 1974).

However, in order to obtain relief on the basis of significantly changed circumstances, the appellant must show "why, if the significantly changed circumstance is new or newly discovered facts, such facts were not or could not have been presented during the prior proceeding." 10 C.F.R. 205.105(b).

In addition to specifying the grounds upon which an appeal may be granted, Section 205.106(b) allocates the burdens of presentation and proof. Section 205.106(b)(1)(ii) permits the FEA to summarily deny an Appeal if the appellant fails to present facts and legal argument which would support the claim that the FEA action being appealed was erroneous or arbitrary. Thus, the Regulations place on the appellant the burden of coming forward to present arguments and evidence. Section 205.106(b)(2) permits the FEA to deny an appeal "if the appellant does not establish" that the action being

appealed is erroneous or arbitrary. (Emphasis added.) Consequently, the appellant bears the burden of proof as well as the burden of coming forward. In a number of previous decisions, the FEA has indicated that the appellant can meet its burden of proof only by the submission of substantial and convincing evidence. For instance, in Terrible Herbst, Inc., 5 FEA Par. 80,535 (December 21, 1976), the FEA stated:

> "Section 205.106(b) of the FEA Procedural Regulations states that the FEA may deny an Appeal if a firm fails to present facts and legal argument in support of its contentions, or if the appellant does not establish that the FEA action was erroneous in fact or law, or arbitrary and capricious. In a number of previous cases the FEA has pointed out that the burden of showing error in an order being appealed or establishing that exception relief is warranted rests with the appellant. See, e.g., The Permian Corporation, 3 FEA Par. 80,639 (June 1, 1976); West Penn Power Company, 3 FEA Par. 80,533 (December 15, 1975). In the present case, Herbst has completely failed to establish by substantial and convincing evidence that the October 15 Order was erroneous in fact or law, or was arbitrary and capricious. Herbst's Appeal of that Order should therefore be denied."

B. Judicial Review

The denial or summary denial of an appeal of a remedial order is a final order of the FEA which is subject to judicial review. See 10 C.F.R. 205.106(a)(3)(iii); and 10 C.F.R. 205.107(b)(2)(iii). The FEA Regulations appear to preclude a firm's obtaining judicial review of a Remedial Order until such a final order is issued by the FEA. 1/ Section 205.100(b)

1/ But see Banks Enterprises, Inc. v. FEA, 3 Fed. Energy Guidelines, CCH Par. 26,040. In that case, the court noted in dictum that it would be improper to review the FEA's denial of the firm's exception request since the firm had failed to file an appeal and since Section 205.58

(Continued)

expressly provides that:

> "[a] person who has appeared before the FEA in connection with a matter arising under Subparts . . . O [the subpart pursuant to which Remedial Orders are issued] . . . has not exhausted his administrative remedies until an appeal has been filed under this subpart and an order granting or denying the appeal has been issued."

An appellant may also be deemed to have exhausted its administrative remedies if the FEA fails to take action on the appeal of a remedial order within 90 days of the agency's having served notice that all substantive information considered necessary to process the appeal has been received or within 120 days after the appeal was filed. 10 C.F.R. 205.109.

FEA Section 7(i)(2)(B) and ESA Section 211(a), as incorprated by Section 5(a)(1) of the EPAA, vest in the district courts of the United States exclusive original jurisdiction of cases arising under orders issued pursuant to the EPAA or the FEAA, such as remedial orders and denials of appeals of remedial orders, regardless of the amount in

---

_/ (Footnote continued)

of the FEA Regulations provides that a party has not exhausted its administrative remedies until an appeal from an exception denial has been filed. However, the court did proceed to review the Remedial Order and the Modified Remedial Order which had been issued to the firm by the FEA in that case. In conducting its review of these orders, the court apparently ignored the fact that the firm had failed to file an Appeal of the Remedial Orders and that Section 205.100(b) contains a provision identical to Section 205.58 concerning exhaustion of administrative remedies with respect to remedial orders. The opinion does not include any discussion of the provisions of Section 205.100(b) or its limitations.

controversy. 1/ Section 211(b)(2) of the ESA, as incorporated by Section 5(a)(1) of the EPAA, vests exclusive jurisdiction of all appeals from the federal district courts which relate to orders issued by the FEA in a specially created court that is designated the Temporary Emergency Court of Appeals (TECA). 2/ However, only TECA, and, on appeal therefrom, the Supreme Court of the United States have jurisdiction to determine the constitutional validity of any regulation or order issued under the EPAA (ESA, Section 211(g), as incorporated by EPAA, Section 5(a)(1)). Section 211(c) of the ESA implements this restriction by requiring federal district courts to certify any "substantial constitutional issue" to TECA, which may either consider the

---

1/ However, Section 7(i)(2)(B) of the FEAA provides that federal district courts do not have exclusive original jurisdiction of actions that are taken by any officer of a State or local government agency under the provisions of the FEAA. That Section further states that "[c]ases or controversies arising under any rule, regulation, or order of any officer of a State or local government agency may be heard in either (1) any appropriate State court, or (2) without regard to the amount in controversy, the district courts of the United States."

Furthermore, Section 7(i)(2)(B) of the FEAA and Section 211(a) of the ESA, as incorporated by Section 5(a)(1) of the EPAA, both contain a proviso that nothing in Section 7 of the FEAA or in Sections 211(a) and 211(h) of the ESA will affect the power of a court of competent jurisdiction to determine any issue raised by way of defense, other than a defense based on the constitutionality of the FEAA or EPAA or on the legal validity of actions taken by any agency under those statutes. If such a defense is raised, the case may be removed by either party to a federal district court in accordance with the provisions of 28 U.S.C. Ch. 89.

2/ The basic provisions creating TECA and delineating its composition and procedures are set forth in Section 211(b)(1) of the ESA.

entire case or remand the case to the district court with binding instructions concerning the constitutional issue.

Sections 211(d)(2) and 211(e)(1) of the ESA, as incorporated by Section 5(a)(1) of the EPAA, limit the authority of the district courts and TECA regarding remedial orders to the issuance of orders that enjoin temporarily or permanently the application of a particular remedial order to a party involved in the litigation and to judgments that declare a particular remedial order to be invalid. Sections 211(d)(1) and 211(e)(1) of the ESA prescribe generally the scope of judicial review of FEA orders issued under the EPAA. 1/ An injunction or declaratory judgment against a remedial order may only be issued if the court determines that the remedial order exceeds the agency's authority or is based upon findings which are not supported by substantial evidence. The courts have, moreover, explicitly recognized these substantive criteria as the standards that they must follow in reviewing FEA Remedial Orders. In Banks Enterprises, Inc. v. FEA, ___ F. Supp. ___ (D. Wyo., 1976), the court specifically found:

> "(29) That pursuant to §211(d)(1) of the Stabilization Act, incorporated by §5(a)(1) of the Allocation Act, the September 20, 1974 Modified Remedial Order issued by the FEA cannot be enjoined or set aside unless such

---

1/ Section 207(a) of the ESA, as incorporated by Section 5(a)(1) of the EPAA, expressly declares the judicial review provisions of the APA, 5 U.S.C. Ch. 7 (1970), inapplicable to functions exercised under the EPAA. However, Sections 211(d)(1) and 211(e)(1) of the ESA permit a court to apply the criteria set forth in Section 10(e) of the APA, 5 U.S.C. 706(2) (1970), in reviewing the legality of a regulation.

> order is in excess of agency authority, or is based upon findings which are not supported by substantial evidence."

In Wentz Heating & Air Conditioning v. FEA, supra, the Court reached an identical conclusion with respect to its authority to issue a declaratory judgment:

> "This Court's jurisdiction is quite limited by Section 211 of the Economic Stabilization Act of 1970, as adopted by 15 U.S.C. §754. It may only declare an agency order invalid if the order was in excess of the agency's authority or was not based on substantial evidence.

The courts have interpreted the substantial evidence standard set forth in Section 211 of the FEA to require that the evidence provide a rational basis for the FEA's order. For instance, in Atlantic Richfield Co. v. FEA, supra, Fed. Energy Guidelines, CCH Par. 26,054 (ARCO), the court applied the substantial evidence test to its review of an FEA Interpretation and the denial of an appeal from the Interpretation by construing the standard in the following terms:

> "Substantial evidence is such relevant evidence 'as a reasonable mind would accept as adequate to support a conclusion.' Consolidated Edison Company v. NLRB, 305 U.S. 197, 229 (1938). Such evidence 'must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.'" United States v. Wharton, 514 F.2d 406, 409 (9th Cir., 1975).

In a subsequent section of the same decision, the court emphasized the limited scope of judicial review by quoting with approval the following passage from Pasco, Inc. v. FEA, 525 F.2d 1391, 1400 (TECA 1975):

> "In reviewing the discharge of an agency's function in interpreting the [EPAA], promulgating regulations thereunder and applying and enforcing such regulations, this court has recognized that where administrative control has been congressionally authorized, the 'judicial function' is exhausted when there is a rational basis for the conclusions approved by the administrative body. [Citations omitted.]

See also Basin v. FEA, CCH Fed. Energy Guidelines, Par. 26,071 (TECA, 1977).

Finally, in interpreting the substantial evidence standard in this restrained manner, the courts have shown considerable deference to the FEA's administrative expertise. The ARCO court justified its reluctance to strike down an FEA Interpretation that had a reasonable foundation by quoting once again from the Pasco decision:

> "Administrative decisions based upon analysis of the data and information submitted on applications for exception relief require the application of administrative expertise and this court should not be quick to overturn them." 525 F. 2d at 1404.

VI. CIVIL ACTIONS

A. Civil Injunctive Actions Brought on Behalf of FEA Under the EPAA and ESECA

The FEA has no authority to go directly into court to seek an injunction against violations of its regulations or orders. Although injunctive relief is available to the FEA, its availability is contingent upon the willingness and ability of the Department of Justice to bring such actions on behalf of the agency.

As has been noted above, Section 5(a)(1) of the EPAA incorporates by reference ESA Sections 205-207 and 209-211. Section 209 of the ESA provides, inter alia, that the agency may request the Attorney General

to bring an injunction action whenever it appears that any individual "has engaged, is engaged, or is about to engage" in any action or practices constituting a violation of any FEA regulation issued pursuant to the EPAA. Section 209 specifically provides that, upon a proper showing, a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. The court also may issue a mandatory injunction commanding any person to comply with such order or regulation. Similarly, Section 12(b)(4) of ESECA provides that FEA may seek similar injunctive relief, again through the Attorney General, with respect to violations of prohibition or construction orders or coal allocation orders issued under §2 of ESECA or violations of FEA's reporting requirements under Section 11 of that Act.

Thus, FEA appears to have ample statutory authority to enjoin violations of its regulations or orders issued under the EPAA or ESECA, provided that the Department of Justice agrees to seek such relief. The FEA has used this authority sparingly to date. Consequently, there is little case law by which to judge its adequacy and relatively little experience by which to judge the willingness or capability of the Department of Justice to bring such actions.

1. Restitution and other Remedial Relief under the EPAA

As noted, under Section 209 of the ESA, in addition to seeking a temporary restraining order and/or preliminary and permanent injunctive relief, the agency, through the Department of Justice, may also seek a mandatory injunction commanding the organization to comply with a regulation

or order, such as a remedial order, issued under the EPAA. Pursuant to that secton, the Agency may also request that the court "order restitution of moneys received in violation of any such order or regulation." Such relief has been sought in a large number of cases, principally through counterclaims, and restitution has been awarded in the few cases which have reached final judgment. See, e.g., Exxon et al v. FEA, 398 F.Supp. 865 (D.D.C. 1975), affirmed on appeal, sub nom. Texaco et al v. FEA, 531 F.2d 1071 (TECA 1976); Banks Enterprises v. FEA, _____ F. Supp. _____ (D. Wyo. 1976), CCH Federal Energy Guidelines, Vol. 3, ¶ 26,040. There is no reason to believe that the language of the statute is not broad enough to permit any reasonable request for equitable relief, including refunds of overcharges payable directly to the United States Treasury.

B. Civil Penalties

In some instances, the FEA may decide that it is appropriate to seek civil penalties. It is generally the FEA's policy that civil penalty is warranted in a case in which sufficient evidence does not exist that a violation was willful but in which it is nevertheless the case that the occurrence of the violation was more than merely an honest mistake. Examples of the type of instances in which the FEA might decide to seek civil penalties include the situation in which a firm has violated regulatory provisions which are simple and unambiguous, or in which the firm has failed to prepare and maintain adequate records or otherwise failed to take reasonable precautions to avoid inadvertant violations. The agency might also determine that civil penalties are warranted in a case in which it appears that the violation was in fact willful, although insufficient evidence exists to support a criminal prosecution.

1. Authority to Assess Civil Penalties

When the Emergency Petroleum Allocation Act, 15 U.S.C. §§ 751-760(h) (1976) ("EPAA") was first implemented in November of 1973, Section 5(a) incorporated by reference sections 205 through 211 of the Economic Stabilization Act of 1970, 12 U.S.C.A. § 1904 (note) (Supp. 1977) ("ESA"). 1/ Section 208 of the ESA, provided for civil penalties as follows:

> Whoever violates any order or regulation under this title shall be subject to a civil penalty of not more than $2,500 for each violation. 12 U.S.C.A. § 1904 (note) (Supp. 11977).

With the implementation of the Energy Policy and Conservation Act ("EPCA"), in December of 1975, the penalty provisions of the ESA were deleted from the EPAA and replaced by an amendment which raised the amount of civil penalty which could be assessed for a violation of the price and allocation regulations:

> Whoever violates any provision of the regulation under section 4(a) of this Act, or any order under this Act shall be subject to a civil penalty —
>
> (i) with respect to activities relating to the production, distribution, or refining of crude oil, of not more than $20,000 for each violation;
>
> (ii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product (other than activities entirely at the retail level), of not more than $10,000 for each violation; and
>
> (iii) with respect to activities —
>
> (I) entirely relating to the distribution of residual fuel oil or any refined petroleum product at the retail level, or

---

1/ In addition, under Section 12 of ESECA, whoever violates any provision of Sections 2 or 11 of that Act is subject to a civil penalty of not more than $2,500 for each non-willful violation.

(II) activities not referred to in clause (i) or (ii) of subclause (I) of this clause, of not more than $2,500 for each violation. EPAA § 5(a)(3), U.S.C. § 754 (1976). 1/

Although the quoted sections of the EPAA clearly subject violators of FEA regulations to civil penalties, these provisions do not expressly indicate who may assess such penalties against a violator. 2/ Historically, the imposition of civil penalties could be accomplished only through de novo review in the federal court. 3/ Because of this traditional role of the courts in imposing civil penalties, the assessment of civil penalties was once considered to be a judicial function not appropriately exercised by administrative agencies. 4/ However, case law in the area of civil penalties has recognized the right of Congress to enact legislation which permits administrative agencies to assess civil penalties. For example, in Lloyd Sabaudo Societa v. Elting, 287 U.S. 329 (1932), the Supreme Court upheld the authority of the Secretary of Labor to impose a penalty against a

---

1/ Subclause (II) of Section 5(a)(3)(A)(iii) provides for a civil penalty for: "activities not referred to in clause (i) or (ii) of subclause (I) of this clause, of not more than $2,500 for each violation." (Emphasis added.) A close reading of the whole clause clearly indicates this subclause contains a typographical error and should read: "activities not referred to in clause (i) or (ii) or subclause (I) of this clause, of not more than $2,500 for each violation." (Emphasis added.) The Senate and House bills which become the EPAA support this view. See S. Rep. No. 94-516, 94th Cong., 1st Sess., at 93 (1975).

2/ But see, Western Propane Inc. , 1 FEA Par. 20,205 (Dec. 12, 1974).

3/ For a general discussion of civil penalties, see Goldschmid, "Report in Support of Recommendation 72-6: An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies", 2 Recommendations and Reports of the Administrative Conference of the United States 896-935 (July 1, 1970 - December 31, 1972).

4/ Id. at 936.

shipowner for bringing certain aliens with diseases into the United States. In upholding the Secretary's authority to impose the penalty, the Court noted:

> ". . . due process of law does not require that the courts, rather than administrative officers, be charged, in any case, with determining the factors upon which the imposition of such a fine depends. It follows that as the fines are not invalid, however imposed, because unreasolable or confiscatory in amount, which is conceded, Congress may choose the administrative rather than the judicial method of imposing them." 287 U.S. at 335.

In similar challenges to the authority of administrative agencies to impose civil penalties, the courts have consistently upheld the agency authority to assess civil penalties. See e.g., Helvering v. Mitchell, 303 U.S. 391 (1938) (upholding authority of the Internal Revenue Service to impose civil penalties for fraudulent withholding of taxes); N.A. Woodworth Co. v. Kavanagh, 102 F. Supp. 9 (E.D. Mich.) (1952), aff'd, 202 F. 2d 154 (6th Cir. 1953) (upholding authority of the National War Labor Board to impose penalties for improper wages under the Wage Stabilization Act of 1942).

Moreover, in recent legislation, Congress has confirmed its belief that civil penalties may be assessed by an administrative agency rather than by a court. For example, the Administrator of the Environmental Protection Agency has been given authority to impose a civil penalty of not more than $1,000 for violations of the Federal Insecticide, Fungicide and Rodenticide Act. 7 U.S.C.A. § 136(l) (Supp. 1977). Similarly, the Occupational Safety Health Review Commission can assess all civil penalties for certain violations of the Occupational Safety and Health Act of 1970, and is required to consider the gravity of the violation, the size of the

business, the good faith of the employer, and the history of previous violations. (29 U.S.C. §666(i) (1975)).

FEA has apparently taken the position that it has no authority to assess civil penalties for violations of its orders or regulations. In part, the Agency's position has been based upon the provision of Section 209 of the ESA, that FEA must request the Attorney General to bring actions, in appropriate federal district courts, to enjoin violations of FEA orders and regulations and that those federal courts are empowered to issue injunctions and order restitution. FEA has interpreted ESA Section 209 to apply to assessment of civil penalties and its regulations direct the Agency to refer civil penalty actions to the Department of Justice. 10 C.F.R. §205.203(b)(2). Similarly, in the FEA Compliance Manual §5.800.00, FEA compliance personnel have been told that:

> FEA does not have statutory authority to impose either criminal or civil penalties for violation of its regulations or orders. Such penalties can be imposed only by a United States District Court in a case brought by the Department of Justice. FEA's role in imposing civil and criminal penalties is limited to referring such cases to the Department of Justice. The Office of General Counsel refers all cases to the Department after reviewing them for sufficiency of evidence and proper interpretation of FEA regulations.

While the issue is not entirely free from doubt, given the civil penalty provisions and broad enforcement authority already provided by the Congress, in the view of the Task Force FEA could develop administrative procedures for the entry of administrative orders providing for the payment of civil penalties without a further grant of statutory authority.

Requiring administrative orders of assessment to be enforceable in the courts pursuant to ESA Section 209 seems consistent with the overall legislative scheme.

2. Authority to Compromise Civil Penalties

Although FEA has never sought to assess civil penalties, it has in fact compromised civil penalties in resolving administrative compliance actions. FEA regulations provide for the compromise of civil penalties as follows:

> When the FEA considers it to be appropriate or advisable, it may compromise, settle and collect civil penalties. 10 C.F.R. §205.202(b)(2).

Indeed, FEA's practice of compromising civil penalties follows the practices of its predecessor agencies, the Federal Energy Office and the Cost of Living Council, both of which had established procedures for the compromise of civil penalties. See 10 C.F.R. Subpart L, 39 F.R. 1924, (January 15, 1974); 6 C.F.R. Subpart G. The procedures which FEA currently follows in compromising civil penalties are included in the FEA Compliance Manual §5.700.00 et seq. Through these procedures, FEA and the violator of an FEA regulation or order, can mutually agree to a compromised amount of civil penalty, taking into account considerations such as the magnitude of the violation and the degree to which a civil penalty suit would be successful if instituted by the Department of Justice. FEA Compliance Manual §5.703.00. Since amounts are not unilaterally imposed by the FEA, but are agreed to by the violator, there is no contest between the parties to be heard in a civil action brought in a federal district court.

The ability to compromise civil penalties is consistent with FEA's current enforcement procedures. FEA may enter into a consent order with a violator to resolve an outstanding compliance investigation. While a consent order must state the relevant facts upon which it is based (10 C.F.R. §205.197(a)), it need not include the full findings of fact and conclusions of law as required in a remedial order. The absence of these conclusions is one advantage of the consent order procedure — permitting an expedited processing of a compliance action without a full scale proceeding necessary for the issuance of a remedial order. Since a violator of FEA's regulations is subject to civil penalties, FEA could not completely resolve a compliance proceeding in a consent order unless it also had authority to resolve the issue of a violator's civil penalty liability. To require FEA to seek a civil action through the Department of Justice to assess penalties when the violation itself can be resolved in an expedited procedure through a consent order would unnecessarily burden the courts and hinder FEA's efforts to resolve violations through consent orders. Thus, FEA can compromise civil penalties and does so in approximately 90% of its cases.

Although Congress has has not expressly granted FEA authority to compromise civil penalties, it has been aware of the procedure for a long time. In response to a March 31, 1975 request from Congressman John E. Moss, Chairman of the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, FEA noted the following:

> Pursuant to the advice of the Department of Justice and consistent with the practice of the Cost of Living Counsel, FEA has operated on the assumption that it does not have statutory authority itself to impose civil penalites on a company that has violated the FEA regulations. An order imposing civil penalties can be issued only by a Federal district court after the case is referred by FEA to the Department of Justice. However, the FEA does believe it has the authority to "compromise" civil penalties prior to the referral of a case to the Department of Justice, and such authority is expressly assumed in 10 C.F.R. §205.202(c)(2) of FEA's procedural regulations.

The statement was later included in the FEA Report of Compliance and Enforcment Activities submitted to Moss' Subcommittee in April of 1975. It was also included in a statement made by Robert E. Montgomery, Jr. on April 10, 1975 before Senator Henry M. Jackson, Chairman of the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations. In addition, at the request of Senator Edward Kennedy, Chairman of the Subcommittee of Administrative Practice and Procedure of the Senate Committee on the Judiciary, Congress conducted a six-month investigation into FEA's enforcement program during 1975. In the report published at the conclusion of the investigation, the Subcommittee found that:

> [t]here were no procedures, guidelines, or even a comprehensive policy regarding seeking and collecting civil penalties against companies that violate the price regulations, negotiating compromises on such penalties, or assessing the dollar amount of such penalties. The Federal Energy Administration: Enforcement of Petroleum Price Regulations, Report of the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary of the United States Senate, 94th Cong., 1st Sess. 10 (1975) (Emphasis supplied.)

The report further noted that FEA had offered interim guidance on civil penalties through the distribution of a document entitled "FEA Policy on Civil Penalties" which discussed compromises of civil penalties. Id. If FEA were not authorized to compromise civil penalties, Senator Kennedy's Subcommittee (which is responsible for administrative practice and procedure) would certainly have noted that fact in its report. To the contrary, the Committee recommended that FEA "effectively implement the recently adopted procedures [FEA Compliance Manual] to ensure that the handling of penalties and other areas of enforcement policy are applied uniformly. . . ." Id. at 42. Thus, it appears that Congress, through its committees in both the House and in the Senate, knew of FEA's position regarding compromise of civil penalties and endorsed it.

Congress, moreover, has extended FEA's authority to enforce the price and allocation regulations in the EPCA without ever denying FEA's authority to compromise civil penalties. Indeed, in the section 452 of the EPCA, Congress amended the penalty provision of the EPAA to increase the amount of civil penalties for which a violator of FEA regulations could be liable. Even though Congress specifically addressed FEA's civil penalty authorities in connection with that legislation, it did not even hint that such authority might be outside the scope of the Agency's jurisdiction.

VII. CRIMINAL ACTIONS

A. Proscribed Conduct and Consequences

Regulation of the petroleum industry has lead to intentional avoidance of FEA's pricing or allocation restrictions by a number of firms and individuals. Where willful violations are detected, the FEA investigates

the case with the aim of referring it to the Department of Justice for prosecution, in addition to remedying the violations. In investigating potential criminal actions the FEA has historically employed special procedures to accommodate the gravity of the violative conduct and the Constitutional protections afforded the offender.

The initial statutory authority to impose criminal sanctions was derived by the incorporation of Section 208 of the Economic Stabilization Act of 1970 into Section 5(a) of the Emergency Petroleum Allocation Act of 1973 (EPAA). 1/ Section 208 provided in relevant part:

> (a) Whoever willfully violates any order or regulation under this title shall be fined not more than $5,000 for each violation.

This provision was promulgated as §205.202(b) of the Federal Energy Administration Regulations at Chapter II of Title 10 C.F.R.:

> Any person who willfully violates any provision of this chapter or an order issued pursuant thereto shall be subject to a fine of not more than $5,000 for each violation. Criminal violations are prosecuted by the Department of Justice upon referral by the FEA.

The Energy Policy and Conservation Act (EPCA) created with its enactment on December 22, 1975, a schedule of both civil and criminal

---

1/ In addition, under §12 of ESECA, whoever violates any provision of §2 or §11 of ESECA, or any rule, regulation or order issued thereunder, shall be subject to a criminal fine of not more than $5,000 for each willful violation. Any person who offers coal for sale in interstate commerce in violation or a coal allocation order or regulation issued under §2(d) of ESECA is subject to a civil penalty of not more than $2,500 for each nonwillful violation, as noted above, and a fine of not more than $50,000 for each knowing and willful violation that occurs after the imposition of a civil penalty for a previous violation.

penalties tailored to violations at various levels in the petroleum industry and added new teeth to the criminal sanction by providing for a penalty or confinement for both individuals and corporate officers. Section 482 superceded the reference to §208 of the Stabilization Act in §5(a) of the EPAA and added the following:

> "(B) Whoever willfully violates any provision of such regulation, or any such order shall be imprisoned not more than 1 year, or —
>
> > "(i) with respect to activities relating to the production or refining of crude oil, shall be fined not more than $40,000 for each violation;
> >
> > "(ii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product (other than at the retail level), shall be fined not more than $20,000 for each violation;
> >
> > "(iii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product at the retail level or any other person shall be fined not more than $10,000 for each violation;
>
> or both.
>
> "(4) Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of paragraph (3), shall be subject to penalties under this subsection without regard to any penalties to which that corporation may be subject under paragraph (3) except that no such individual director, officer, or agency shall be subject to imprisonment under paragraph (3), unless he also has knowledge, or reasonably should have known, of notice of noncompliance received by the corporation from the President."

This section, which was effective December 15, 1975, both increased the monetary penalty and provided, for the first time, for imprisonment. With regard to corporate personnel, Section 452 of the EPCA makes a knowing and willful action which constitutes a violation under that section punishable by any of the criminal or civil sanctions available. Imposition of the sanctions requires reference to the Department of Justice under 10 C.F.R. §205.203(c)(2).

A caveat to the imposition of criminal sanctions against corporate officers is written into Section 452 and is found in the regulation at 10 C.F.R. §205.203(e)(1). The section carries the proviso that imprisonment may not be imposed unless the official has knowledge or should have known of notices of noncompliance received by the corporation from the FEA. "Notice of noncompliance" was defined in the regulation implementing Section 452 of the EPCA to include any written notice that the FEA believes the corporation to be acting in violation of the regulations or order, including a notice of probable violation. On November 5, 1976, this prerequisite was narrowed in definition to include only consent orders and remedial orders.

The effect of this requirement is to unnecessarily restrict the prosecution of corporate officers. The difficulty arises that a corporate officer is given ample opportunity to assure himself that evidence of his activities constituting the corporation's violations

in the first instance is unavailable to prove the case against him. The government has the burden of not just proving the case against the official, but must first establish the case against the corporation, and then prove that the official knew or should have known that the FEA established the case. Only then is proof offered that the official authorized, ordered, or performed the acts constituting a violation of the regulations. By contrast, the members of a partnership or the officers of a non-incorporated firm are subject only to the language, "any person who willfully violates." The statutory shield protects those corporate officials who are unaware that a criminal or unlawful practice is occurring, but also provides a haven to persons who may have committed willful and knowing acts in violation of the regulations.

The number of corporate officials subject to liability under this section of the EPCA was expanded by the definition of "agent" at §205.202(e):

> "agent" shall include any employee or other person acting on behalf of the corporation on either a temporary or permanent basis, whether or not he has authority to engage in the particular activity involved;

The effect of this definition and restriction on imposing a sentence to confinement discussed in the preceding paragraph, is to overprotect a large number of corporate employees who are in a position to commit a willful violation. They are saved from the prospect of prison through the forewarning that they must receive in a notice of noncompliance even if they are in a position where receipt of the notice, for the purpose of the statute, is unlikely to be received. It would seem that the burden of proving that the corporate

agent has knowingly and willfully authorized, ordered or performed an act would provide sufficient protection from prosecution and imprisonment.

The regulation at §205.203(f) contains a reference to prosecution for a violation of 18 U.S.C. §1001 (1970) which is not found in the statutes governing the FEA:

> (f) Other penalties. Willful concealment of material facts, or false or fictitious or fraudulent statements or representations, or willful use of any false writing or document containing false, fictitious or fraudulent statements pertaining to matters within the scope of the EPAA or FEAA by any person shall subject such person to the criminal penalties provided in 18 U.S.C. §1001 (1970).

There is no indication why this section was inserted into the regulation and it appears superfluous to the provisions of 18 U.S.C. §1001.

Violations of 18 U.S.C. §1001 are frequently discovered in FEA investigations and are referred to the Department of Justice as such. Other violations of the criminal code may also come to light and be submitted for prosecution through FEA channels, e.g., 18 U.S.C. §371. Conspiracy to commit an offense against or to defraud the United States arises in the more complex transactions utilized to thwart the effect of the pricing regulations, or to secure allocations through the use of documents prepared by conspiring parties. An abuse of this sort found in the entitlement program could result in a violation of 18 U.S.C. §287, False, Fictitious or Fraudulent claims.

These examples belabor the point that a person violating an FEA regulation may, in addition to or in furtherance of that violation, simultaneously commit a crime under Title 18 which the FEA will investigate. In the course of FEA's investigation of activities which violate the

regulations and relevant criminal statutes, there may be additional violations of 18 U.S.C. §201, Bribery; §1521, Perjury; or §1501 et seq., Obstruction of Justice which the FEA will investigate or forward to the FBI. Mention should also be made that violations of statutes and regulations administrated by the Internal Revenue Service, the United States Customs Service, and the Securities and Exchange Commission may be discovered during FEA's investigation. This information is passed to the appropriate agency.

1. Disposition of Criminal Case Referrals

Again, with respect to civil and criminal actions, FEA may not proceed directly to court but must convince the Department of Justice to take on such actions. Accordingly, the fines and penalties provisions of the EPAA and ESECA have not been sufficiently tested. Most of the criminal and, for that matter, civil cases referred to the Department of Justice to date have either been for violations of other statutes or, if under the EPAA, have not been finally adjudicated. No cases have been brought under ESECA. It is still not settled, for example, whether each day of a violation will be deemed a separate violation. FEA has interpreted the statute this way, but no final decisions have been rendered by the courts which uphold this interpretation. Nor is it clear what the policy of the Department of Justice will be in this regard. To date, only one major criminal action has been brought by the Department on behalf of FEA — the Gulf Oil entitlements case — and that only after FEA fought for and won a

pledge of active prosecution all the way to the Deputy Attorney General. See U.S. v. Gulf Oil Corp., 408 F.Supp. 450 (D.C. Penn. 1975).

Since the beginning of 1975, the Compliance Division of the Office of General Counsel has referred nineteen (19) cases to the Department of Justice, with recommendations for criminal prosecution. Of those nineteen referrals, three (3) have resulted in guilty pleas to one or more charges, indictments have been issued in two (2) referrals, with no further action apparent from file reviews, four (4) referrals have been forwarded by the U.S. Department of Justice to the U.S. Attorney's Office with recommendations for criminal prosecution, with no further action apparent from file reviews, and ten (10) referrals have resulted in the U.S. Department of Justice and/or its U.S. Attorney's Offices declining to bring criminal prosecutions.

With respect to the three (3) guilty pleas, the Harry Hall referral for alleged violations of 18 U.S.C. §1001 and 10 C.F.R. 212.93(a) was resolved by his pleading to one (1) count of a nine (9) count indictment for giving false information to a government agency concerning the sale price of gasoline. He was sentenced to five (5) years imprisonment, with all but thirty (30) days suspended, and fined $7,500. 1/ Charles Nelson

---

1/ Two (2) pre-1975 referrals represent the only other cases where a sentence or probation was imposed by the trail court. John Pizzi plead guilty to charges that he gave false information to the IRS concerning gasoline sale prices, and was sentended to two (2) years probation and fined $5,000. Shirley Ann Vixie was found guilty, after a jury trail, of obstructing justice in relation to her

(footnote continued)

plead guilty to a charge of submitting false documents to the FEA concerning gasoline prices which resulted in customer overcharges of $26,722. Mr. Nelson was fined $5,000. Charles Reed plead guilty to a charge of falsifying gasoline base period records which resulted in customer overcharges of $40,000. Mr. Reed was fined $11,000.

With respect to the ten (10) referrals which the U.S. Department of Justice's Economic Litigation Section and/or its U.S. Attorneys decided not to prosecute criminally, the reasons for such disposition (to the extent reasons were committed to writing) varied. In at least two of those referrals, the Economic Litigation Section indicated it would not proceed with criminal prosecutions because of inadequate investigations, and insufficient or conflicting documentary evidence with which to support the criminal charges. 1/

In several other referrals, the Economic Litigation Section felt that the potential penalties associated with the applicable felony charges

---

(footnote continued)

misrepresentation of 8,162 gallons of regular gasoline as being premium gas. She was sentenced to six (6) months in jail, all but five (5) days of which was suspended, and fined $5,000.

1/ Similarly, in two (2) pre-1975 referrals the Department of Justice felt that there was inadequate evidence to support the charges. In one, the U.S. Attorney's Office requested FEA to audit the books and records of a company to better determine that company's interpretation of certain regulations of fuel oil prices so that the issue of intent would be more clearly focused. In the other, the Economic Litigation Section concluded that certain conflicting documentary submissions by the company under investigation negated Justice's ability to prove the element of willfulness.

were too severe in relation to the alleged violation. In one such referral, the Economic Litigation Section wrote a memorandum to the U.S. Attorney under whose jurisdiction the alleged offense had occurred, setting forth certain considerations which led them to recommend against criminal prosecution. The memorandum indicated, inter alia, that the Department of Justice had attempted to avoid the appearance of "Big Government" being oppressive to "little people" and that they therefore had been less likely to recommend prosecutions under 18 U.S.C. §1001 against owners of small businesses. The memorandum further advised that the Economic Litigation Section did not believe there was any present sympathy in the public, judiciary or Congress for taking a hard line against retail service station operators. In the case of similar conduct by large entities, however, they felt they would be inclined to seek the heavier penalty.

In another referral which was not prosecuted criminally, the Economic Litigation Section recommended only civil action because all similar cases involving overcharges by retailers brought throughout the country — and especially in the jurisdiction where the offense allegedly occurred -- up to that time (March 8, 1977) had been handled civilly. Finally, in one referral where the U.S. Attorney received the files with the Economic Litigation Section's recommendation for criminal prosecution, 1/ the U.S. Attorney involved found that after a complete review of the file,

---

1/ FEA referred to matter to Economic Litigation Section of the Department of Justice in June, 1975.

the case did not warrant Federal criminal prosecution at that time (June, 1977). Unfortunately, the U.S. Attorney gave no written reasons supporting that determination, and the Economic Litigation Section attorney who referred the case was similarly unaware of the reasons behind the decision not to prosecute.

VIII. PRIVATE ACTIONS

A. Actions Against the FEA Under the EPAA

1. Jurisdiction

Sections 210 and 211 of the ESA, as incorporated in §5(a)(1) of the EPAA, provide for judicial review of cases or controversies arising under the EPAA. Section 210 provides for private actions, which will be discussed below. Section 211 provides for suits against the FEA. Under §211(a), exclusive original jurisdiction of such cases is lodged in the district courts; and §211(b) provides for exclusive appellate jurisdiction, similar to that of a circuit court of appeals, in a specially created Temporary Emergency Court of Appeals ("TECA"). Section 211(c), furthermore, provides that whenever a district court determines that a "substantial constitutional issue exists," the district court shall certify such issue to the TECA. 1/ Significantly, there is no statute of limitations for filing actions under §211 of the ESA. Laches is the only bar to dilatory actions.

1/ The TECA determines the appropriate manner of disposition, including a determination that the entire action be sent to it. To date, the district courts have used the certification provision very sparingly, as most constitutional claims have turned out not to be "substantial" and have been dismissed at the district court level. Among those cases where the TECA has reviewed certified constitutional issues are Condor Operating Co. v. Sawhill, 514 F.2d 351 (TECA 1975) cert. denied, ____ U.S. _____ (1975); and Griffin v. U.S., ___ F.2d ___ (TECA 1976), cert. denied, ____ U.S. _____ (1976). In each case, the TECA declined to hold the FEA regulations or orders unconstitutional.

2. Standards of review

The standards for review of FEA regulations and orders are set forth in §211(d)(1). Under this provision, no regulation may be enjoined or set aside unless its issuance is determined to be in excess of the agency's authority, arbitrary or capricious, or otherwise unlawful under the criteria set forth in 5 U.S.C. §706(2) (the Administrative Procedure Act). Orders of the FEA are subject to a different review standard; namely, whether the order is in excess of the agency's authority or based upon findings which are not supported by substantial evidence. 1/

3. Injunction authority

Section 211(d)(2) contains a special limitation on the power of a district court or the TECA to enjoin FEA regulations or orders, either temporarily or permanently. Such injunctions may be issued, but only to a person who is a party to litigation before the court. Thus, a person subject to an enjoined FEA regulation, but who was not a party, must arguably seek its own injunction or continue to comply with the regulation or order. This provision has had a tendency to cause a proliferation of litigation, but it has also had the benefit of helping the agency to maintain the status quo pending final judicial resolution. 2/

1/ The standards for judicial review are discussed in greater detail in an earlier section of this report.

2/ For example, when the FEA's regulation of service station rentals under the EPAA was enjoined by a district court in Shell Oil Co. v. FEA, ___ F.Supp ____ (S.D. Tex. 1975), several similar lawsuits were filed in other jurisdictions. The plaintiffs in those cases, however, continued to comply with the rent regulations, while the Shell decision was on appeal to the TECA.

4. Declaratory judgments

Section 211(e)(1) of the ESA grants the district courts jurisdiction to declare FEA regulation and orders unlawful under essentially the same criteria as those set forth in §211(d)(1).

A final judgment of the TECA that enjoins or sets aside any statutory provision of the EPAA or any regulation or order issued thereunder is automatically postponed for 30 days from the date of entry. ESA §211(f). If a petition for a writ of certiorari is filed with the Supreme Court within such 30 days, the stay of judgment is automatically continued pending final disposition by the Supreme Court.

In sum, the usual panoply of judicial relief is available to private litigants challenging FEA regulations or orders issued under the EPAA; and the standards of judicial review do not depart significantly from those customarily associated with review of agency regulations or orders under the Administrative Procedure Act ("APA"). 1/ Injunctive relief is limited to the parties before the court, and a special court of appeals with exclusive original jurisdiction over substantial constitutional issues has been established, thereby eliminating the phenomena of the

---

1/ This is so despite the fact that FEA's actions are explicitly excluded from the judicial review criteria set forth in Chapter 7 of the APA. See ESA §207, as incorporated in §5(a)(1) of the EPPA. The significance or purpose of this exclusion is difficult to discern in view of the specific reference in §211(d)(i) of the ESA to the review criteria of Chapter 7 of the APA.

"race to the courthouse" and the "law of the circuit," resulting from potentially inconsistent decisions in the circuit courts of appeals.

B. Actions Against the FEA Under ESECA

Judicial review of FEA regulations and orders issued under ESECA is provided for in §7(i)(2) of the FEAA. Review of rulemakings of "general and national applicability" may be had by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 30 days after promulgation, while review of rulemaking of "general, but less than national, applicability" may be had by filing a petition in the U.S. Court of Appeals "for the appropriate circuit" within 30 days after promulgation. FEAA §7(i)(2)(A). The district courts have exclusive original jurisdictional over all other cases or controversies arising under ESECA. FEAA §7(i)(2)(B). Significantly, there is no statute of limitations applicable to cases or controversies brought in the district courts. It is assumed that appeals of district court decisions must be taken to the circuit court of appeals in which the district court is located.

The standards of review for actions brought under ESECA via §7(i)(2) of the FEA Act are presumably those contained in Chapter 7 of the APA. Similarly, the statutes are silent with respect to the nature of judicial relief available, so it is presumed that there is no limitation on the relief the courts may grant.

To date, only a handful of lawsuits have been brought under ESECA and none of thes cases has reached final adjudication.

C. Private Enforcement Under the EPAA

Section 210 of the ESA, as incorporated in the EPAA, authorizes private suits for damages and other relief, including declaratory and injunctive relief, to be brought in district court by "any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto." ESA §210(a).

In any such action brought against a person selling petroleum products covered under the EPAA, the plaintiff may, in the discretion of the court, be awarded attorney's fees and costs; and, if the overcharge is "willful," the plaintiff may recover "an amount not more than three times the amount of the overcharges" or "not less than $100 or more than $1,000," whichever is greater. ESA §210(b).

Where the defendant establishes that the overcharge was "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to the avoidance of such error," liability is limited to the amount of the overcharge. ESA §210(b)(2). Where the overcharge is not "willful," no action for an overcharge may be brought, unless the purchaser has "first presented to the seller . . . a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim." Id. The term "overcharge" is defined as any amount in excess of "the applicable ceiling [price] under the regulations or orders issued under this title."

Due to a variety of factors, including the failure of FEA to complete its audits of most large petroleum firms expeditiously or to interpret certain key provisions of the regulations, private damage actions under §210 of the ESA are now proliferating at a rapid rate. Moreover, as a result of the recent decision of the TECA, Longview Refining Co. v. W.R. (Bill) Shore, ____ F.2d _____, CCH Federal Energy Guidelines ¶26,068 (T.E.C.A., Feb. 15, 1977), the Agency is being routinely joined as a party in actions which previously would have involved only the private parties. In Longview, the TECA held that FEA should be joined as a party, because (1) the agency had "considered, investigated, or determined various aspects of plaintiffs cases," and (2) the agency's "expertise and responsibility with respect to interpreting, applying, and enforcing the regulations in controversy" may be helpful to the court. Id., at 26,537. As a result, FEA is finding itself in situations where it has not completed (or perhaps not even commenced) enforcement action against the private defendant, but the plaintiff, through discovery, is uncovering evidence of violations of FEA regulations warranting agency compliance action or at least active and extensive participation in the fact finding aspect of the lawsuit. In addition, many of these cases involve regulatory issues which FEA has neglected to resolve and whose resolution would clearly benefit from FEA's special expertise.

In appropriate instances, the FEA may move to stay the judicial proceedings to allow the agency to complete a related compliance proceeding and/or to issue a definitive interpretation of its regulations. See, e.g.,

Evanson v. Union Oil Co. and FEA, ____ F.Supp. _____, CCH Federal Energy Guidelines, ¶26,056 (D. Minn. 1976). However, due to the agency's unusually poor (and by now widespread) record of not completing such administrative proceedings in a timely manner, the courts are increasingly inclined to permit private actions to proceed despite the lack of a final agency position.

This could be of critical importance to FEA's overall compliance effort. The TECA's Longview decision insures, to some extent, that the agency will be a participant in such judicial resolutions. However, as the courts are to become the arena in which novel regulatory decisions are made, substantially greater emphasis and support should be given to the agency's active participation, at least as a "friend of the court," in such litigation. FEA's ligitation effort to date in private actions has concentrated principally on requesting more time for the agency to resolve outstanding issues outside of court rather than taking an active role in the litigation.

D. Private Enforcement Under ESECA.

Section 12(b)(5) of the ESECA authorizes any person suffering legal wrong because of any act or practice arising out of any violation of the provisions of Section 2 of ESECA (relating to coal conversion and allocation) or Section 11 (relating to energy information), or of any rule, regulation, or order issued pursuant to those provisions, to bring civil action in district court for appropriate relief, including an action for

a declaratory judgment or a writ of injunction. No suits have been filed under this provision to date.

IX. JUDICIAL ENFORCEMENT OF SUBPOENAS, SPECIAL REPORT ORDERS AND FREEDOM OF INFORMATION ACT

A. Subpoena Enforcement

Section 5(a)(1) of the EPA incorporates by reference Section 206 of the ESA and provides that the Administrator or his duly authorized agent shall have authority, for any purpose relating to the EPAA, "to sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant books, papers, and other documents." In the case of a refusal to obey such a subpoena, the Administrator or his delegate may request the Attorney General to seek the aid of the district court of the United States for any district in which the person or company subject to the subpoena is found to compel appearance to give testimony or to produce the requested documents.

Sections 13(b) and (e) of the FEA Act also specifically authorize the Administrator to collect information and to issue subpoenas to compel the production of documents and records needed to perform the energy information gathering functions specified in the Act. In the case of contumacy or refusal to obey such subpoena, any appropraite United States District Court may issue an order requiring the party to whom such subpoena is directed to appear and to give testimony or to produce the requested documents. FEA §13(e)(2). Any failure to obey the order of the court may be punished by the court as a contempt. Id.

Finally, §11(a) of ESECA directs that the FEA Administrator "request, acquire and collect such energy information as he determines to be necessary to assist in the formulation of energy policy or to carry out the purposes of this Act or the Emergency Petroleum Allocation Act of 1973." The Administrator (or his designee) is specifically authorized "to sign and issue subpoenas for the attendance and testimony of witnesses and the production of books, records, papers, and other documents," ESECA §11(b)(1)(B). He (or his designee) is also permitted to enter and inspect any business premise or facility (including books, records, other documents or stocks of energy resources) for purposes of verifying the accuracy of any energy information submitted to FEA, provided he presents proper credentials and written notice. ESECA §11(b)(2).

To enforce an administrative subpoena issued under ESECA, the Administrator may request the Attorney General to petition the district court, within whose jurisdiction any inquiry is carried on, for an order requiring compliance therewith. ESECA §11(b)(3). Any failure to obey the order of the court may be punished by the court as a contempt. Id. The authority contained in ESECA with respect to obtaining reliable energy information by, inter alia, subpoena is "in addition to, independent of, not limited by, and not in limitation of, any other authority of the Federal Energy Administrator." ESECA §11(g)(1).

As has been noted, supra, the FEA's subpoena powers have received broad support from the TECA. See, U.S. v. Empire Gas Corp., _____ F.2d _____, CCH Federal Energy Guidelines ¶26,065 (Em. App., 1976).

B. Special Report Orders

In addition to subpoena powers, FEA has authority under the FEA Act and, ESECA to require, by "general or special orders," persons engaged in the petroleum industry and in other energy industries to prepare special reports or to answer written interrogatories. FEA Act §13(b) and (c); ESECA §11(b)(1)(A) and (C). FEA utilizes this authority to require persons subject to the petroleum price and allocation regulations to prepare what are commonly called "special report orders" regarding their compliance with the regulations. See 10 C.F.R. §210.91.

As has been noted above, two lawsuits have been filed challenging FEA's authority to issue special report orders. Crown Central Petroleum Corp. v. FEA, C.A. No. _____ (D. Md.); Powerine Refining Co. v. FEA, C.A. No. _____ (C.D. Calif.). The Powerine case also challenges FEA's authority to issue a special report order in connection with a compliance proceeding after an NOPV has been issued to the firm in question. Neither of these cases have been briefed or argued. ESCA Section 12(b)(4) provides for the enforcement of Special Report Orders issued pursuant to FEAA Sections 13(b) and 13(c) and ESECA Section 11(b) by the Department of Justice. To date there have not been any cases brought to enforce compliance with an SRO.

C. Freedom of Information Act Cases

Several firms have filed extensive requests for information under the Feedom of Information Act ("FOIA") in connection with litigation pending or contemplated against FEA. One case, Coastal States Gas Corp. v. FEA, C.A. No. 76-1173 (D. C.), challenges the FEA's compliance with the "indexing" requirements of the APA, 5 U.S.C. §552(a)(2), and involves a request for a massive amount of compliance related documents. Arguably, if it can be established that FEA's failure to comply with the APA's indexing requirement resulted in the nondisclosure of documents that serve as agency precedents, decision criteria, instructions or so called "secret law," than compliance action related to such documents may be collaterally attacked. Similarly, several major oil companies subject to the EPAA regulations and utilities subject to ESECA are attempting to use FEA's repeated inability to respond in a timely manner to their FOIA requests as a basis for attaching related agency orders.

X. REPRESENTATION BY DEPARTMENT OF JUSTICE

A. Statutory Authority

The Department of Justice ("DOJ") has statutory authority to represent all federal agencies in court, "except as otherwise authorized

by law" 28 U.S.C. 6516. See also 28 U.S.C. §§518-519. 1/

Under the "exception" clause, several federal agencies (including the Department of Labor, almost all independent regulatory commissions, the Veterans Administration, the Environmental Protection Agency, the Bureau of Mines and others) have obtained explicit authority, either by statute or by agreement with DOJ, to represent themselves in some or all of their civil litigation.

In addition, the Judicial Review Act of 1950, 28 U.S.C. §2341 et seq., provides that litigation in the United States courts of appeals and the Supreme Court involving appellate review of final orders of several agencies and departments, including the Federal Communications Commission, the Maritime Commission, the Atomic Energy Commission (now the Nuclear Regulatory Commission), and the Secretary of Agriculture, may be conducted by such agencies on their own behalf.

Finally, cursory research indicates that at least a dozen other agencies conduct all or a portion of their civil litigation, pursuant to informal arrangements with DOJ. Generally, the more complex the subject

---

1/ The full text of 28 U.S.C. §516 reads as follows:

§516. Conduct of Litigation Reserved to the Department of Justice

"Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under direction of the Attorney General.

matter of the litigation, the more likely it is the agency will assume responsibility for it. In this respect, FEA appears to be an anomaly.

To date, except for extremely rare occurrences, DOJ has refused to relinquish officially any of the statutory authority it has over the conduct of FEA's litigation. However, as will be discussed more fully within, DOJ is not adequately staffed and lacks sufficient proximity to and comprehension of the nation's extremely complex and rapidly developing energy regulatory programs to exercise control over the conduct of FEA's litigation effectively or wisely. Consequently, the DOJ staff lawyers assigned to FEA cases have grown increasingly (and are often almost totally) dependent on the input of FEA's own litigation attorneys for the successful conduct of their cases. Control, in many cases, therefore, is being exercised in name only by DOJ attorneys and without sufficient appreciation for the consequences of such litigation on national energy policy. 1/

1/ DOJ attorneys do not ordinarily know what issues are important to the agency, particularly in view of FEA's frequently shifting regulations and programs. Cases which may look very straight forward on their face may involve subtle issues of critical import to the agency's compliance effort — e.g., the "transaction" definition has surfaced in some cases without being labled as such, and DOJ would have no reason to know these cases are important. Moreover, many of the cases are so complex that to brief and argue them properly requires a mastery of the facts, the regulatory programs and the proceedings involved, which DOJ attorneys often have no time to attain and which they cannot obtain merely by having the agency prepare a litigation report. A lawyer practically must live with FEA's regulatory programs if he or she is to brief and argue them persuasively. Thus, given the enormous caseloads of the DOJ staff attorneys, it is easier for them to brief "legal" issues rather than to master the regulations and the factual and policy issues in a particular case.

The FEA's litigation staff is prohibited by DOJ from assuming direct control of FEA's cases. Agency attorneys must be content to influence the outcome of the agency's litigation by indirect means, such as providing draft pleadings and briefs and suggesting appropriate litigation strategy and argument to their DOJ counterparts. On several occasions, agency suggestions have been ignored and DOJ attorneys have refused to provide an opportunity for the Agency to review the pleadings or briefs filed on its behalf. There is usually no effective appeal of DOJ attorneys' decisions, except to higher levels of DOJ, which are even further removed from the matters involved and less inclined to accept advice from the Agency's counsel. A more rudderless and inefficient system would be difficult to devise for the litigation of the FEA's extremely complex and interrelated lawsuits.

B. Civil Division, DOJ

The majority of FEA's litigation arises under the EPAA and is handled at DOJ by the Economic Litigation Section of the Civil Division. FEA has also had some (and expects much more) litigation arising under ESECA, which is handled by the Lands Division of DOJ. In addition, related cases arising under the Freedom of Information Act, of which there have been several, are handled by the Information and Privacy Section of the Civil Division. Subpoena enforcement cases are customarily

handled by the appropriate United States Attorney's office, except that the more complex and controversial subpoena cases are usually referred back to the appropriate section of DOJ's national office. Because the majority of FEA's litigation has arisen under the EPAA, this discussion will focus primarily on the procedures that have developed for handling FEA's litigation between the Economic Litigation Seciton of DOJ's Civil Division and the Litigation Division of FEA's Office of General Counsel.

The Economic Litigation Section (hereinafter sometimes referred to as the "Section"), is comprised of a section chief, two assistant chiefs, 14 staff attorneys, and secretarial staff. The Section has a disporportionately large caseload. In addition to FEA's litigation, of which the Section handles both district court and appellate proceedings, it also has responsibility for five other major unrelated areas of litigation. These include: (1) defense of Renegotiation Board orders in trials de novo before the U.S. Court of Claims; (2) virtually all of the litigation of the Department of Housing and Urban Development, other than disputes over federally-owned properties; (3) litigation arising out of the fixing of rates and the distribution of water by the Department of Interior for hydroelectric power, irrigation, flood control, etc., in western states; (4) litigation in state courts over electric and gas utility rates which allegedly discriminate against federal facilities; and (5) a backlog of cases that remain from the regulatory programs of the Cost of Living Council under the Economic Stabilization Act. As a consequence, the Department of Justice has only four man years to devote to FEA business.

FEA cases must be squeezed in among lengthy contract renegotiation trials, labyrnthine water rights disputes, complicated state court trials over utility rates, and an extremely large caseload of HUD litigation which has recently estimated to be from 500 to 600 cases. Additionally, the Section acts as liaison and consultant to the Civil Rights Division of DOJ on housing discrimination cases and has the usual distribution of Equal Employment Opportunity Act litigation, which it shares throughout the Civil Division. The legal staff of the Section has increased only modestly since the passage of the EPAA in November 1973; but since that time the Section has added both HUD and FEA to its list of client agencies, which together account for the majority of its cases.

The result is that FEA is unable in many cases to pursue issues and litigation strategy in an optimum or aggressive manner. Oral arguments and depositions are often not carefully prepared, and FEA is rarely able to conduct any significant discovery of its own or to take an active role in the private actions to which it is a party. Many significant opportunities may be missed as a result of DOJ's understanding. 1/

1/ The Economic Litigation Section is farily typical of the Civil Division generally. After only three months on the job, Barbara Allen Babcock, the new Assistant Attorney General of the Civil Division, described the condition of the Civil Division in a widely distributed memorandum to the Attorney General, as follows:

> "Presently the Civil Division is suffering from years of inattention as to resources. Lawyers are poorly

(continued)

C. DOJ's Procedures for Handling FEA Litigation

There are no known written procedures for DOJ's handling of client agencies' litigation. Each client agency is free to establish the best working relationship it can with the DOJ entity that represents it, including conducting some or all of their litigation. Thus, the term "procedures" is used loosely here to refer to a mode of operation that has developed during the past three and half years of interaction between the Economic Litigation Section of DOJ's Civil Division and the Litigation Division of FEA's Office of General Counsel.

1. Defensive Litigation

Most FEA litigation to date has been defensive litigation challenging the agency's regulations and orders. Such cases are typically decided

---

(footnote continued from previous page)

> housed, often two or three to a room, in inadequate space, with low-level secretarial and virtually non-existent paraprofessional support. There is no cohesive training or meaningful evaluation program for lawyers, nor is there an identifiable career-track within the Division for either lawyers or other personnel. Although there are excellent lawyers here, the quality is not uniform because of the lack of training and supervision, and because many lawyers are working under caseload constraints and in condition which are not conducive to first-rate lawyering."

Although the Civil Division is aiming for a budget in fiscal 1979 which will correct these conditions, there is no relief in sight prior to that time and no guarantee or relief even then. Thus, for the next few years, which are likely to be crucial ones for the litigation of FEA's regulatory programs, FEA's cases are likely to continue to be grossly understaffed and inadequately supervised by DOJ.

on cross-motions for summary judgment without extensive discovery or the need for an evidentiary hearing.

Cases filed against FEA must be served both upon the agency and the Attorney General. After a complaint is received, two staff attorneys, one from FEA and the other from DOJ, are assigned to each case and they begin to divide the labor. DOJ routinely transmits a copy of each complaint to FEA, together with a formal request for a "litigation report" 1/ and a proposed answer to be provided by a specified date. FEA's staff attorney provides the draft answer and forwards available administrative records, if appropriate. Instead of preparing a "litigation report," the FEA attorney usually commences the preparation of the necessary affidavits, motions and briefs, in coordination with a DOJ counterpart.

The traditional means for presenting the FEA's position in defensive litigation involving regulatory issues has been the preparation of comprehensive litigation affidavits, which explain in detail the "rational basis" for the agency's regulatory decisions. Such litigation affidavits usually include sections on relevant statutory background and legislative history, the regulatory provisions at issue and how they conform to statutory objectives, the procedural history, related

---

1/ A "litigation report" means a memorandum describing the factual and legal issues in the case, the agency's position, and the administrative records, if appropriate. For most agencies represented by DOJ, the litigation report is their major (and often their only) input in a case. FEA, however, has always taken an active role in the litigation of its cases.

administrative proceedings, and the likely effects of an adverse decision. In addition to explaining the agency's position to the court, such affidavits have served the further purpose of educating DOJ attorneys about the complex regulatory programs and policies involved.

Preparation of litigation affidavits is the exclusive province of the agency's attorneys. The preparation of briefs is typically shared between FEA and DOJ attorneys, with agency attorneys usually preparing the first draft of briefs or at least the statement of facts, and DOJ attorneys assuming the responsibility for finalizing briefs and having them filed. DOJ asserts final authority to decide the final contents of briefs whenever disputes arise. FEA, on the other hand, has always insisted upon its rights as a client to review final briefs before they are filed on its behalf and insists upon having an Agency attorney at every court appearance to provide assistance. 1/ On several occasions FEA has been denied the right to review final briefs, which has resulted in counterproductive institutional disputes.

DOJ insists on arguing all cases in court and in representing agency witnesses in depositions, despite the fact that FEA attorneys, who live with the regulations on a daily basis, often know the facts and underlying rationale of the FEA's position far better than their DOJ counterparts. FEA attorneys must therefore spend an inordinate

---

1/ According to DOJ attorneys, the FEA is unique in this regard.

amount of time and duplicative of efforts to familiarize DOJ attorneys with their cases. Under this system, the attorneys arguing cases or conducting depositions often lack a sufficient appreciation for the nuances and complexities of the agency's regulations, or the many inter-related policy considerations which an attorney should have at his or her fingertips to argue a case well and respond effectively to questions from the bench or opposing counsel.

2. Offensive Litigation (Including Counterclaims)

Other than counterclaims FEA has filed in response to the lawsuits filed against it, FEA has initiated only a few civil lawsuits, and with only a few exceptions, these have involved relatively routine and straightforward infractions of the FEA regulations. 1/

1/ One notable exception was a case filed by FEA against Texaco Oil Company in November 1974, seeking a mandatory temporary restraining order to require Texaco to provide crude oil to two small, independent refiners. Texaco had filed similar motions to enjoin the FEA from enforcing its regulations. See Texaco v. FEA, C.A. Nos. 74-234 and 74-244 (D. Del.). A TRO was entered in favor of the FEA, thereby establishing for the first time the credibility of the agency's enforcement program. The case was later dismissed after Texaco brought itself into full compliance with the FEA's crude oil allocation regulations.

The only other major enforcement action filed by DOJ was the Gulf Oil entitlements case, in which FEA sought and obtained a criminal indictment against the company and its high officials for their public refusal to comply with the operation. After both the Civil Division and the U.S. Attorney in Pittsburgh refused to seek the indictment, the FEA brought the matter to the Deputy Attorney General, who resolved the dispute in favor of FEA. The case was subsequently dismissed after the company agreed to pay $25,000 in criminal fines and its chief executive paid nominal civil penalties.

The procedure for bringing a routine civil claim through the offices of DOJ is still somewhat vague and haphazard. All such cases are referred to a single attorney in the Economic Litigation Section. DOJ has the ultimate authority to decide to file such cases, to decide whether to file them as civil or criminal cases, and, once a case is filed, to determine how to prosecute it and, if necessary, settle it. Routine cases are generally handled out of the U.S. Attorney's offices. Such cases are triggered by the transmittal of a litigation report prepared by the Agency including the Agency's investigative reports. After a case has been so referred, it is usually not heard of again until DOJ needs the Agency's assistance, it is time for trial or the case has been decided. Occasionally, a case is returned for additional preparation because DOJ does not believe it should be prosecuted at all.

3. Appeals

Appeals of district court decisions to the TECA must generally be approved by the Solicitor General of DOJ. This is usually a pro forma matter and is handled administratively by the Economic Litigation Section, which has the line responsibility for the conduct of such appeals. In the event the Section chooses not to sponsor an appeal, FEA must persuade the Assistant Attorney General of the Civil Division or her deputy that an appeal is warranted. If that fails, then the Solicitor General must decide whether to take the agency's appeal. Generally, if the Civil Division recommends against an appeal, there is very little likelihood that an appeal would be approved by the

Solicitor General. Thus, as a practical matter, except for uniquely important cases such as the Gulf Oil entitlements case, the FEA must live with the determinations of the Civil Division. 1/

4. Discovery

Responding to interrogatories and requests for production of documents is primarily the responsibility of the FEA staff attorney. The conduct of depositions is the responsibility of the DOJ staff attorney. This is consistent with the division of labor generally. FEA does the bulk of the written work while DOJ does the majority of the oral work. 2/

DOJ lacks an appreciation for the difficulties which massive discovery requests place upon an agency, particularly an agency such as

---

1/ This was demonstrated recently in litigation involving the sequence of recovery of increased product and nonproduct costs. FEA, with the cooperation of the Economic Litigation Section, moved for a protective order against the deposition of several of its top officials. The FEA lost the motion in district court, but, upon the request of the DOJ attorney in charge of the case, the district court agreed to certify the issue for an interlocutory appeal to the TECA. DOJ later refused to prosecute the appeal, and the matter was taken to the Deputy Assistant Attorney General, Civil Division. He refused to recommend an appeal to the Solicitor General, and thereby committed the FEA to burdensom depositions and other related discovery.

2/ Only on a few occasions have FEA attorneys been allowed to argue their cases, and only once in the TECA. On that occasion, it has been reported, the reason for permitting the agency attorney to argue the case was that the DOJ believed the case would be lost and it wanted the agency to bear the responsibility. The case, however, was won and became an important precedent for the agency. See Marathon Oil Co. v. FEA , ___ F.2d ____ (TECA 1977).

FEA, whose regulatory functions and files are spread among ten regional offices and several national offices. Consequently, DOJ often does not take an aggressive role in seeking protective orders against extraneous or burdensome discovery requests submitted to the agency. This is particularly relevant for the future, because, as noted, the caseload is changing from cases primarily involving challenges to the FEA's statutory and regulatory authority to cases involving the application of the regulations to particular firms. The former have typically been decided through summary judgment proceedings without substantial discovery; the latter involve remedial orders and denials of exception relief having a more immediate financial impact which tends to stimulate lengthy and dilatory discovery tactics. A more aggressive opposition by DOJ to such discovery is clearly desirable.

The Task Force found that there is mutual dissatisfaction between FEA and DOJ with the present arrangement. While it is recognized that FEA's legal staff has greater expertise with the regulations, there is substantial disagreement with respect to matters of policy and litigation tactics. DOJ lawyers have criticized the quality of FEA's audits and FEA's responsiveness in meeting deadlines for materials needed for litigation.

The Task Force agrees with the feeling shared by both agencies that the present arrangement for handling FEA's litigation caseload is unsatisfactory. There appears to be a mutual consensus that the two agencies are performing duplicative work, and the Task Force agrees with that assessment.

SECTION VI

REPORT AND RECOMMENDATIONS

ON COMPLIANCE STRATEGY

Summary of Recommendations

Strategy

1. Develop within three to four months a program which, when approved by the appropriate authority of the Department of Energy, will be capable within 18 months to two years of completing audits and case resolution (not including Exceptions and Appeals proceedings) at the fifteen largest integrated refiners, and selected other large refiners presently in FEA's RARP program:

   i. For most of the dollar volume until a diminishing return point (expected to be approximately 70 percent of total dollar volume of each firm audited);

   ii. Of transactions occurring through the end of calendar year 1976;

   iii. With several refiners targeted for completion through 1976 in considerably less time that 18 months.

2. Consistent with the major refinery strategy, provide high priority to major independent crude producers and crude oil resellers.

3. Adopt forms to be filed by crude producers, resellers (both propane and others), NGL processors, and refiners, which provide base data and current information about actual costs and recoveries:

i. Overriding consideration in design of forms should be to maximize extent to which the forms on their face reveal or predict violations;

ii. In all programs other than major refiners, utilize forms to maximum feasible extent in choice of firms for on-site audit;

iii. Consider prospective changes in regulations applicable to resellers and retailers which would render the regulations more amenable to reporting forms while still accomplishing statutory purposes of EPAA and related statutes.

4. In establishing priorities among programs other than major refiners, independent crude producers and crude oil resellers, and in targeting of firms within program, use cost/benefit ratios as baseline, and move generally in direction of comparable marginal cost/benefit ratios across program areas. For targeting of firms within programs, superimpose on this baseline considerations ordinarily brought to bear in maximizing deterrence.

5. Redefine, for all programs other than major refiners, goals by which Regional Compliance performance is measured in terms of prescribed cost/benefit ratios consisting of a given amount of dollar violations for each hour of auditor's time.

6.0 Compliance and Enforcement Strategy

6.1 General Overview of the Problem:

- 6.1.1 Diversity of Firms Subject to Regulations
- 6.1.2 Changing Role of "Deterrence"
- 6.1.3 Recommended Strategy for Dealing with Past Audit Periods
- 6.1.4 Recommended Strategy for Future Compliance Efforts

6.2 Present Strategy

- 6.2.1 Reseller/Retailer: Initial "for cause" Audit Initiation
- 6.2.2 Major Refiners: Continuous On-Site Audit From 3 Approaches
  - o "Cycle Concept"
  - o "Module Concept"
  - o "Common Audit Approach"
- 6.2.3 Unfulfilled Goal at Major Refiners
- 6.2.4 Early 80-20 Audit Strategy
- 6.2.5 Current FEA Audit Strategy: Stretched-Out Cycles
- 6.2.6 "Goals" to Implement Strategy
- 6.2.7 Reseller Targeting
- 6.2.8 Targeting: Independent Crude Producers
- 6.2.9 Recommended Approach

6.3 New Audit Strategy --- Greatly Expanded RARP Program

- 6.3.1 Inadequate Progress in Audits of Major Refiners
- 6.3.2 Major Realignment of Personnel
- 6.3.3 Reasons for New Audit Strategy
  - o FEA Credibility
  - o Largest Potential Violations at Major Refiners
  - o Refiners are Largest Crude Producers
  - o Potential Increased Ratio-Dollar Violation/Audit Hour
- 6.3.4 Potential Disadvantages of New Audit Strategy

6.4 Major Elements of Greatly Expanded RARP Program

- 6.4.1 General and Summary
- 6.4.2 Nature of Refiner Regulations
- 6.4.3 Expand Audit Coverage of Cost Data at the Major Refiners
- 6.4.4 New Approach to Class of Purchaser
- 6.4.5 Less Abstract Resolution of Issues
- 6.4.6 Realign Resources
  - o Institutional Arrangements
- 6.4.7 Improve Access to Records
- 6.4.8 Integration of Computer Expertise with RARP Teams
  - 6.4.8.1 Why Computer Expertise Must Be Integrated Into RARP Audits
    - o Expanded Source of Existing Records
    - o Better Understanding of Accounting Systems
    - o Ability to Confirm the Accuracy of Data
    - o Capability to Utilize Machine Sensible

Records in Order to Speed Up Audits.

6.4.8.2 How to Integrate Computer Expertise in RARP Audits
- o Legal Authority
- o Seek Cooperation of Oil Companies
- o Obtain Specialized Staffing
- o Auditor Training

6.4.9 Benefits of Third-Party Litigation

6.5 Conversion to a Self-Reporting System
- 6.5.1 Overview
- 6.5.2 FEA's Present Compliance and Enforcement Reporting System
- 6.5.3 FEA's Use of Its Compliance and Enforcement Reporting System
- 6.5.4 History of FEA Compliance Forms
  - 6.5.4.1 Transfer Pricing Report, F701-M-0
  - 6.5.4.2 Domestic Crude Oil Purchasers Report; P124-M-0
  - 6.5.4.3 Domestic Crude Oil Entitlements Program Refiners Monthly Report; P103-M-1
  - 6.5.4.4 Utility Supplier Questionnaire; P111-S-0
  - 6.5.4.5 Refiners' Monthly Cost Allocation Report; P110-M-1
- 6.5.5 Conclusion: FEA Has Not Used a Self-Reporting System
- 6.5.6 The Concept of a Self-Reporting System
- 6.5.7 Self-Reporting With Respect to FEA Price Regulations
- 6.5.8 Advantages of a Conversion to a Self-Reporting System
- 6.5.9 The Use of Self-Reporting Forms
  - 6.5.9.1 Resellers/Retailers
  - 6.5.9.2 Producers
  - 6.5.9.3 Gas Processors
  - 6.5.9.4 Refiners
  - 6.5.9.5 Utility of Independent CPA Certification
  - 6.5.9.6 Books and Records Requirement

6.6 Choice of Non-RARP Targets in the Future
- 6.6.1 Overview
- 6.6.2 Achieving Future Deterrence
- 6.6.3 Maximizing Discovery of Violations
- 6.6.4 Targeting Within Programs: Violation Indicators
- 6.6.5 Other Factors: Regional Selection and Some Coverage in Each Program

6.7 New Definition of Goals
- 6.7.1 Introduction
- 6.7.2 Overview of Present Goal-Oriented System
- 6.7.3 Weaknesses of Present Goal-Oriented System
  - o Slow Resolution of Regulatory Issues
  - o Unrealistic Manpower/Productivity Expectations
  - o Overly Optimistic Anticipated Audit Times
  - o Too Little Regional Input

- o Lack of Support from Regions and RA's
- o System Did Not Encourage Selection of Audits With High Violation Potential
- o System Detracted From Completions of Major Refiner Audits

6.7.4 Proposed Performance Measurement System Overview

6.7.5 New Strategy for Major Refiners

- o Becoming Current

6.7.6 Other Programs - A New Definition of Goals

6.0 Compliance and Enforcement Strategy

6.1 General Overview of the Problem

6.1.1 Diversity of Firms Subject to Regulations

The universe of firms subject to FEA regulations is extremely diverse. It ranges from the small "mom and pop" gas station in rural America to the single truck home heating oil dealer all the way up to the industry giants such as Exxon Oil Company with a refining capacity of over 1.25 million barrels per day and a diversified structure involving all phases of the industry. Recordkeeping systems may range from a shoebox full of receipts and disbursements to a complex computer system. The locations of these records may vary from private homes to corporate headquarters which may be hundreds or even thousands of miles from the actual sites of the operations. This great diversity of firms and products means that violation rates, and violation amounts likely to be uncovered by a given investment of auditor's time, vary greatly. These considerations are central to an enforcement strategy.

6.1.2 Changing Role of Deterrence

Moreover, the strategic choices that face the Compliance program in July of 1977 involve both the past and the future. A conventional task of law enforcement is to deter. In the context of FEA's pricing regulations, to deter means to influence the dollar volume of future transactions at or below the maximum lawful selling price. Approximately half of the products produced from a barrel of crude oil, by volume, have already been decontrolled and decontrol of motor gasoline is under consideration. If motor gasoline is decontrolled, current deterrence, that is, with respect to the present system of price controls, will be an important task only with respect to crude oil, NGL's, propane, and certain other products. For decontrolled products, the role of deterrence is to maintain the credibility of the government against the time when it might again become necessary to reimpose controls. Such deterrence is achieved by not allowing past violations to go undetected. In particular, product controls are likely to be reimposed on an episodic basis, in response to an embargo or similar emergency. To maintain credibility of the regulatory system, it is essential to remedy past violations with respect to presently decontrolled

products. Moreover, it is essential to maintain a credible standby enforcement capability in the event of reimposition of product controls.

6.1.3 Recommended Strategy for Dealing with Past Audit Periods

The major strategic choice involves not the future but the past. Innumerable transactions, involving all areas of the regulations and all segments of the industry, have yet to be audited, even for the embargo period. Violation rates in all segments of the industry have been found to be substantial. It is not possible to do on-site comprehensive audits of all industry members for the period 1973 to the present. A choice is therefore necessary, and the major strategic question is, how should the past be dealt with? Given that there are violations as yet undetected in all industry segments for the embargo period and the years thereafter, in what areas will a given level of audit effort reveal the largest dollar volume of past violations? As will be seen, the Task Force has answered this question by recommending a strategy of greatly intensified audit coverage at the major refiners. Additionally, the Agency ought to explore alternative means for determining past and present compliance with its regulations such as an audit by questionnaires. This is especially true for the lower levels of the distribution chain.

6.1.4 Recommended Strategy for Future Compliance Efforts

Vigorous and effective pursuit of past violations will enhance deterrence for the future. Moreover, with respect to the future, the long run recommendation of the Task Force is to put in place to the maximum feasible extent a system of self reporting forms which would enable auditing to be conducted on the basis of forms which reveal violations or by targeting firms where there are predictors of violations in the forms submitted.

As for short run deterrence, the Task Force recommends the use of cost benefit analysis to approach a coverage in each industry segment (or "universe") to the point at which, because of diminishing returns, the cost benefit ratios in each industry segment are approximately the same. Such analysis should be the baseline on which are imposed conventional elements of prosecutorial discretion, including vigorous pursuit of wilfull violations that are of economic significance, development of precedents, and cases against firms that, for whatever reason, are likely to impress upon some geographic or economic segment of the industry the seriousness and effectiveness of FEA's enforcement effort. Moreover, attention should be given to selecting cases in which the pricing violations may have had particular anticompetitive significance.

6.2 The Present Strategy

6.2.1 Reseller/Retailer: Initial "for cause" Audit Initiation

When the Compliance program was initiated in 1973, except for the audits of the major refiners, the audit strategy primarily directed at retailers and resellers was predominately a "for cause" system whereby complaints generated a good deal of the audits and investigations. As prices started to stablize, pressures were placed upon FEA to move out of the retail and resellers area and emphasis shifted to firms further upstream in the petroleum industry.

6.2.2 Major Refiners: Continuous On Site Audit from Three Approaches

The strategy in major refiners has been relatively consistent from the beginning of the program. Essentially, the strategy has maintained a continuous audit of the major refiners by resident teams of auditors.

Several approaches have been used in an attempt to determine the refiners' compliance with the regulations. These approaches were termed the "cycle concept", the "module concept" and "common audit approach", the last of which is still in use.

- The "cycle concept" was a term used to describe a method whereby certain audit units were to be completed by a specified date. For example, the first cycle, which was intended to be completely audited by June 30, 1974, was to (1) verify May 1973 base period data, and (2) test-check the accuracy and validity of crude costs during the August 1973 through January 1974 period.

- The "module concept" presented a procedure to be used to audit the accuracy of the information presented by the refiner. There were

22 audit modules 1/ designed to be completed in a predetermined order of priority on a company by company basis.

O The "common audit approach" incorporated a priority system which basically maintained the procedures under which the audit teams were to review May 1973 cost and price data before going into any other audit areas. The "common audit approach" reinstituted unit audit areas and also adopted time frames for the audits of particular audit areas. Thus, once the May 1973 and the embargo period were completed, all audit periods would become synonymous with the refiner's fiscal year.

1/ The modules are: Review of Refiner's Monthly Cost Allocation Report (P-110-M-1), Company Review, Preliminary Audit Procedures, Domestic Crude Cost, Domestic Crude Oil Entitlements, Imported Crude Oil and Transfer Pricing, Transportation Charges, Purchased Product Cost, Product Cost Allocation and Recovery, Refinery Balance Incentive Program, Class of Purchaser, Octane Ratings, Residual Fuel Sales, Profits, Non-Product Cost Allocation and Recovery, Complaints, Allocation Sales Calculations, Specials Audits or Projects, Review of Refiner/Importer/Gas Processing Plant Operator Monthly Report By Facility (Form FEO-1001)

6.2.3 Unfulfilled Goal at Major Refiners

Each of these approaches was designed to bring the audits of major refiners up to a "current" status. In terms of audits, current may be defined as completion of an audit for a specified period within about 18 months after the end of that period. The audit itself is not necessarily conducted during this entire 18 month period. At the end of any fiscal period a firm must be given a reasonable period of time to reconcile records and prepare documents. Since the audit for one audit period depends upon completion of previous periods, additional time is needed.* To date, no audit of a major refiner is current. For that matter, the May 1973 cost and price base data has not been completed at any major refiner. The completion of this data is essential to the completion of any audit period.

*For example, a Department of Defense Audit Agency uses a two-year cycle for its financial audits. For some Internal Revenue Service programs, the audit cycle is 16 to 18 months.

6.2.4 Early "80-20" Audit Strategy

The first systematic audit strategy developed by FEA for non-refiners was done as part of the FY-76 budget submission. It was designed to achieve two objectives fundamental to any enforcement program; detect and correct violations of the regulations that had already occured, and deter future violations by maintaining a visible audit presence in the field. The general approach recommended by the agency to meet these objectives was to asign a high audit coverage to the largest firms within each of the ten Compliance programs to maximize detection of significant violations, and a lower audit coverage to the remaining firms to ensure deterrence. The assumption inherent in such a strategy was that the largest firms were likely to have committed the largest dollar amounts of violations. The strategy also assumed -- totally unrealistically--that the Agency would be able to complete comprehensive audits of large volume firms every two years.

The actual parameters of the FEA recommended audit strategy were calculated by taking into account the distribution of firm sizes

in the universes, the number of Compliance personnel available (or the number that could realistically be requested in the budget), and the existing data on audit times and violation rates and amounts. Since there was little completed audit experience to draw on, the data base used for the analysis was inadequate and the results were necessarily imprecise. However, the results suggested that an efficient strategy would be one which audited the largest firms - those accounting for 80% of volume or sales - on a two year cycle, and the remaining smaller firms on a five year cycle. This audit coverage came to be called the "80-20" strategy.

In a Presidential Issue Paper on the FY-76 budget the Office of Management and Budget generally agreed with the concept of assigning higher audit coverage to the larger firms, but disagreed with the FEA recommended coverages for the smaller companies on the grounds that the "....coverages exceed those used by the Internal Revenue Service in tax audits .."and"... the coverages are too high on smaller firms accounting

for only a small portion of total production and where the potential for uncovering significant price violations is limited". The FEA disputed these points, but the OMB position was accepted and the Compliance budget was approved at a resource level insufficient to implement an 80-20 strategy.

6.2.5 Current FEA Audit Strategy: Stretched-Out Cycles

The audit strategy currently being used by FEA is therefore defined primarily by the OMB - imposed coverage levels for each of the ten Compliance programs. The final budget proposed annual audit coverages for each program ranging from a low of 14% of the propane retailers to a high of 100% of major refiners.

FEA has superimposed on these flat coverages a system directing the Regions to select from universe lists high volume companies for audit at a greater rate than the smaller ones. In effect, the given coverage levels in conjunction with this volumetric selection system results in an audit strategy similar to the 80-20 strategy in the sense that it contemplates blanket coverage on varying time cycles: the large firms are subjected to audit on cycles ranging from 3 to 5 years depending on the program, and small firms receive a 7 to 10 year audit cycle.

6.2.6 "Goals" to Implement Strategy

In implementing this strategy, the National Office establishes goals specifying the numbers of audits to be completed within each program during the year. Ideally, the goals should match the budgeted coverage rates by program, but in fact they do not. This gap is primarily because the distribution of Compliance personnel nationwide does not match the distribution of firms comprising the Compliance universes. The geographic distribution of Compliance staff has been modified somewhat to narrow the gap, but the disproportinate number of auditors in high population centers stems from the early history of the programs where the emphasis was on auditing retailers rather than firms involved in upstream activities. Thus, the goals are established to come as close as possible to the budgeted universe coverages, but within the constraints imposed by the levels and distribution of the Compliance staff.

As has been seen, the basic strategy was to audit all firms with varying frequency depending largely upon the size of the firm. A strategy that

approaches "for cause" targeting is used in only one program -- Resellers.

6.2.7 Reseller Targeting

The information used in targeting specific resellers is obtained from a short questionnaire mailed to approximately 500 large resellers each quarter (a different group of 500 each quarter). Each firm must report its May base price to its largest class of purchaser and cost per gallon for each controlled product, and corresponding prices and costs for a specified month during the Embargo period. When the forms are returned these prices to the largest class of purchaser and costs are compared, and any excess margin (after incorporating the allowable non-product costs per gallon specified in the regulations) above the base period is assumed to represent an overcharge to the largest class of purchaser. The per gallon overcharges are multiplied by annual volumes reported by the firms, and the resulting indicators are used to rank the company in decreasing order of potential violation.

This approximate "for cause" system has resulted in a substantial improvement in the productivity of reseller audits. Because the violation rate for all resellers is so high -- 66 percent -- the slightly higher 70 percent violation rate among targeted resellers is not a useful indication of the activity of targeting system. A better indication is the fact that whereas the overall ratio across all programs of violation dollars detected per audit hour expended is $50, the ratio for resellers that received a high target ranking is $192 per hour.

The form used to gather this data does not reflect the full complexity of the regulations (e.g., data on only the largest class-of-purchaser is collected) and thus is only a general "targeting" form. It does not embody all of the possibilities for incorporating predictors of violations, or for requiring calculations that would actually reveal violations

6.2.8 Targeting: Independent Crude Producers

A slightly different approach to targeting was taken in the independent crude producer program. Prior to July 1976, all crude producers selling "new

oil" were required to file a form FEA-90 with the agency. The forms were reviewed and producers were ranked in decreasing order of their percentage of new oil sales which was believed to be a good predictor of potential violations. The lists were circulated to the Regions for the initiation of audits. The highly ranked producers were, in fact, discovered to have greater than average violations. As it turned out, many of the listed producers had already been targeted by the regions for audit on the basis of information available at the local level (e.g. complaints received). The FEA-90 form has been superceded by the P-124 form, and a similar targeting system is being designed around the data available on the new form which includes percentages of new, old, and stripper oil sales as well as such other indicators as the weighted average prices of each type of crude oil.

6.2.9 Recommended Approach

The selection of an effective Compliance strategy must recognize the two objectives mentioned earlier: detection of significant violations

committed in the past with appropriate remedy of the overcharges, and the achievement of future deterrence and maintenance of credibility in government enforcement. Within this general framework, the problem becomes one of identifying the most cost-effective methods of achieving these objectives for a fixed level of Compliance resources and of identifying the absolute extent to which these objectives must be achieved if the program is to accomplish the statutory objectives. The following chapter discusses a new strategy to maximize detection and recovery of violations. The second Compliance objective of deterrence is treated in Chapter 6.4.

6.3 New Audit Strategy--Greatly Expanded RARP Program

6.3.1 Inadequate Progress in Audits of Major Refiners

The petroleum industry is dominated by a small group of major firms involved in many phases of the industry cycle from crude production to the marketing of refined products. Table 1 shows the aggregate market shares in crude production, refining, and marketing for fifteen of the largest firms.*/ These companies together account for more than 60% of the volume in each activity. Obviously, any reasonable Compliance strategy must make provision for the special position of these kinds of firms within the industry. The current strategy assigns full-time audit teams (ranging in size from two to fourteen auditors) to these fifteen firms, as well as to twenty other firms

---

*/ These fifteen firms were determined by the FEA at the time of passage of the EPAA to be those firms that were neither "small" nor "independent" refiners according to the statutory definitions in that Act. Under Section 3 of the Act, a "small" refiner is one whose total refinery capacity is less than 175,000 barrels a day. An "independent" refiner is one who obtained more than 70 percent of its refinery input of crude oil from sources not within its control, and who marketed a substantial volume of gasoline through independent marketers.

For purposes of the RARP program, FEA has classified as a "major refiner" any refiner whose total refinery capacity is greater than 75,000 barrels a day. This broader classification has brought within the RARP program an additional 20 firms not among the 15 largest integrated refiners.

classified for the RARP program as major refiners.

However, despite the current staffing emphasis on major refiners, the audit progress to date has not been statisfactory. A review of this program indicates that no major refiner audit has been conducted for a recent audit period. Moreover, the May 1973 cost and price base data has not been completely audited for any of the major refiners. Verification of this data is essential to the audit of any subsequent time period.

6.3.2 Major Realignment of Personnel

It is essential to expedite completion of these audits. The Task Force, therefore, recommends a major realignment of personnel designed to audit most of the volume of the large refiners for all

activities subject to FEA regulation. This will require augmenting the existing RARP (Refinery Audit Review Program) teams assigned to the major refiners with personnel from the other Compliance programs. Only in this way can the majors' NGL and crude oil production be audited simultaneously with the other high priority base period costs and class-of-purchaser audits. Specifically, it is the conclusion of the Task Force that FEA must develop within three to four months a program which, when approved by the appropriate authority of the Department of Energy, will be capable within 18 months to two years of auditing and completing case resolution (not including exceptions and appeals proceedings) of the 15 largest integrated refiners and selected other large refiners presently in FEA's RARP program; for most of the dollar volume of these refiners until a diminishing return point is reached which is expected to be approximately 70% of total dollar volume for each firm audited; and

for all transactions occurring through the end of calendar year 1976. Within this framework, several refiners should be targeted for completion through 1976 in considerably less time than 18 months.

6.3.3 Reasons for New Audit Strategy

. FEA Credibility

There are several reasons for this proposed strategy. First, and perhaps most important, is the need to instill public confidence in the government's desire and ability to protect consumer interests. As previously mentioned, the large integrated refiners account for the majority of the volume and sales dollars in most phases of the industry. The public must perceive that these companies are being audited thoroughly. And it is in the interest of these companies for final determinations to be made that they do or do not have liabilities under the price regulations. Completing audits of these companies can affect deterrence in other industry segments. The field staff has reported the adverse effects of the perception by local resellers and retailers that they are being forced to abide by the regulations, but refiners do not appear to be required to adhere.

These considerations would support increased efforts at the major refiners even if they do not prove to be the most significant violators of the FEA regulations, although there is considerable evidence to the contrary.

o Largest Potential Violations at Major Refiners

Probably the most reliable indicators of the magnitude of potential violation amounts from an intensified effort at major refiners are the draft NOPVs, COs, and ROs currently pending against the 15 largest integrated firms. (This is not to say that the intensified coverage should be limited to these firms.) Table 2 shows that, of the approximately $1.686 million in this category, $911 million or 54% of the total stems from cases involving the top 15 major refiners. At no time has the number of personnel assigned to these top 15 firms exceeded even 20% of the total Compliance field staff. These cases cover the full range of industry activities from crude production to the sale of refined products.

There are other indications of significant non-compliance among the majors in cases which have not yet reached the resolution stage. Some refiners have made extremely liberal interpretations of FEA's regulations in an attempt to sustain financially advantageous positions. For instance, in the non-product recovery issue involving the sequence in which a refiner passes through its

product and non-product costs, some firms chose to pass through non-product costs before product costs. This position was taken even though the historical regulatory concept required that product costs be passed through first. Since the refiner could not "bank" non-product costs and market conditions would not permit full pass-through of both product and non-product costs, this interpretation enabled the refiner to improperly "bank" or save product costs and use them to justify future price increases. If the agency's position is sustained, this type of violation could exceed $1 billion dollars.

o Refiners are Largest Crude Producers

The violation amounts disclosed by independent producer audits further suggests huge sums are at stake at the refiners which are the largest crude producers. Audits have shown that about one-third of the independent producers have violated FEA regulations and that this dollar return per audit hour is $77. Assuming that there is a comparable rate of violation at the crude production level of the larger refiners, the dollar violations should amount to many millions of dollars

because these larger producers account for about 70% of the total U.S. Crude production.

o Potential Increased Ratio - Dollar Violation/Audit Hour

Even if, in order to concentrate more of its resources on the major refiners without increasing its total staff, the Office of Compliance must reduce its emphasis on smaller firms which currently comprise the majority of the FEA audit targets, such a shift of resources would very probably increase the ratio of dollar violations discovered per audit/resolution hour expended (see Table 3). According to this simplified cost/benefit analysis, each hour of audit/resolution time that has been spent at refiners included in the RARP program has yielded $141 in refunds, rollbacks, and bank adjustments, compared to $115 for small refiners and $77 for independent crude producers. Although this is the highest such ratio for any Compliance program, it undoubtedly understates the return to be expected in the future from additional allocation of time in the major refiner program. Much of the effort to date in the major refiner program will not yield any

measurable "benefits" until the audits are complete and the cases go through the resolution process. As this "investment" is realized in the future, the benefit-to-cost ratio can be expected to increase substantially.

6.3.4 Potential Disadvantages of New Audit Strategy

The potential disadvantages from the proposed strategy include magnifications of problems which currently beset the RARP program. The large companies are better equipped to fight harder and force delay in resolution of cases against them. This would result in a short-term reduction in recovery results. In addition, the proposed strategy might require a significant relocation and possible retraining of Compliance personnel. Furthermore, since some of the issues affecting large amounts of potential violations (for example, transfer pricing, and non-product costs) will no doubt be questioned in the courts, there is no assurance that the new strategy will ever result in increased recoveries.

In summary, there are two possible "errors" associated with selecting this audit strategy: audit the largest firms and discover they do not yield significant violations, or do not audit them when they may in fact be the most significant violators. In the former case, the government and the public take the risk of spending tax dollars on audits that do not reveal significant violations and not doing other audits that might have revealed such violations; in the latter case, the public takes the risk of not receiving the benefit of very large refunds, rollbacks or bank adjustments. It is the conclusion of the Task Force that the risk of not auditing the major refiners is the greater risk.

Table 1

CUMULATIVE MARKET SHARES
FIFTEEN LARGEST INTEGRATED REFINERS

FIRM (Decreasing Order Of Refinery Capacity)	REF. CAP. % (1976)	CRUDE PROD. % (1974)	BRANDED SALES % (1974)
Exxon	7.9	9.8	8.4
Std. of Indiana	14.9	15.7	14.4
Shell	21.9	22.1	20.6
Texaco	28.8	29.8	28.7
SOCAL	34.8	34.3	34.5
Mobil	40.4	38.3	39.9
Gulf	45.5	42.7	45.2
ARCO	49.5	46.9	48.8
Sun	53.0	49.7	51.6
Marathon	56.3	51.5	52.5
Union	59.4	54.5	55.4
Conoco	61.8	56.9	57.5
Phillips	63.7	59.7	59.8
Cities Service	65.4	62.0	61.1
Getty/Skelly	66.7	65.3	62.2

SOURCES: Petroleum Market Shares : Indices (FEA, April 1976)

FEA Entitlements Program.

Table 1a

CUMULATIVE MARKET SHARES
The 34 Largest Refiners

FIRM (Decreasing Order Of Refinery Capacity)	REF. CAP. % (1976)	CRUDE PROD. % (1974)	BRANDED SALES % (1974)
Exxon	7.9	9.8	8.4
Std. of Indiana	14.9	15.7	14.4
Shell	21.9	22.1	20.6
Texaco	28.8	29.8	28.7
SOCAL	34.8	34.3	34.5
Mobil	40.4	38.3	39.9
Gulf	45.5	42.7	45.2
Amerada Hess	50.1	43.8	48.7
ARCO	54.1	48.0	52.3
Sun	57.6	50.8	55.1
Marathon	60.9	52.6	56.0
Union	64.0	55.6	58.9
Std. of Ohio	66.6	55.9	60.6
Conoco	69.1	58.3	62.7
Ashland	71.4	58.5	64.7
Phillips	73.2	61.3	67.0
Cities Service	74.9	63.7	68.3
Coastal States	76.6	63.8	68.8
Getty/Skelly	77.9	67.1	69.9
TOSCO	79.2	67.1	70.1
Kerr-McGee	80.4	67.5	70.6
American Petrofina	81.6	67.7	71.4
Commonwealth	82.6	67.7	71.7
Champlin	83.6	68.3	72.0
Murphy	84.4	68.5	72.4
Koch	85.2	68.5	72.4
CF Petroleum	86.0	68.5	72.4
Clark	86.7	68.5	72.9
Tenneco	87.4	69.4	73.8
Crown Central	88.0	69.4	73.8
Farmland	88.5	69.4	73.8
Tesoro	89.0	69.5	74.1
Texas City	89.5	69.5	74.1
Charter	89.9	69.5	74.4

SOURCES: Petroleum Market Shares : Indices (FEA, April 1976)

FEA Entitlements Program.

Table 2

VIOLATION AMOUNTS AS INDICATED
BY DRAFTED AND ISSUED
NOPV'S, CO'S, AND RO'S
INVOLVING FIFTEEN LARGEST INTEGRATED REFINERS
(As of June 30, 1977)

FIRM	$ VIOLATIONS (000)	% OF TOTAL
Exxon	191,782	11.4
Texaco	56,580	3.4
Shell	62,310	3.7
Std. of Indiana	65,278	3.9
SOCAL	32,179	1.9
Gulf	90,109	5.3
ARCO	65,943	3.9
Mobil	11,540	0.7
Getty/Skelly	134,774	8.0
Union	19,330	1.1
Sun	82,080	4.9
Phillips	39,097	2.3
CONOCO	16,787	1.0
Cities Service	20,477	1.2
Marathon	22,955	1.4
TOTAL	911,221	54.0
ALL CASES	1,686,320	100.0

TABLE 3

VIOLATION DOLLARS RETURNED PER HOURS OF AUDIT/RESOLUTION TIME INVESTED (BENEFIT/COST RATIO)

PROGRAM	BENEFIT/COST RATIO
TOTAL	80
IMPORTER	*
CRUDE RESELLER	*
CRUDE PRODUCER	77
MAJOR REFINERS**	141
SMALL REFINERS	115
NGL PROCESSORS	*
PROPANE RESELLERS	30
PROPANE RETAILERS	51
RESELLERS-OTHER	50
RETAILERS-OTHER	41

*Insufficient data

**Refiners included in RARP program

6.4 Major Elements of Greatly Expanded RARP Program

6.4.1 General and Summary

The plans and techniques for greatly enhanced RARP coverages should have critical analysis from audit and legal experts. In addition, a complete review of the current status of the audits at each of the major refiners should be performed by a select group of technically competent personnel within the FEA. It is obvious that the audits of these firms have not progressed at the same rate. Therefore, the purpose of such a review would be to establish a tailored audit plan for each major firm.

When establishing future audit plans, FEA must develop new and more forceful approaches to issues, particularly, class of purchaser. FEA must also localize or otherwise greatly speed up the issue resolution process; realign field resources; greatly improve access to records; and increase expertise for use in major refiner audits.

6.4.2 Nature of Refiner Regulations

The FEA regulations applicable to refiners generally permit firms to charge prices which were in effect on May 15, 1973, plus allowable increases which

reflect a dollar-for-dollar pass-through of increased product costs plus certain increased non-product costs. Sellers are permitted to "bank" product cost increases by passing them through in the form of higher prices in subsequent months if they are unable to recover them in the month following that in which they were incurred.

Subject to a few exceptions, the regulations also provide that whatever price increase a seller charges must be applied equally to all purchasers. This provision tends to preserve the price distinctions among purchasers which usually existed under the free market conditions of May 1973. If a firm does not elect to apply price increases equally, FEA requires that the firm determine costs recovered through price increases for that product as if price increases had actually been applied equally. The maximum amount of costs recovered from any one class is deemed to have been recovered against all other classes.

The pricing regulations governing refiners of petroleum products include the following concepts:

(1) A one-month lag is required from the time a refiners incurs the costs until the time that those costs can be passed through by price increases.

(2) Refiners have been permitted to recover increased costs by allocating a greater proportion of costs to certain products. Proportionate pass-through of costs has been required during certain periods of time for gasoline, No. 2 oils, propane, and avaiation jet fuel. Currently, to promote fuel conservation, FEA has permitted gasoline to bear a disproportionate share of crude oil and non-product (operating) costs.

(3) Entitlements are issued to refiners according to the amount of "lower-tier" domestic crude oil they process. In order to equalize crude oil costs among refiners, those firms with a large proportion of lower-tier (low-cost) oil must purchase entitlements (i.e., rights to refine their greater than average amounts of old crude oil) from refiners with a greater percentage of upper-tier, importer, or stripper (high-cost) oil.

(4) In addition, the oil import regulations establish eligibility requirements for firms to import oil by requiring importers to be licensed, and by allocating maximum import volumes to licensees.

The regulations also establish import fees and provide guidelines for collecting and refunding those fees.

A simplistic analysis of the above regulations reveals the following key areas:

(1) May 1973 costs, which establish the basis or reference standards for measuring increased costs available for recovery.

(2) Classes of Purchaser and the May 15, 1973 prices which logically include the definition of "transaction" in order to determine their prices.

(3) Costs available for recovery through price increases, which include a comparison of last month's costs to May 1973 costs for the firm's own crude and natural gas liquids, other purchased products, the firm's own foreign crude production used in the U.S., and purchased foreign crude.

(4) The allocation to products of the increases in the costs described above and the subsequent recovery of such cost increases through increased prices.

A cursory review of the current status of the audits of the major refiners indicates that many

of the audits have made some progress in auditing costs that are numeric concepts traceable to standard accounting records. Many audits, however, in an attempt to resolve May 1973 base data, have bogged down in a quagmire of disputes concerning issues of a non-numeric nature such as class of purchaser, deemed recovery, or transaction. The resolution of these issues will be a time-consuming process under the present system.

6.4.3 Expand Audit Coverage of the Cost-Data at the Major Refiners

It seems rather obvious to the Task Force that FEA will never be certain of the correctness of recoveries through price increases until the costs available for recovery are known to be correct. In order to validate the costs available for recovery, FEA must be assured of the accuracy of the costs claimed by the major firms.

In order to fully utilize its audit resources and to make as much progress as possible in the near

term, the Task Force believes that FEA should make a concerted effort to audit the various claimed costs of the major firms. At the same time FEA should maintain the present level of effort in auditing May 1973 data, including class of purchaser and other important issues currently in process.

FEA has alleged violations of cost over-recovery by several of the major refiners without having completed an audit of costs available for recovery. Under this approach, the basis for these alleged violations is a presumption that the unaudited costs are as reported. By maintaining the audit of costs ahead of recoveries, additional audit work involving the same recovery calculations could be eliminated.

There is a prevailing opinion within FEA that major refiners may have overstated their claimed costs. This opinion is based on known or suspected practices by the refiners. For example, some firms are are suspected of having adhered to an incorrect definition of property in their computation of the prices that could be charged for domestically produced crude oil. Unlike costs for purchased products, which are fixed by outside invoices, most of these suspected practices involve areas where the firms

transferred between affiliates various costs subject to internal and self-serving determinations.

Based on an analysis of the crude production leases of several of the major firms, the Task Force believes that auditing a relatively small percentage of the leases may cover a high percentage of the crude production of the major firms and would represent a high percentage of the nation's domestic crude. In addition, if approximately 100 of the gas plants operated by the same firms were audited, coverage would also be given to about 70 percent of their natural gas liquid (NGL) production and about 50 percent of the nation's NGL production.

This high concentration of production suggests that a change should be made in audit approach and regulatory enforcement strategy for claimed costs by major refiners. The current technique for auditing crude and NGL production involves selecting a statistical sample of leases or plants and then auditing the accuracy of the pricing of that production to detect systems errors. After FEA has completed the audit of the sample, the firm is instructed to prepare a special report. In this report the firm is to recompute all of its production and resulting prices after revising its system to overcome the

deficiencies found in the audited sample.

This technique has not been consummated at any major refiner. The Task Force believes that intensified direct coverage is preferable, at least to the point of diminishing returns. This is not to say, however, that all work now completed on the statistical samples for the major firms should not be fully utilized in the proposed strategy. Any systems errors identified in the prior work should be applied in the audit of the large leases.

6.4.4 New Approach to Class of Purchaser

Based on discussion with several RARP teams, it is apparent that by and large FEA knows what the major firms claim as their classes of purchaser. In some cases, audits of classes of purchaser disclosed that firms had disregarded the class of purchaser structure they had originally furnished to FEA. In other cases, the concept itself proved unacceptable to FEA. In both instances, FEA not only tried to prove that the firm was in error, either as a matter of fact or law, but also tried to reconstruct what classes of purchaser the firm had in fact established. The fact that FEA auditors have had to reconstruct classes of purchaser has been the largest single impediment to completion of audits and could result in delays of the RARP program for years.

It is apparent to the Task Force that some type of forceful and innovative action must be taken to resolve class of purchaser issues. Two alternatives should be given intense consideration and legal analysis. One alternative would be to go to court once it is suspected that a refiner failed to calculate prices on an acceptable class of purchaser basis. Such an action would seek a court order requiring the firm (1) to affirmatively disclose its method for classifying purchasers; and (2) to demonstrate that it has, in fact, consistently followed such classifications in its pricing behavior. If the firm fails to satisfy either of the above, a court order would be sought to treat each purchaser as a separate class. Court action would be even more effective if it could also result in an order forbidding the firm from increasing prices until its class of purchaser problem had been resolved.

An alternative would be to require the same information by Special Report Order. This administrative alternative would be subject to the scrutiny of the courts either upon review of the SRO or any resultant administrative order.

6.4.5 Less Abstract Resolution of Issues

In discussions with auditors at the major refiners, the Task Force became very much aware of the fact that many enforcement actions have been, or are presently, bogged down awaiting an authoritative pronouncement of FEA's position on a particular issue. The regions were reluctant to proceed with the audit for fear that their interpretation of the rules to a particular set of facts would not be in consonance with FEA's final position on the issue.

While the Task Force recognizes that new issues will continue to surface, its necessarily limited assessment strongly suggests that, for the most part, the bedrock issues such as transaction and the definition of property have been disposed of to a degree sufficient to allow intelligent application by RARP teams. What appears to remain in these areas may be no more than the inevitable gap between the last declaration of a legal rule and its application to a particular set of facts. Therefore, greater emphasis should be placed on dealing with issues

within their factual setting rather than awaiting an official FEA pronouncement based upon the abstract factors in the issue.

To be effective, this greater emphasis has to come from (1) encouraging regions to analyze fully and offer solutions to all problems encountered and (2) encouraging the FEA to accept the idea that issues ought to be resolved in the context of specific factual settings in which they arise. The regions can be encouraged to develop better solutions if they have some assurance their actions will be supported by the National Office. The best way to provide this assurance is to have on-the-spot legal input to provide guidance on the legal validity of a theory, including the evidence needed to sustain that theory. The regions obviously need legal advice at the early stages of an audit. In addition, when crucial issues are unresolved, OGC and the Office of Compliance must quickly make the necessary decisions in order to expedite the completion of work in the regions.

As a part of the thrust to reduce abstraction in the resolution of issues, auditors and attorneys should be convinced that the fastest way to resolve issues is within the context of a proposed remedial action.

The regions should be encouraged to take a position on an issue by drafting an NOPV setting forth their position on the particular issue. It will be imperative for OC and OGC to rule on the submitted NOPV immediately. In the review process, OC and OGC should generally try to sustain all positions which are reasonable applications of the regulations, even if these positions are not the only reasonable applications.

These draft NOPVs, ROs, and COs would become the basis for developing issue papers to establish precedent for those top level items which are recognized as having far-reaching effects. Some specific examples where this individual NOPV approach is thought to have applicability are (1) the handling of cost transfers between cost pools after the audit has shown the amount of cost available for transfer was in error, and (2) situations in which a firm is required to make refunds in lieu of strict application of the equal application rules.

6.4.6 Realign Resources

Because RARP teams are concentrating their efforts on auditing base period costs, the class of purchaser area and other high priority areas (such as special requests from National Office), they do not have sufficient resources to achieve concurrently adequate audit coverage in crude production and NGLs; yet these latter areas involve the costs into the refinery that underlie all violations. Adequate

audit coverage could be achieved simultaneously in crude production and NGLs by utilizing non-RARP personnel presently working on independent crude producers and independent NGL plants.

Generally these non-RARP auditors are located in oil producing areas where most major refiners' production records are located. These independent crude production and NGL auditors should be reassigned to audit major refiners' crude and NGL production records located in the auditors' geographic area irrespective of which region has audit responsibility for the major refiner and of where the refiners' headquarters are located. These non-RARP auditors would be an adjunct to the cognizant RARP teams until their respective assignments are completed. Although their participation would require coordination with the cognizant RARP team, they would work their segments of the audit relatively independently from the regular RARP team and would not require any significant retraining.

The number of non-RARP personnel that would be required to be reassigned to RARP would depend on (1) the present status of crude and NGL audits at each major refiner, (2) the portion of the crude and NGL production universe to be audited, and (3) the time frame to be established for achieving currency in

the crude and NGL production audit areas. Given the assumptions in (2) and (3), an analysis of conditions at each refiner will determine the extent of the realignment required.

O Institutional Arrangements

It is evident that the massive effort here proposed will create extraordinary needs of many kinds. It will require legal, auditing, computer, and management skills of the highest order. Those possessing such skills within the agency will have to be supplemented by persons now outside the agency. Hiring outside the Civil Serive system is indispensable if the necesary skills are to be secured. Sufficient super-grade levels must be made available, and hiring procedures accelerated, if the program is to have any chance of accomplishing its goals. It cannot be emphasized sufficiently that the demands of this undertaking will require skills that are extremely difficult to obtain and are very dear in the private sector. If individuals can be found who are willing to participate in the task, the agency must be able to offer at least some of them supergrades so that, at the least, such individuals are provided maximum stature even if salaries are not comparable to what they were earning in the private sector.

This massive effort will also require new internal procedures, and, probably, new organizational units. Management personnel must be able to respond extremely quickly to whatever reorganization arrangements this intensified program requires.

Not only must there be a highly concentrated and defined effort, but the seriousness and commitment of the Administration to that effort must be unmistakably clear. It is the view of the Task Force that all of the various considerations are probably best served by the creation of a special office to head the intensified refiner coverage effort. The Task Force believes that the head of this special office should have the greatest possible autonomy and should report at the highest possible level of the Department of Energy, without compromising the effectiveness of the agency's other program activities. Such an office should, in the view of the Task Force, be headed by an attorney with considerable experience in litigation and prosecution. The office should have responsibility for organizing the RARP program, implementing it, and taking whatever court action might be necessary to enforce compulsory process or obtain recoveries.

6.4.7 Improved Access to Records

At the present time most RARP team arrangements for accessing records and information are both very formal and very restrictive. In most cases auditors make all requests for records and information, including questions regarding refiner operations and systems, in written form and submit the requests to an established company contact. After the company contact accumulates the requested records and information and prepares written responses to the auditor's questions, it is generally reviewed at one or more levels within the company. At many refiners, all data and information is reviewed by company counsel before it is furnished to the auditors. In many cases, auditors' questions are answered by company counsel.

At some refiners, auditors are denied direct access to technical personnel and, in some instances, requests for explanations regarding the companies' accounting systems have been denied or auditors' efforts to gather systems information have been frustrated. Some companies will provide only records that are specifically requested by the appropriate company terminology, label

or precise identification. In some audits, if the auditors do not use the proper company terminology in their requests, the company contact will return the requests on the ground that the company does not have the records described according to the auditor's terminology. The record request process then begins all over again.

Because of the complexity of the refiners' accounting systems, the auditors cannot possibly know the existence of the many records that are available and how they flow and interface within the company's accounting system without making a comprehensive review of the internal control systems, both financial and management. This review must include a comprehensive systems analysis. In all audits of major refiners, if such a review has not already been conducted, it must be the first priority.

In addition, arrangements with refiners must be redetermined in order to improve the auditors' access to records, documents, information, and technical personnel and to reduce the turn-around time of such requests.

Cooperation of the major refineries or the FEA use of compulsory process is imperative if FEA is to ascertain refiners' compliance with the pricing regulations. The volume of records and transactions at a major refiner is so immense, their operations and accounting systems are so complex and the application of FEA's current regulations to actual refiner practices is so difficult, that without full access, RARP audits cannot be conducted effectively.

Most major refiners have tolerated FEA auditors as a temporary nuisance assuming that deregulation of the industry was imminent. There have been many instances were refiners have used delaying tactics to inhibit fact and document gathering by auditors and postpone the resolution of issues. Refiners have been reluctant, perhaps because of the apparent impermanence of the agency's compliance program, as well as other reasons to commit the necessary resources to speed up the audit and issue resolution processes.

FEA should seek commitment from the highest organizational levels at each major refiner to (1) provide direct access to the company's computers; (2) provide the necessary resources to facilitate FEA's audits and (3) approach the fact finding part of the audits with cooperation. These resources may include more company personnel to service FEA auditors (including making technical personnel readily and directly accessible to FEA auditors when necessary), or providing assistance to FEA auditors in utilizing the companies' machine sensible (computer) records.

If FEA cannot secure this commitment from major refiners, then it must adopt a more aggressive posture in order to fulfill its needs. The auditors will have to reduce their tolerance for delays and excuses and the agency will have to utilize all of its tools and authority to overcome resistance by refiners. Vastly increased use will have to be made of Special Report Orders, subpoenas, interrogatories and injunctions. In addition, the agency must reconsider its liberal and time consuming administrative appeals procedures applicable to SRO's and subpoenas and will have to be willing to enforce swiftly and vigorously all agency compulsory actions.

6.4.8 Integration of Computer Expertise With RARP Teams

6.4.8.1 Why Computer Expertise Must be Integrated Into RARP Audits

If FEA is to establish an effective (or long-term) Compliance program, it must address the reality of the situation faced by refiner auditors who deal with massive amounts of data and work with computer generated records at major integrated oil companies. The volume of transactions recorded by a major oil company is enormous. Between one-half million and one million sales transactions can be generated per month at a large integrated refiner. At one refiner, the audit of the class of purchaser area involved a universe of almost 30,000,000 transactions. Most large oil companies have thousands of production properties which they operate. Data recorded each month involves tens of thousands-of transactions. An audit of non-product costs involves reviewing at least eight expense account categories for each refinery and administrative office operated by that company which, again, involves thousands of transactions per month. These are only a

few examples of the high transaction volume areas encountered by RARP teams.

Oil companies cope with this transaction volume by utilizing sophisticated computer equipment and computer systems and by maintaining large departments of computer specialists. Auditing data generated by these computer systems requires as much expertise as actually creating the data.

Recognizing the sophisticated ADP audit environment that exists at large oil companies, the following are some of the benefits which would be obtained by having computer expertise within RARP:

1. Better capability of utilizing large amounts of information stored in machine-sensible form in order to speed up audits.

2. Expanded source of existing records and information.

3. Better understanding of accounting systems, policies and procedures.

4. Enhanced ability for confirming the accuracy and completeness of information.

O Expanded Source of Existing Records

Many refiners require that RARP auditors requesting records be specific in their identification of those records. Obviously, if the auditors do not know all the various types of records that are available, it is difficult for them to make specific requests. By compiling a computer systems environment analysis, the auditors would know exactly what records are available in hard copy form.

O Better Understanding of Accounting Systems

With a computer systems analysis and the ability to read program documentation, the auditors could obtain a much better understanding of the various accounting systems.

Systems and program documentation contain precise descriptions of record flow procedures. By reviewing this documentation, auditors would know exactly what source documents are generated, the purpose of those documents, their source, and their relationship to the record flow and the accounting system.

O Ability to Confirm the Accuracy of Data

By having the capability to read computer program documentation, the auditors would be in a better

position to confirm the accuracy and completeness of computer-generated information. Auditing in an ADP environment requires evaluating and testing the oil companies' computer programs. This may involve merely analyzing program documentation, but in some cases it might involve making test runs to ascertain if the program does what the company says it does.

- Capability to Utilize Machine Sensible Records in Order to Speed up Audits

The principal benefit of computer expertise in the RARP audits would be the capability of utilizing the oil companies' data bases stored in machine-sensible form. The oil companies have innumerable record files stored on tape, discs, etc., which could be accessed with appropriate computer programs.

In areas such as class of purchaser, recoveries, crude production, non-product costs, etc., auditors must work with great numbers of transactions. In most cases, it is necessary to audit these areas with computer-selected data. In some cases, this may require the selection, comparison, calculation, rearrangement or summarization of data; in other cases,

it may require only a computer-generated, statistically selected sample. When dealing with the voluminous amount of data which RARP auditors are confronted with, it is not practical to attempt to sample statistically without the use of a computer program application.

FEA generally has the authority to require that refiners produce records in auditable form. However, because of the complexities involved in accessing and reformatting data from various data bases, ADP expertise is necessary just to adequately communicate and coordinate RARP auditors' needs to the refiners' ADP personnel. More importantly, ADP expertise is required to properly evaluate the computer-generated material and the procedures and programs used to access the material.

In some cases, it might be necessary for the FEA to write its own programs and to run its own computer applications from the refiners' data bases. In other cases, it might be possible to utilize some existing commerical program packages developed by national accounting firms. These commercial packages are designed to perform standardized functions and generally are not adaptable for specialized needs. They could be used, however, to do standard statistical

sampling. The advantages of these packages are that they are immediately available and are relatively simple to use. In any event, the RARP program needs ADP expertise.

The program packages could be developed by the company or by FEA - either in-house or by a commercial contract.

6.4.8.2 How to Integrate Computer Expertise in RARP Audits

Implementation of computer expertise in RARP audits is not a short term proposition. It not only will take time, but it may require considerable resources. Furthermore, it may cause some interpretive questions and may precipitate resistance by refiners. In order to successfully integrate computer expertise in RARP audits, the following areas must be addressed:

1. Meet any challenges to legal authority.
2. Secure cooperation from refiners, or require access to computers.
3. Obtain additional specialized staffing.
4. Train auditors.

- Legal Authority

The agency must move quickly to meet any challenges to its legal authority to require the production of machine sensible records in addition to systems and program documentation. If the agency authority is not clearly established initially, it could severely delay and frustrate the program.

- Seek Cooperation of Oil Companies

The cost of accessing machine sensible records (programming and computer time) may be a basis for resistance on the part of refiners. Furthermore, refiners will not necessarily be inclined to make FEA's audits easier and more productive. Therefore, it is desirable to secure the cooperation of the major refiners at the highest levels of the company. This might require some discussion with the companies and the highest levels of FEA and/or the Department of Energy.

Failing cooperation, FEA must utilize its legal authority for access to records.

- Obtain Specialized Staffing

The development of computer capabilities will require additional staffing. In order to deal with the highly complex computer systems employed by major oil companies, experienced computer systems

analysts and computer programmers must be recruited. Because FEA has immediate needs in this area, there is not sufficient time to train auditors to be programmers and systems analysts. Some of the FEA auditors may already have computer expertise and may have the capability of assuming programming functions without extensive training. They, of course, will be used but the number is relatively small.

It is also possible for FEA to contract for systems analysts, programmers and computer time, if necessary.

O Auditor Training

In addition to having experienced systems analysts and programmers, the RARP program will require auditors with computer training so that these auditors will be able to recognize and identify audit areas that are susceptible to computer applications and be able to communicate their needs to programmers. This does not require extensive programming training; it only requires awareness training and can be accomplished in 5 days or less.

Organizationally, there needs to be strong central coordination and functional support at the National Office. Regional offices with heavy RARP activities should have at least one systems analyst with appropriate programmer support. In addition, each RARP team should have an auditor with some degree of programming capability to coordinate the audit team's needs with the refiner and the Regional computer specialists and to assist with programming requirements.

After completing staffing and training goals, the first step in the implementation of a computer program should be conducting computer systems environment analyses at all targeted refiners. This consists of reviewing the companies' hardware configurations, their systems documentation, and their report catalogues. This would take from two to four weeks for each targeted refiner. Thereafter, appropriate audit areas at these refiners should be identified for potential computer assistance audits.

It is envisioned that each audit team would include a low level auditor/computer specialist, and each team's increased awareness of computer applications would enable it to request Regional Office assistance for higher level computer expertise. Regional Offices, with a small number of specialists, would be able to serve several audit teams. When necessary, Regional Office could draw upon the resources of the National Office. The National Office would provide the necessary services to Regional Offices whose RARP activities are sufficient to justify their own staff of specialists.

6.4.9 Benefits of Third-Party Litigation

For various reasons, private actions under FEA's pricing regulations have not been frequent. Such actions could have a substantial deterrent effect and could precipitate more voluntary compliance by the major refiners. One extremely thoughtful suggestion from outside FEA and the Task Force was to require all major refiners to disclose to each of their purchasers on each invoice the class of purchaser,the May 15, 1973 selling price for that class, and the increment of cost increase being applied to

comprise the current selling price on that invoice. This system would enable the purchaser, on his own recourse, to challenge any of the elements making up his price, and should also prove helpful to FEA in its policing functions.

The Task Force believes this suggestion has sufficient merit to warrant further analysis by FEA, realizing that some regulatory changes would be required.

6.5 Conversion to a Self-Reporting System

6.5.1 Overview

As previously discussed (Report Section 6.2) FEA's present compliance and enforcement strategy toward monitoring the petroleum industry is one of "blanket" audit coverage. In addition to increased emphasis at the major refiners, the Task Force recommends that FEA attempt to devise and implement a self-reporting system for several segments of the industry.

The Task Force sought to determine if the regulations as presently written were translatable into a self-reporting form which would be along the lines of the familiar IRS-1040 form and which would on its face disclose violations, provide indicators or predictors for other violations and permit the generation of statistical information for profiles of the firms. It was recognized that a form could not disclose all misunderstanding or individual overcharges (except in the producer area) because of the aggregation of the information on the form itself.

To demonstrate the feasibility of a self-reporting system, the Task Force was briefed on the basic regulatory concepts of the price regulations for four segments of the petroleum industry and subsequently prepared draft self-reporting forms if none previously existed. If a form already existed, the Task Force reviewed the form to see

if it could be made more useful for self-reporting purposes.

Generally, the Task Force found that a self-reporting system was feasible for both the producer and reseller/retailer segments of the industry and that certain changes should be made to the present forms for refiners and gas processors. A detailed discussion pertaining to each form is presented later in this text.

6.5.2 FEA's Present Compliance and Enforcement Reporting System. The reporting system established by FEA and its predecessor organizations serves a variety of purposes including energy development, policy analysis, and the implementation of both price and allocation regulations. Some reporting is necessary in order to comply with the requirements mandated by Congress in certain energy legislation. Data from these reports is used primarily for the evaluation and development of energy policy; e.g., Petroleum Industry Monthly Report for Product Prices (FEA form P302-M-1) required by P.L. 93-275 to provide data for policy analysis. On the other hand, still other reporting is directed toward regulatory compliance, e.g., Refiner's Monthly Cost Allocation Report (FEA form P110-M-1). These reporting requirements are established by FEA's regulations under authority granted by legislation.

6.5.3 FEA's Use of its Compliance and Enforcement Reporting System. Despite the authority given FEA by certain energy legislation, the Agency has not exercised this authority effectively in the area of its "regulatory programs;" i.e., a self-reporting system has not been used. The Presidential Task Force on Reform of FEA Regulations identified a total of 43 separate types of reports required of the industry by FEA. These reports were found to be concerned with virtually every aspect of petroleum production and refining, as well as the distribution of all types of products. Although 24 of the reports dealt directly with regulatory programs, 17 were related to FEA's allocation regulations. (See schedule "A" attached).

Only 3 of the reports identified by the Presidential Task Force related to FEA's price regulations. These are included in the following discussion concerning the history of FEA Compliance forms.

6.5.4 History of FEA Compliance Forms

There has been a multitude of data collected from the petroleum industry by FEA, most of it via reporting forms developed for Regulatory Programs Managers which served as information bases. The majority of these forms collected cost, pricing and inventory data. Still others provided the means for the monitoring of movements within the petroleum industry. Few of the forms, however, were developed specifically for determining Compliance with FEA

regulations. Some forms did resemble the characteristics of "self-assessment" reports demonstrating the respondent's compliance with certain FEA price regulations. A brief description of 5 such reports is provided below:

6.5.4.1 Transfer Pricing Report; F701-M-0

The F701 (which is still in use today) applies to each refiner that imports at least 500,000 barrels of crude oil during the month or each refiner that imports crude oil from an affiliated entity during the month. FEA uses the form to obtain full disclosure on costs and prices of the movement of imported crude oil and to identify exchange activity to the extent that unusual movements appear to occur. As a compliance form, it provides the starting point for audit verification of company submitted data concerning product costs. The auditors, upon request for verification from FEA Regulatory Programs, Operations, verify directly from company records the following numbers that appear on the form: (a) quantity of crude petroleum purchased, (b) average landed price calculations, (c) purchase price expressed on dollars per barrel, (d) transportation costs, (e) volume of imported crude acquired through exchanges.

Upon receipt of the audit results, FEA ORP, Operations, provides Compliance with names of companies in violation of transfer pricing regulations. Compliance prepares notices of probable disallowance (NOPD's) when the violation relates

to excess costs or notices of probable violations (NOPV's). Transfer pricing audit work is in various stages of completion at 28 firms.

6.5.4.2 Domestic Crude Oil Purchasers Report; P-124-M-0

The P124 applies to each purchaser who obtains ownership and holds the title of domestic crude oil, including firms taking title between affiliated entities. Approximately 280 firms submit this report. It provides the means for FEA to monitor and enforce the weighted average first sale price (composite price) of domestic crude. The firms must report volumes, weighted average prices and total amounts for first purchaser relating to old, new and stripper oil.

Starting with the P-124 report, the auditor verifies the volumes and prices of the three categories of oil. An initial audit is conducted to determine if selected firms prepared the P-124 correctly. Discrepancies noted have resulted in the requirements for the firm to resubmit the P-124. A total of 103 companies have been audited. There have been 58 companies required to resubmit the P-124 reports. Some of the more common reporting errors are: 1) not including oil purchases, 2) providing inconsistent reports of booked costs, and 3) including products other than crude oil in reports. More comprehensive audit and verification work is planned in this area.

6.5.4.3 Domestic Crude Oil Entitlement Program Refiners Monthly Report; P103-M-1

The P103 "Refiners Monthly Report" is used by refiners to provide summary data governing the allocation of old oil under the Crude Oil Allocation Program. This form is both an informational report and an operational form. The Regulatory Program Manager uses the form to compute national averages and determine whether the reporting refiner is a buyer or seller of entitlements. The Compliance auditor must verify the figures of this report. Based on the audit work, actual adjustments are made in the entitlements program. More comprehensive audit work is being done in this area to determine whether the accuracy of the information reported which, in turn, enables a determination as to whether the correct amounts of entitlements were bought or sold.

6.5.4.4 Utility Supplier Questionnaire; P111-S-0

This was a "self-reporting" type form used in the Utilities Program which has since been discontinued. FEA mailed a worksheet which required the utility to give details on transactions with its suppliers. As a cross check, the suppliers were sent questionnaires concerning their transactions with the utilities. The desk auditor matched the worksheets and supplier questionnaires to identify obvious errors (missing transactions, differences

in volume, add-on charges, etc.). Based on the results of this matching process, the auditor filled out a scorecard assigning quantitative values to discrepancies found during the desk audit. The scores were then used as a means for identifying which firms to target for on-site audits.

6.5.4.5 Refiners' Monthly Cost Allocation Report; P110-M-1

The FEO-96 and its successor, the P110, were intended to provide a measure of how the refiner treated increased product costs and how these costs were allocated across product lines. Specific items reported:

- Summary of Crude Oil Costs
- Increased Cost of Crude Oil Purchases
- Non-Product Cost Data
- Permissible Cost Increase Per Gallon

Although it was designed to be a "self-reporting" form (detailing the mechanics of computing and adjusting the May 15, 1973, prices) it has not met FEA's needs with respect to refiners:

- o The P110 has nothing to do with sales prices; only a cost increment is provided
- o No May 15, 1973, pricing data is shown on P110
- o There are indications that the refiners have not actually used their increment (s), reported

on the P110, in pricing their products.

- o The form only provides a measurement of costs available for recovery and estimates the recoveries based on comparisons; no actual cost data is presented.
- o No "bottom line" figures are provided; i.e. FEA cannot assess the extent of a refiner's non-compliance from information provided on the face of the form.

6.5.5 Conclusion: FEA Has Not Used a Self-Reporting System

It is the position of the Task Force that FEA has not used a self-reporting system in attempting to carry out its compliance and enforcement responsibilities. None of the reports discussed on the preceding pages qualify as self-reporting forms. Although some indicators of non-compliance may be provided, they are not very adequate and they do not exhaust the possibilities for embodying predictors of non-compliance on reporting forms.

Additionally, the forms are filled out by the smallest segments of the industry measured on the number of firms, i.e., about 155 refiners and 700 gas plants, rather than the largest segments, i.e. resellers/retailers (over 300,000) and producers (15,000). The Task Force found that no forms existed for the latter two segments although audits of these areas are the most manpower-intensive and most conducive to targeting on a "for cause" basis. Therefore, a more concentrated effort was given to evaluating the feasibility of a self-reporting system in these two areas.

Report section 6.5.9 will detail specific recommendations for a conversion to a compliance and enforcement strategy containing the element of "self-reporting."

6.5.6 The Concept of a Self-Reporting System

A key element in a succesful compliance and enforcement strategy is "self reporting." As used by the Task Force, a self-reporting system should provide a reasonable demonstration by the firm filing the form of its understanding of the regulations and its compliance or non-compliance with such regulations.
If achievable, the form would, on its face, disclose certain violations to both the firm and FEA in the same way that the familiar IRS Form 1040 indicates the individual's tax liability or refund. In addition, the form should provide indicators or predictors of violations to FEA because of improper manipulations of the numbers appearing on the form and would permit statistical information for profiles of the firms within that segment of industry. The form itself would not directly reveal misunderstanding of the non-numeric terms of the regulations nor would it disclose overcharges to individual customers if the information is reported reported in aggregate.

In the opinion of the Task Force, a self-reporting

system is most useful when the universe is large and the risk of relying upon the information is small. For example, an erroneous report submitted by a small reseller would be inconsequential to the market place, but the same type of error by a major refiner could have a significant effect on the market place. In other words, general compliance may be an adequate goal for one segment of the industry and can be achieved by a self reporting system whereas specific compliance may be the goal for another segment which can be achieved only by detailed audit.

With respect to FEA price regulations, the implementation of a system of this type would require the agency to:

- Develop reporting forms for use by the various segments of the industry;
- Prepare for mandatory submission of these reports; e.g., assess GAO requirements for form approval, determine regulation changes which are necessary to require report filings, pretest "self-reporting" forms.
- Set aside resources for moving directly into a "for cause" action; i.e., the establishment

of a violation based solely on information provided on the form or in the report.

- Use resources for "selective verification" of the required reports; i.e., audits or investigations of particular firms.

Apparently for a variety of reasons, FEA has overlooked or at least not seriously explored this concept.

6.5.7 Self-Reporting with Respect to FEA Price Regulations.

It is the position of the Task Force that the translation of most of FEA's pricing regulations into forms is sufficiently promising that a substantial agency effort to this end is warranted. Most of FEA's pricing regulations appears to be translatable into a form; i.e., a series of questions formulated so that the answers reveal certain violations and are indicators (or predictors) of others. Because, however, the regulations do not always lend themselves to considerations of auditability or the possibility of self-reporting, many of the concepts are not easily built into forms. The forms, therefore, will be lengthy and will not reflect all of the concepts in the regulations.

It is recognized that there are numerous difficulties involved in developing forms, given the complexity of the regulations that FEA is attempting

to enforce at present. For example, non-numerical factors such as the definition of property in FEA's producer regulations and the definitions of transaction and class of purchaser for resellers and retailers (Subpart B) present problems. Not all such concepts can be fully rendered on a form; they precede what appears in the form in much the same way that a proper understanding of what a deductible medical expense is must precede the entry of such an expense on an income tax form. Such concepts are, quite simply, the limits of forms. Nevertheless, as will be shown in report section 6.5.9, self-reporting forms can be developed which will reveal specific violations; e.g., "old" improperly sold as "new" oil or erroneous classification and sale of old oil as "stripper well" crude oil. Even as to the concept of property a form should provide an indicator of non-compliance with respect to a misapplication of FEA's definition of "property" resulting in classification of "old"crude oil as "new".

Self-reporting is only one element of a compliance and enforcement strategy. Reliance must be placed in some instances on direct, field auditing to resolve problems. No self-reporting form required to be completed by the petroleum industry can be designed to answer all questions of a regulatory nature. Therefore, audit coverage must be used selectively to test questionable items and to resolve areas of general difficulty.

Possibly when designing a self-reporting form it may be found that, given the general difficulties, the report development is feasible but, when implemented, completion of the form will be unduly onerous. If this is the case, it must be recognized that the regulations are too complex for practical enforcement and that changes to concepts more amenable to a self-reporting form must be given the most serious consideration. There may be instances where regulation changes are essential to the resolution of areas of general difficulty if a practical self-reporting system is to be designed.

6.5.8 Advantages of a Conversion to a Self-Reporting System.

There would be a number of important advantages in a self-reporting system. Among these are:

- O An effective targeting system would be provided for identifying firms in the industry with probable pricing violations.
- O FEA's present audit strategy would be rendered less "manpower intensive." A more efficient (See report section 6.5.10) and effective use of audit resources could be made; e.g., if audit staff is diverted to the major refiners to strengthen the present staff, self-reporting would aid in providing coverage for the other segments of the industry.
- 0 Firms in the industry would be provided a tool (a self-assessment type form) which they could use to set their prices in accordance with FEA regulations. The form would present the mechanics of "what the regulations really mean" in everyday business

language and thus would provide a means by which these firms could reasonably and practically assess their compliance.

These advantages must be weighed against the previously discussed limits and problems of self-reporting system. On balance, the Task Force believes that an effort is needed to develop such a system.

6.5.9 The Use of Self-Reporting Forms

To amplify the previous discussion in points 5 and 6 (i.e., a self-reporting system, a "feasible" task with advantages) some discussions is useful of self-reporting forms pertinent to each segment of the the petroleum industry.

Incorporated into each discussion is information received by the Task Force from briefings on the basic regulatory concepts and related draft self-reporting forms applicable to refiners, gas processors, reseller/retailers, and crude oil producers (in effect, the major sections of FEA's price regulations -- 10 C.F.R. Part 212, Subparts D, E, F, and K).

The detailed discussions and the draft forms (attachments) are in no way intended to represent acceptable correct forms ready for issuance, but were drafted only to satisfy the Task Force that it is reasonable for the agency to spend the resources that

will be required by an effort to put self-reporting forms in place. The Task Force does recommend that these forms be used as a starting point for projects to develop an implement a self-reporting system. Additionally, the discussion of each form should not be construed as all inclusive but rather be viewed as examples and general guidance by the Task Force.

6.5.9.1 Resellers/Retailers

The Task Force has studied and has been briefed by FEA on the feasibility of a "self-reporting" form for this segment of the industry, prepared in accordance with the present regulations, 10 C.F.R., Part 212, Subpart F (see Attachment B). The resulting form is lengthy, particularly for this segment of the industry that is comprised of many small businesses. Changes in these regulations to enable a more simplified form warrant serious consideration. As indicated earlier, no form for this industry segment has previously existed.

The Task Force has also had drafted a proposed set of revised reseller/retailer regulations for review. The revised regulations are more amenable than the present ones to being rendered on a form. In brief, the changes would eliminate the calculations of unrecouped costs carryover (banking) and the class of purchaser concept by requiring the reporting firm to treat customers separately. (These suggestions are similar to those contained in the Presidential Task Force on Federal Energy Administration Regulation.) The Task Force is not taking a position one way or the other on the economic desirability of these changes. Rather, the revised regulations were drafted to provide a concrete illustration of the inter-relation between regulatory concepts and the burdens and feasibility of reporting forms, and to emphasize the importance of building in considerations of enforceability and amenability for self-reporting at the very earliest stages of the development of new regulations.

A corresponding self-reporting form has been developed, complete with instructions, supporting schedules, and in the form required for approval by the General Accounting Office (see Attachment C). This proposed form will provide the "bottom line" violation under the revised regulations for a particular reporting firm and as such will provide sound

predictive values. Only limited follow-up audit effort would be required to verify the extent of non-compliance.

Certain implementation questions have been tentatively addressed as evidenced by the proposed form:

O A one-time report detailing the "base data" would be required; (see Attachment C.)

O Monthly reports would be required thereafter, beginning with the current month (e.g., July 1977). Unlike IRS, the need of FEA with respect to resellers and retailers is for monthly information rather than annual filings.

O Mandatory filings would be required of the larger firms based on sales volume. FEA could not handle the monthly submissions of 300,000 firms. Therefore, all firms will be required to complete forms and have them available for inspection but only certain firms would be required to submit them to FEA.

In addition to a method of ascertaining bottom line non-compliance , reseller form would permit FEA to make the

following determinations:

- Industry wide cost and selling price figures on 5-15-73 and subsequent dates could be compiled.
- Industry costs could be constantly monitored on a monthly basis by FEA.
- Average profit margins extant on 5-15-73 could be computed for use by FEA Exceptions and Appeals and others.
- Comparisons between different geographic regions concerning product costs, profit margins, etc., could be made.
- Sales volumes could indicate trends in seasonal demands.
- Measurements could be made of the allegation by this segment of the industry that their margins are being decreased by the major refiners.

As the form is developed, and public comments received, these tentative judgments may undergo significant alteration.

6.5.9.2 Producers

The Task Force has done extensive work with respect to the present producer regulations and self-reporting forms.

The Task Force was initially briefed on the application of FEA regulations pertinent to producers of domestic crude oil and presented an initial draft of a self-reporting form that could be used by FEA to ascertain compliance or non-compliance with FEA pricing regulations. The initial form and instructions (See Attachment E) employed a concept wherein the industry would provide only the amount of information necessary for FEA to perform pricing calculations on a property-by-property basis and determine whether crude oil has been sold at prices in excess of those permitted by FEA regulations.

The initial form was designed to take advantage of a programmable calculator system already in place at FEA. The system is programmed to (1) perform mathematical calculations to determine compliance or non-compliance with FEA pricing regulations and (2) provide printed results with respect to the crude oil sold from each property on a monthly basis. More

specifically, the calculator can perform complete analysis of prices charged for crude oil including the accumulation and presentation of any amounts received in excess of those permitted by FEA regulations and can eliminate the necessity for FEA verification of the calculated overcharges during the review process. The printed results are arrayed in a format so that reasons for apparent overcharges can be readily identified.

The initially drafted form would simply eliminate the necessity for the auditor to extract the needed source information from the firm's records and would solicit from the firm, by a series of questions, its understanding of FEA's property concept. The responses to the property questions would not necessarily disclose a violation but would provide indicators of possible misconstruction of properties which could cause violations. The initial form does not provide any self-compliance feature, that is, by filling out the form properly, the firm would not know whether it had or had not complied with the regulations.

At the request of the Task Force, a second self-reporting form and set of instructions were developed that would have the self-compliance feature, with respect to "property." Property is the entity for which prior production must be compared with current production to determine the appropriate classification of crude oil produced (i.e., old, new, released, stripper) and thus, the appropriate prices to be charged pursuant to the regulations. Another feature of this form is the provision for submitting to FEA a refund plan to correct any overcharge.

The second form would require producers to assimilate substantially more information than required in the initial form and includes the firm's computations of lawful prices and determination of compliance with FEA's regulations for the crude oil sold.

Although the Task Force has been advised that the second form is of no greater benefit to FEA, it is of greater benefit to the firm for self compliance purposes.
The Task Force recommends that both forms be studied and a decision be made as to which form would better serve both the FEA and the industry.

The form itself is enclosed as Attachment G--FEA Form P- , Domestic Crude Oil Production and Pricing Report.

Both of the forms developed offer the following potential benefits:

o Sufficient information, with regard to categories of "old," "new," "stripper," etc., that radical changes in volumes for each classification can be detected.

o Data detailing higher than normal prices for "upper tier" oil.

o A device to compare crude oil prices between fields, thus detecting instances when a particular producer's prices are substantially higher than the crude oil prices in neighboring fields.

o Some potential to monitor, on an annual basis, the composite price required by the EPCA.

o A viable desk audit concept that would "pin-point" most types of violations and significantly reduce on-site audit requirements.

o Availability of strong indicators to target firms for detailed audit as a part of overall audit strategy.

o Prompt recognition of areas with high potential for violation.

o Completion of detailed pricing computations by the industry rather than the FEA, including the preparation and submission to FEA of overcharges on sales of crude oil.

o A means of providing the industry with instructions and forms to accomplish a complete "self-audit."

o A system for the industry to submit to FEA detailed plans for correction of any misapplication of the pricing regulations disclosed by the "self-audit."

It is recognized that all violations cannot be discovered from information reported on the face of the form; e.g., curtailment of production resulting in a stripper qualification based on average daily production of 9.8 barrels per day. As previously stated, however, (report Section 6.5.7) complete reliance must not be placed on the self-reporting system.

In the opinion of the Task Force, both crude producer self-reporting forms are practical and feasible to implement. The implementation of either reporting system would require the submission of a one-time report for the period September 1973 through calendar year 1977, followed by annual submissions of selective and limited information. The Task Force recommends that both self-reporting forms be studied with a view toward selecting and implementing the most desirable and productive alternative at the earliest possible date.

6.5.9.3 Gas Processors

Like refiners, each gas processor is required to file a monthly report (P110-M-1, Schedule G) which provides a "bottom line" maximum price increment. This increment is determined by an aggregation of information on either a firm wide basis or an individual plant basis and, therefore, would not disclose overcharges to individual customers. Because a form already existed and there is a relatively small number of firms in this segment of the industry, the Task Force concerned itself with enhancing the capacity of the form to predict violations. This predictive value can be accomplished to a substantial degree because the non-numerical class of purchaser

definition does not appear to be a major problem with the independent processors, since the regulations have for the most part "written out" this issue by virtue of the floor prices for NGLs.

In the opinion of the Task Force, by adding two sections to the present form and expanding several line items in a present section, the form will be a strong prediction of compliance. One of the added sections deals with general information provided to determine whether the firm is the operator of the plant and whether the firm has elected to file on a firm wide basis, or on an individual plant basis. The second of the new sections specifies the actual method of computing shrinkage costs which is not on the present form. The items which have been added to the present section serve to elicit information concerning allocation of costs among the various products. These changes do not appear burdensome to the industry and, therefore, should be given strong consideration for implementation by FEA.

The Task Force also believes that FEA should consider the possibility of requiring the gas processors to file actual costs, recoveries and volumes. Because the present filing time requirements are liberal, i.e., presently the processors are required to file 45 days after the end of month being reported, sufficient time should have passed for the firm to have accumulated actual figures.

The revised draft report and set of instructions are included as Attachment E. In addition, a narrative of the regulatory background for processors and a layman's description of the regulations are included.

6.5.9.4 Refiners

Refiners are already required to report monthly their costs available for recovery on a very complex FEA form P110-M-1 (formerly FEO-96).

In the opinion of the Task Force, the complete non-numeric terms included in the regulations (e.g., "class of purchaser" and "deemed recovery"), and the significant aggregation of information, prevent development of a reporting form that would function either to reveal or to predict any but the grossest of violations. Nevertheless, these forms are important

because they require the firm to compile and organize data with reference to FEA's regulations. Therefore, the forms provide an important starting point, or reference, for auditors as they work back to voluminous source documents. The Task Force, therefore, addressed itself to making this form more auditable, that is, making it more possible for the auditor to trace the entries on the forms back to the firm's accounting records. Serious consideration should be given to requiring refiners to file within a specified time period after the initial filing, (1) a report detailing actual costs incurred, (2) actual recoveries calculated under the equal application provision of the regulations, and (3) the actual volumes of products sold. By trying to audit estimates, the auditors have been placed in a weaker position than they would have been if they were auditing actuals which by their very nature are less disputable.

Because of the complexity of both the regulations and the present form, the Task Force has not attempted to draft proposed changes to the regulations or the form, but believes that FEA should give these matters strong consideration.

6.5.9.5 Utility of Independent CPA Certification

One additional point pertinent to the use of self-reporting forms might be in order. Most forms require the preparer to certify to the accuracy of the information presented. Possibly, the accuracy and predictive value of data reported to FEA by Firms subject to its regulations could be significantly enhanced by requiring the firm's independent auditor to express an informed opinion as to the correctness of such data appearing on the forms. This idea deserves furhter exploration, bearing in mind that many of the concepts embodied in the forms are not ordinary cost accounting terms.

6.5.9.6 Books and Records Requirment

The utility of self-reporting forms will be greatly enhanced if, as a concomitant of the forms, FEA prescribes the books and records to be used to support entries.

The maintenance of uniform records will also greatly facilitate the agency's audit and on-site inspection program.

6.5.9.7 GAO Approval

Forms developed for self-reporting system must be considered under the Federal Reports Act. The Task Force believes that the self-reporting system here envisioned can carry such enormous public benefits that forms proposed for this purpose should be given the promptest possible consideration by the GAO. Moreover, it must be emphasized that the need for the forms is supported by the most compelling reasons of public policy.

6.6 Choice of Non-RARP Targets in the Future

6.6.1 Overview

The development of a suitable strategy to deal with the objective of maximizing discovery of large violations that have already occurred has been dealt with in Chapters 6.3 and 6.4. With respect to the remaining non-RARP companies, it is necessary to address the two general components of the Compliance problem: how best to identify firms that have committed significant violations, and how to achieve future deterrence.

6.6.2 Achieving Future Deterrence

Under present plans, price controls are to continue for some time on crude oil producers, NGL processors, marketers of propane, and certain other products. For these programs the objective of deterrence (the encouragement of future voluntary compliance) is an immediate concern. All other products have already been or are actively being considered for decontrol, and the objective with respect to marketers of these products is to build credibility in the FEA enforcement program should future events require reimposition of price controls.

How best to accomplish these objectives is in general a subtle problem involving, among other things, the way industry management perceives the risks of non compliance. What absolute level of Compliance resources should be committed to achieve deterrence is not susceptible of "hard analysis." It depends, among other things, on knowledge of industry information networks, the strength of incentives to disobey the regulations and the frequency with which violations are discovered. Nevertheless, an essential factor in creating the necessary deterrence and credibility is clearly this: industry must be convinced that significant past violations of regulations will be detected and corrected. Only if this perception is widely held can extensive voluntary compliance be reasonably expected in the future.

It is the position of the Task Force, therefore, that the best way to effect deterrence is to give a clear signal to industry that past significant violations will be pursued.

Thus, in the non-RARP areas the two components of the Compliance strategy problem -- the past and the future -- are largely reduced to one: how best to recover the maximum amount of past violations within a given staffing level.

6.6.3 Maximizing Discovery of Violations Using Cost/Benefit Approach As Baseline

It is proposed that a cost/benefit approach be used as the departure point for efficient allocation of Compliance resources. Data showing the amount of violations recovered in the past and the corresponding amount of audit time spent in each program can be used to construct estimates of current benefit/cost ratios by program. Presently available estimates support a pattern of audit coverage in non-RARP programs that differs from the present pattern. To increase overall Compliance efficiency, relatively more audit emphasis than in the past should be given in the future to programs with the highest ratios. Staffing and targeting decisions should, subject to other factors relating to deterrence, be in the direction of achieving broadly comparable marginal cost/benefit ratios across programs.

6.6.4 Targeting Within Programs

Violation Indicators

Within each program the best information available must be used to target likely violators. Targeting firms "for cause" is currently done only in the Reseller program, where appropriate indicators are derived from information reported by resellers on a special Compliance targeting form. The best long run solution to targeting within programs is the use of self-reporting forms that reveal or predict many, though not all, significant violations. Until such time as a self-reporting or expanded targeting system is instituted for the other Compliance programs, proxy indicators (such as firm size data) should be used to select systematically the most significant potential violators.

6.6.5 Other Factors: Regional Selection and Some Coverage in Each Program

In addition, as noted at the beginning of the discussion of strategy (Chapter 6.1, supra), targeting of particular firms must reflect considerations often used by prosecutors to accomplish deterrence as well as the statutory responsibility to maintain competition.

Moreover, the regions must be given sufficient flexibility to exploit local conditions (e.g., a dominant industry within the regions) for achieving maximum Compliance impact, and they must be able to pursue willful violations that come to their attention through complaints or otherwise. In addition, whether or not indicated by the appropriate benefit/cost ratios, some minimal level of audit presence should be maintained in every program, since it is not known if the deterrent effect associated with the discovery of violations (no matter how large) in one program has any deterrence value in other programs.

6.7 A New Definition of Goals

6.7.1 Introduction

Audit strategy and performance measurements must be carefully integrated so that performance measurements create incentives that further the strategy and success in achieving the strategy is accurately monitored. Therefore, the proposed changes in audit strategy to place greater emphasis on major refiners will also require a change in the present method of evaluating Compliance performance. In addition, the revised performance measurement system will require substantial evaluation to remove the conceptual weaknesses of the present system which bias selections toward smaller, low-dollar-return audits.

6.7.2 Overview of Present Goal - Oriented System

The present goal-oriented system of performance measurement involves establishing annual audit goals for each of Compliance's ten programs. This system, initiated in August 1976 to measure Performance in FY 77, represented FEA's first attempt to establish a system for measuring the progress of its regional Compliance offices.

With the exception of major refiners, regional audits goals were expressed as the number of audits to be completed during FY 77.

Non-violation audits were also counted toward goal completion if, after a preliminary audit, the firm was found to be in substantial compliance with FEA's regulations.

When selecting firms for audit, the regions were instructed to use target lists prepared by the National Office. For every four firms selected, at least one firm must have been a large-volume firm shown on the target lists. Major refiner goals were expressed as target dates for completing the various audit areas; e.g., class of purchaser at each of the 35 largest domestic refiners where resident audit staffs are maintained.

To count toward the annual goal, the audit must be completed through the issuance of the Remedial Order or Consent Order. These stages were selected in an attempt to force the regional Counsel and audit staffs to work toward one common goal-the full completion of enforcement actions on a regular basis.

6.7.3 Weaknesses of Present Goal Oriented System

This goal-oriented system has not worked well because of several weaknesses in the conceptual design of the goals and because of problems with the actual implementation and execution at the field level. These weaknesses are discussed in greater detail below:

Slow Resolution of Regulatory Issues

When the goals were established in August 1976, the Compliance staff assumed that major regulatory issues impeding audit completion would be resolved much more quickly than what actually occurred. Unresolved regulatory issues have been a significant deterrent to goal completion in nine of Compliance's ten programs. For instance, the crude oil reseller regulations have not yet been published; the final property issues affecting audits of crude production were not resolved until January 1977; the multiple inventory class exception is presently unresolved and has held up the completion of propane reseller and retailer audits since February 1976. Other audits significantly constrained by unresolved regulatory issues are in the refiner and natural gas liquid programs.

- Unrealistic Manpower/Productivity Expectations

The established goals assumed a higher amount of manpower productivity for audit completion than was reasonable. For example, it was assumed that there were 1760 direct hours available annually for each audit. Experience has shown that this figure is substantially less than 1760 hours. Simply stated, the 1760 hours estimate did not recognize the multitude of special projects, Congressional requests, and other non-audit related projects that diverted FEA auditors from their major audit mission. As a result, the goals were set too high for most programs. The only program in which the goal was realistic was independent crude producers.

- Overly Optimistic Anticipated Audit Times

The audit times (i.e., the time required to conduct a given type of audit) used to calculate the goals were too optimistic. When the goals were originally calculated, estimates of audit times were used because sufficient data on completed audits were not available to compute actual audit times. Since it was impossible

to appropriately differentiate between audit times for large and small firms, average audit times were used to set goals. A recent analysis of completed audits showed that actual audit times required to complete audits were much greater than those used to establish the original goals.

- Too Little Regional Input

Regional Compliance personnel have often expressed a desire for greater input into goal setting. Although the original goals were discussed with the regions and regional Compliance personnel participated in making a mid-year adjustment to the goals, the Task Force believes that greater effort should be made to give each region more opportunity for input into goal setting for FY 78.

- Lack of Support from Regions and Regional Administrators

There was a general lack of receptivity and support for the goal-oriented system by those whose support was essential to make the system work -- the regions in general and, in particular, the Regional Administrators. Due to the organization of FEA, the Regional Administrators were generally not held responsible for poor performance in the Compliance area. Some Regional Administrators who tried to support the goal system found it difficult to obtain the support of their Counsel staffs because of the "mixed" organizational setup in FEA.

- System Did Not Encourage Selection of Audits with High Violation Potential

Most importantly, however, the goals in practice were conceptually counterproductive to the agency's major mission of identifying and correcting significant overcharges. For instance, the goals encouraged the region to

complete audits without any economic consideration of the dollar-return-per-audit-hour. As a result, some regions selected smaller firms in order to meet their goals. Once a firm was selected, a large number of audit hours were often expended pursuing relatively minor violations. This biased selection was done at the expense of potentially more lucrative violations. Greater emphasis should be placed on economic factors when selecting and performing audits.

- o System Detracted from Completion of Major Refiner Audits

Finally, the use of inflexible audit goals for all ten programs detracted from the successful completion of audits at the major refiners. Even though the Major Refiner program was Compliance's highest priority, the regions were reluctant to divert personnel into major refiners at the expense of their other goals. After January 1977, diversion to areas such as Crude Production at major refiners would have been beneficial since all major regulatory issues were resolved for this area. The regions were reluctant to divert staff, however, since they generally perceived that little could be accomplished at

the major refiners in view of the significant unresolved regulatory issues such as class of purchaser. Therefore, if auditors were diverted to the majors, other programs would suffer without any substantial offsetting accomplishments at the majors.

6.7.4 Proposed Performance Measurement System Overview

As stated previously, the revised performance measurement system must be conceptually sound and be designed to carefully track the new audit strategy. Basically, the new audit strategy proposed by the Task Force divides FEA's ten Compliance programs into two parts -- "major refiner" and "other" programs. As its primary objective, the new strategy stresses fully reviewing and remedying significant violations that have occurred at the major refiners. Second, the new strategy endorses selective audits of firms in the other nine FEA programs with emphasis on remedying large dollar violations, and, for those continuing programs such as propane, to deter future violations.

The strategy for the "other" program is in the short run intentionally subordinate to the strategy for major refiners. It is fully intended that all necessary resources be devoted to the refiner strategy, even at the expense of other programs, although priority should be given to major independent crude producers and crude oil resellers. For decontrolled products, the audit emphasis will be designed to remedy significant prior violations and, of equal importance, will ensure government credibility if it ever again becomes necessary to return to a price-control system. Although there are other dimensions, high dollar return for each hour invested is a common factor in every element of the new strategy. The Task Force's proposed performance measurement system, as presented below, is designed to emphasize dollar return and, thereby, remedy the conceptual weaknesses that exist in the present goal-oriented system.

6.7.5 New Strategy for Major Refiners

The overall success of the new strategy will be determined by how efficiently Compliance executes the major refiner strategy - the primary strategy. This program is the farthest behind and is the program in which the largest price overcharges appear to have occurred.

The major refiner strategy primarily involves one major objective--to become current. Therefore, the primary performance measurement at the majors will involve the setting of a time-phased goal for each major refiner to "catch up" and become current. Milestones will be established for each refiner and for each significant component (audit unit) of the strategy. e.g., crude production, class of purchaser, etc.

6.7.6 Other Programs -- A New Definition of Goals

Within the strategy for FEA's other nine Compliance programs, there are three objectives: (1) to identify and correct large violations, (2) to deter future violations by maintaining an appropriate audit presence, and (3) to assure the credibility of any future price control program by remedying the overcharges for those products that have been decontrolled. The proposed strategy is a selective one as opposed to the current strategy of blanket coverage for each program. By using audit resources effectively in identifying and punishing large dollar violators, these three objectives can be accomplished.

In order to assure economic selectivity, the Task Force proposes that Compliance develop a cost/benefit ratio to measure Compliance performance. The cost/benefit ratio would be the departure point for selecting firms for audit. However, superimposed on this system should be flexible procedures for permitting the region to exercise conventional prosecutorial discretion in targeting firms for audit. Some considerations that would be appropriate for regional discretion in targeting

firms are (1) potential willful violations, (2) significant opportunities to impact on highly visible industries, (3) new programs and, (4) precedential issues.

The advantages of a cost/benefit measurement performance over the prior system are as follows:

- It will discourage the pursuit of low return audits.
- It will make the regions and the National Office more aware of Compliance's primary mission -- to identify and remedy significant overcharges.
- It will enable each region to manage better its own resources and to identify and remedy factors contributing to non-productive audit teams, counsel staffs, area offices, and posts of duty.
- It will enable the National Office to manage better its resources by identifying and remedying non-productive regions.

- It will not detract from, or compete with, FEA's major strategy of completing audits at the major refiners.

SECTION VII

REPORT AND RECOMMENDATIONS ON AUDIT STAFFING AND TECHNIQUES

Audit Skills and Techniques

Recommendations

1. Quality of Auditors/Investigators

   a. Require FEA's Office of Management and Administration to take action very rapidly to reclassify investigators if qualified, to auditors. For those investigators, except those with special criminal investigative skills, that cannot qualify, FEA should institute replacement action. To the extent possible, FEA should make every effort to encourage or provide training to assist personnel in upgrading their skills. However, in implementing any reclassification action, FEA should be sure to recognize the specific auditing and investigative skills that are required to adequately perform FEA's Compliance function.

   b. Improve the supervisory techniques over inexperienced audit personnel. These improvements should involve (i) instilling a sense of urgency to complete a professional audit package within established time frames, and (ii) detailed supervision in the proper use of investigative techniques.

   c. Obtain the Office of Management's assistance in replacing personnel unqualified to work in the National Compliance Office. Consideration should be given to placing these personnel in other Agency programs requiring their skills.

d. Review the capabilities of personnel presently occupying supervisory positions at all levels (including team leaders, area managers, and Compliance Directors) and take action to upgrade satisfactorily the supervisory skills and to enhance the sense of urgency among supervisory personnel.

e. Seek additional ways to provide meaningful job enrichment and promotion opportunities to the staff.

f. Make a study and, where necessary, develop restrictive regulations on outside employment for Compliance personnel.

g. FEA should enhance its internal review (Compliance Review) capability by upgrading the staff with persons with audit expertise.

h. Take action to expedite the hiring of Compliance personnel to bring the office up to its authorized level.

2. Quality of Audits and Use of Professional Audit Techniques

a. Make a concerted effort to fully implement the provisions in the Compliance Manual dealing with workpaper preparation and the Common Audit Approach (CAA). Since the program has been in existence for several months and has been ignored by several regions, it is now time for FEA to act with decisiveness to assure full implementation of the Manual's provisions. The fact that an audit was started prior to including the CAA in the manual should not be permitted as an excuse for not upgrading ongoing audits.

b. Begin efforts immediately to upgrade and enhance the capability to audit "through the computer." Due to the urgency of obtaining this expertise rapidly, FEA should consider, among other options, contracting for this expertise.

c. The acceptance of sampling techniques, including statistical sampling, should be fully endorsed as an auditing tool by FEA management at all levels.

d. Develop a training program on sampling techniques for Compliance auditors and attorneys.

e. Compliance should review and adjust the Compliance Manual to provide for any significant omissions or deviations from the concept discussed in Section 1.2.6.

Training and Relationship with Counsel

a. In light of the Task Force findings, restructure the basic auditor/investigator course along the following lines:

- o Include materials that impart a sense of the purposes, public policies and economic rationale of the statutes and regulations being administrated.
- o Shorten the time spent on Agency administrative indoctrination material. Such material can be read easily by new employees and specific important questions, if any, can be answered locally if there is not time at the school.

- o Shorten the time spent on the background of the FEA and speciality areas so that it is truly an overview.
- o Expand the time of instruction for basics of accounting in the industry, use of computers by the firms and how to audit the computer output and through the computer, the common audit approach, the techniques used in setting up an audit (including review of internal control procedures and financial and managerial records), the audit workpapers and the execution of an investigative audit.
- o Separate the area of specialization schools (Producers, RARP, NGL) from the basic school allow employees to attend a specialization school only after a working indoctrination period of at least six weeks.

b. Require attorneys that support the Compliance function to attend Compliance training courses.

4. Personnel Deployment

a. Perform an analysis of the deployment of personnel to assure that it is in line with the present audit strategy. This analysis should given full consideration to the economic feasibility and the appropriate alternatives to maintaining small offices. As a by-product of this analysis, the desirability of the present locations of Regional Offices should be assessed. Such

determinations should consider closing, merging, and dividing regional offices if the workload analysis support such conclusions.

b. Consider using inter-regional assignments to audit the large record centers maintained by the major refiners.

1.0 Audit Skills, Audit Techniques, Training and Personnel Deployment

Task force representatives visited the National Office of Compliance and several regions for purposes of evaluating the quality of the professional skills of the Compliance staff, the use made of audit techniques, and the general utilization of personnel resources in support of Compliance's major function. The scope of the analysis consisted of reviews of audit performance, audit workpapers, personnel education and experience backgrounds, personal observations, discussions with Compliance personnel, and other supporting analyses as required. At the time of its review, the Task Force noted that FEA's Compliance staffing was 105 personnel below its authorized staffing levels. This section of the report will not discuss the lack of proper integration of the compulsory process into the auditing function as this matter is discussed in the section on enforcement authority. The Task Force did find areas in which audits were performed in a highly professional manner. In addition, the Task Force observed that in many instances, the Compliance Office is staffed at both the national and regional levels with many dedicated and qualified personnel. However, the overall conclusion of the task force was that substantial improvements are required to upgrade the professionalism of Compliance's audit staff.

1.1 Quality of Personnel Audit Skills

Although FEA's Compliance function is a law enforcement system, this system, of necessity, must have as its cornerstone an aggressive and effective auditing office, staffed with trained professionals. On many audits, especially those involving large integrated refiners, Compliance auditors are involved with one of the most complex accounting systems. To further complicate the audit problem, FEA's regulations impose an additional burden on the auditor by requiring audit verification of calculations based on theoretical concepts not normally associated with conventional auditing (class of purchaser and recoveries). The Task Force found that a significant number of personnel now associated with the Compliance auditing function did not possess the necessary skills to properly perform their assigned mission.

1.1.1 Regional Investigator Personnel

At the start of the Compliance program, the Internal Revenue Service hired mostly investigators (GS-1810) [1/] rather than trained auditors (GS-510) [1/] to perform the Compliance mission. FEA continued to permit the regions to hire investigators until mid 1975. Supposedly, such hiring was permitted because of the emphasis, during the early days of the program, on resolving consumer complaints at the retailer and reseller levels. As a result, investigators

1/ These numbers refer to Civil Service job series codes.

initially made up 50 percent of some regional Compliance staffs. Currently, about 150 investigators are on board. These investigators often had backgrounds and experience in investigations against people rather than investigations into possible financial crimes and violations. In one Area Office in Region II, 15 of the 20 personnel assigned were investigators (10 of these investigators were former New York City Policemen). As borne out by the discussion in audit techniques, many of these personnel were not equipped to perform the sophisticated audits that are now required of Compliance personnel.

In a report issued by the Civil Service Commission (CSC), several months ago, the CSC ruled that the basic mission of the Compliance process involves auditors in the GS-510 series and recommended that FEA take action to replace the investigators with qualified auditors. The task force found, however, that FEA's personnel office has not taken action to implement the CSC recommendations.

1.1.2 Regional Auditor Personnel

Although the problem with inexperienced auditors is not as severe as with investigators, the problem does, however, exist at some locations. The task force review showed that some of the auditors whose professional abilities were lacking came from auditing backgrounds substantially

different from FEA. For the most part, these personnel came from agencies which were often able to use "canned" audit programs (predetermined and standardized) requiring little judgment and personal initiative. As a result, these personnel have found it difficult to adjust to the "fluid" investigative nature of FEA auditing.

1.1.3 National Office Personnel

The task force also noted that certain National Office positions were occupied with personnel who were not trained in accounting or auditing. Some had skills such as engineering and journalism. As a result, several of these personnel who could not be placed in non-audit related functions were not productively employed and were blocking the placement of qualified personnel. Although these personnel were involuntarily placed in these positions as a result of prior Agency reorganizations, the Task Force believes that FEA should make every effort to encourage or provide training for those able to benefit from it or take appropriate action to place these personnel outside the Compliance program. With the advent of the new Department of Energy, an excellent opportunity exists to place these personnel in jobs requiring their skills so that qualified replacements can be hired.

1.1.4 Description of Personnel Make-Up at Selected Compliance Offices.

The following paragraphs present a profile on several Area Offices. In addition to providing support for the above analysis of quality of personnel, this profile should be helpful in understanding the next section on quality of audits.

Manhattan Area Office - The Manhattan Area Office has 15 investigators (1810's) out of a total of 20 people (10 of these people were formerly with the New York City Police Department). Review of historical workpapers in this Area Office often showed a lack of educational background, experience and training for the work being done. The Manhattan Office is responsible for the audit of some very large resellers and importers. None of the workpapers reviewed showed any use of the common audit approach.[2/]

Refinery Teams - The Mobil audit team consists of two investigators and 10 auditors. There are two Grade 13's, six Grade 12's and four Grade 11's on the team. The team leader came from the Post Office Auditor Department a little over one year ago. A review of the work product did not indicate that much had been accomplished by the team to date. Much of the work on Mobil has required travel by the team to Texas and California.

2/ Common Audit Approach. This term refers to a common audit approach that is part of the body of knowledge available to the accounting profession.

Hess Refinery - As a contrast to the Mobil Team, the 11-person team at Hess has only auditors on its staff and includes two Grade 13's, four Grade 12's, one Grade 9, and four Grade 7's. Many of the team members have public or private accounting backgrounds. Workpapers reviewed showed utilization of the individuals' backgrounds. It should be noted that the Mobil and Hess RARP team leaders do not meet with each other or other RARP team leaders to discuss problems or current solutions.

Smithtown Office - The Smithtown Office audits mainly retailers and resellers; besides the Area Manager, there are two auditors and four investigators. Grades of personnel are: one 13, two 12's, and four 11's.

We were advised that there are no certified public accountants or certified internal auditors in the New York Region.

Other Offices - Our visits to the Dallas, Oklahoma City, Houston, and Atlanta Offices showed that new employees were hired at lower grade levels with accounting training and degrees (some of whom were CPA's). These people are bringing their body of knowledge to current audits and the workpapers reflect completed work more in line with the common audit approach and manual requirements.

1.2 Quality of Audits and Use of Professional Audit Techniques

It is necessary to consider the quality of audits and the use of professional audit techniques in conjunction with the above discussion on the quality of auditors. In essence, it is necessary to have a trained audit staff to consistently perform quality audits. As discussed in the section on Training, it is possible to enhance a professional auditor's skills in the use of professional accounting and auditing techniques. However, it is not practicable nor feasible for an Agency to spend time training unskilled personnel.

The Agency has often used investigators to audit firms although many of the investigators have never had any financial or accounting training and, as previously indicated, have experience only in the investigations of crimes against people.

To cope with the audit quality problem, Compliance provided guidance by publishing a technique called the common audit approach (CAA). This audit approach, which simply incorporates into one document a technique common to the accounting profession, was not implemented until recently. The task force found that many audits started in 1974, 1975, and 1976, which in many cases are still ongoing, did not use any CAA techniques. This finding includes some work presently underway at the major refiners.

1.2.1 Workpaper Analyses

To determine the adequacy of audit performance, a review was made of some audit workpapers in Regions II, IV, and VI in connection with audits performed in 1974, 1975, early 1976, and some more current audits. While the review showed improvements in the later audits, there was still substantial room for improvment in the following areas:

- Lack of proper planning prior to going to the field
- Lack of background memoranda on the firms
- Lack of memoranda on introductory meetings with the firms
- Inadequate use of FEA's audit guidelines
- Lack of review of the firm's system of internal control (both financial and management) applicable to the items under audit, especially the input and output of computers

- Lack of detailed audit plans (programs)
- Lack of budgeting of time in connection with the audit plan (program)
- Little or no indexing of the workpapers or cross referencing of the work to conclusions
- Inadequately supported conclusions (occurring most often on retail audits)
- Insufficient indication of supervision or review

The above deficiencies are noted with the full knowledge that the Compliance Manual and use of the common audit approach (included in Section 4.100 of the Compliance Manual) were introduced subsequent to initiating or completing several of the audits included in the review. Nevertheless, the technique espoused in the common audit approach was part of the body of common knowledge available to the accounting profession. Therefore, these procedures should have been applied by qualified auditors even though not yet included in the Manual when the audits started.

1.2.2 Supervision

On the surface, it appears that the auditors are being supervised. Supervisory personnel are making assignments, reviewing workpapers and suggesting changes as part of on-the-job training. These supervisors seem to know the status of work under their control. However, the supervisors are not

always controlling the auditor's time spent on the work or directing the work to completion. Generally, they are not providing sufficient supervisory leadership by demonstrating a sense of urgency to complete the audit work and close the case. Rather the supervisors are providing only superficial supervisory review and support without performing the full spectrum of supervision. What FEA now has is management by exception; the effort to appropriately supervise the completion of major audit work generally occurs only when management wakes up to extreme audit completion delays.

1.2.3 Use of the Computer

The task force found that the level of sophistication in using the computer for audit purposes is seriously lacking at most FEA audit locations. Assuming that FEA is successful in getting direct access to a company's computer, it will be necessary for FEA to upgrade its staff quickly with qualified systems and computer personnel. This is essential if FEA is to expedite its audits by auditing "through the computer" rather than "around the computer" as it presently does. In order to assure a quick upgrading of its computer technical capability, FEA should, among other options, consider contracting for this support.

1.2.4 Use of Sampling

The industry audited by FEA involves firms that process thousands of transactions each day. Therefore, it is essential that sampling techniques (including the use of statistical sampling) be used extensively to enhance the completion of audit verification procedures. Some FEA auditors possess this skill. However, the degree of successful use of this technique is seriously lacking. There are several reasons why this has happened. The primary reason is a lack of sophistication among auditors and attorneys in understanding the use of sampling. For the most part, attorneys and audit managers in FEA are somewhat fearful to use sampling in a law enforcement environment. Since sampling has been a method of selection of documents for audit verification for many years, its use in FEA is not an innovation. Therefore, the task force believes that a training program for both auditors and attorneys should go a long way toward removing the roadblocks to accepting sampling for regular use in FEA audits.

1.2.5 Outside Employment

During its visits, the task force noted several instances in which Compliance personnel were employed (including self-employment) in occupations other than Compliance. Such employment involved practicing CPA's, tax specialists, and flight crew members. Such

outside involvement could impact on the quality of audits. In addition, this situation creates the opportunity for conflicts of interest and diversion of audit personnel. Therefore, it is suggested that appropriate restrictive criteria be established for approving outside employment. Such action should be employed along with ways to improve meaningful job enrichment and promotion opportunities for its personnel.

1.2.6 A Discussion of Basic Auditing Techniques

Although the following audit techniques basically are included under the common audit approach or elsewhere in the current Compliance Manual, they are repeated here as a means of emphasis to confirm the approach to auditing as described in the Manual. It is the task force's belief that an exerted effort must be made to fully implement these procedures.

a. The application of audit techniques must be based on proper education and training of the auditor. That person must understand the industry and firm's place in its sphere of the industry in order to reach the objective of the audit.

b. The auditor must obtain background information on ownership, management and financial operations of the firm. Some of this can be obtained from third party sources (such as Dun & Bradstreet reports or information filed annually with the Secretary of the State of incorporation) or in the case of public companies--financial statements or annual reports.

c. Information gleaned from sources identified above should form the basis for requesting information in a Data Statements (DATS) letter. The DATS letter should also ask the firm to provide written or flow-charted information on accounting, management and computer internal controls. By requiring more information to be supplied and verified by means of the DATS letter, the auditor is putting the firms on notice that they will be held to those requests. Presently, much of the information is requested orally in introductory meetings with management creating a position in which communications among the parties may be misunderstood. A written request for internal control documentation that is answered -- "We don't have that information" provides the basis for instituting remedial action when it is later found. However, oral communication of the same answer can always be used as the basis for a reply that "We didn't understand what you were looking for when you asked for it." The written reply forms the basis for audit documentation and support.

d. The introductory and all subsequent meetings with any representatives of the management of a firm should be fully documented by a complete memorandum for workpaper purposes. If at all possible, the introductory or first meeting with the firm after reviewing internal controls should spell out each source person for documents the audit

staff may need for subsequent audit purposes. This source person should not be the liaison person at the firm. Perhaps an internal questionnaire to be filled out by the firm and verified by the audit staff should be devised for general use at the major firms.

e. After the initial steps listed above, an audit plan (guide) should be prepared and inserted in the workpapers. This plan should identify the objectives of the audit and the appropriate steps for accomplishing these objectives.

f. The preparation of the tailored, detailed audit program (plan) together with an estimated time budget for each audit step can only be based on a review of the internal controls of the firm in conjunction with the objectives of the audit. That means that the auditor has to understand the accounting system (whether manual or on computer) and output (reports) of that system before he can audit. We were informed by various management and supervisory staff level personnel of FEA that they have been working (auditing) at the majors (and other firms) without benefit of a complete internal control review (audit survey); that some of the audit teams are putting together information on the firm's systems as they learn of new areas; and that they seldom have full grasp of the full output of computers -- either on the financial reporting or management information track.

g. The detailed audit program cannot be complete without a test of the firm's computer programs. The testing of the programs as well as the devising of audit steps to audit through the firm's computer should be accomplished by computer oriented personnel and by the use of prepared programs available to audit through the computer. The agency has not been using this audit technique and will have to add trained personnel to accomplish the adoption of this technique. In considering the above, the Agency should be cognizant that most of the majors (and probably many other firms) use the computer as a master management planning tool. Non-financial crude oil production reports are probably prepared for the geology, engineering, transportation and refinery departments so that they can efficiently plan their operations -- and the same most probably holds true for many other activities throughout the firms. That non-financial information also should be available for review by the Agency.

h. The next step is to have the detailed audit program reviewed and approved by expert supervisory personnel.

i. Audit verification is always time consuming. However, the experiences of the auditors at the major firms have made it worse than normal. There is no direct contact between the auditor and the source of information.

There is always a liaison person acting as an intermediary. All requests for information are put in writing, go through an intermediary, are screened prior to return and are returned usually after long delays. Operating and auditing under these conditions is very difficult. However, when added to these problems is the fact that Agency's audit people usually do not have full grasp of the "system", certain key aspects of sound investigative auditing are lost. Results of audits are only as good as information the auditors see -- both visually and by gaining a comprehensive understanding of the system. The FEA must find a way to allow its auditors the same access to records and people as the firm's independent accountants routinely are allowed.

j. When the work is complete, the papers should be reviewed by supervisory personnel capable of insuring that the conclusions are well documented in the workpapers and that the report will stand on its own. Those same supervisory people should ensure the acceptance of the report by keeping counsel advised of the progress of potential actions and clearing problems with counsel as the audit work progresses.

1.3 Training

As indicated previously, FEA must assure in its training program that its personnel possess the essential basic accounting and auditing skills. Therefore, those personnel who are not sufficiently trained academically must be required to seek this training or be removed from the program. The task force has made appropriate recommendations in this regard. For purposes of this section, the discussion of the task force's findings revolve around Compliance's formal training program which is designed to enhance an auditor's basic skills and instruct him in the theory and application of FEA's regulations.

1.3.1 Review of Compliance Training

The Agency has training programs to provide for indoctrination, initial training and advanced training of the application of FEA regulations to specific audit areas. The first stage course is entitled Basic Auditor/Investigator with more advanced courses on Reseller/Retailer, Crude Oil Producer, Refiner and Natural Gas Liquids. In addition, the investigators attend a special investigations course to sharpen their investigative skills.

A recent training course was scheduled as follows:

Basic	- 3-1/2 days
Producer	- 2-1/2 days
NGL	- 4 days
RARP	- 5 days
	15 days

A member of the Task Force reviewed the course material, attended one-half day of the crude producers course, reviewed the students's critiques of the course, talked to some of the students and instructors and discussed the training programs with management, supervisory and staff personnel in the regions.

1.3.2 General Observation

a. Training course material for use by the instructor and student was well laid out and included audio-visual guides, handouts of explanation and example, testing material and sheets for constructive criticism of the course and instructor.

b. The instructor's guidelines to the course left little to chance and any instructor who knew his material well should have little difficulty teaching the course material.

c. The instructors for the crude producers course were knowledgeable and experienced in auditing crude producers and comments from personnel in the field indicated that other instructors also seemed knowledgeable in their areas.

1.3.3 Identified Shortcomings

However, even though the above comments may sound as though training is thorough and successful, there are

underlying problems and shortcomings that require correcting. Some of the improvements needed are:

a. As currently presented, the course offers too much material for a new employee to absorb in a short period of time, especially if he has not worked on an audit in the area covered by the training material.

b. A new employee should be given a brief indoctrination course covering all areas for background information only and not be allowed to attend a detailed course until after working in the field under close supervision in an audit area of specialization selected for the employee. (We understand that some students were handled in this manner.)

c. Although instructors knew their areas well, there was just too much material to cover in a short period of time and the students, at times, had trouble understanding the instructor and the material. Some students and management personnel commented that some instructors needed more instructor training.

d. Too much time was spent on FEA personnel rules, forms, travel procedures and FEA reporting from firms in the industry to FEA. Some of the people felt that much less time could be spent in these areas.

1.4 Attorney Training

Currently, it is not the practice to require that attorneys attend Compliance training courses. While most attorneys come to FEA with sufficient legal training, the nature of FEA's Compliance function requires an extra dimension -- financial orientation in the petroleum industry and understanding of FEA's regulations. This training and close association with others involved in audit performance will provide attorneys with a better working understanding of the auditing process. Therefore, they will be in a better position to provide legal support to include more focused suggestions for appropriate areas of inquiry. This joint training should improve the timeliness of audit completions.

1.5 Relationships with Counsel

Generally our review showed that auditors do not consult with counsel in the preparation of cases; also that the lawyers are ill-prepared to review the workpaper files since they are not trained in auditing matters and often have not attended the Agency's basic or specialization

schools. This situation probably is true also of counsel preparing or clarifying the regulations, since those regulations require the application of some unusual auditing techniques.

Some of the hostility between auditors and counsel could be lessened by the training and also by recognition by counsel of the professional qualifications of auditors to complete the work, given proper direction and quick determination of problems and clarifications.

1.6 Personnel Deployment

During the course of this review, the Task Force noted that audit personnel were not deployed effectively. Several regions were maintaining area offices manned by only one or two pesonnel. For example, Region II maintains offices in Albany and Buffalo staffed by one person. There were similar situations in other regions. While the Task Force did not analyze this problem to any significant degree, there was ample evidence to suggest that a comprehensive analysis be made to line up personnel deployment with Compliance's audit strategy.

An example of how Region II deploys its 73 personnel is shown in the following chart:

Office	No. of Personnel
Albany	1
Buffalo	1
Manhattan	35 (Area Office - 20) (Mobil RARP - 12) (Witco RARP - 3)
Newark	16 (Area Office - 5) (Hess RARP - 11)
Smithtown	7
	60
Regional Office (New York City)	13
	73

In addition, the Task Force observed several areas in which substantial personnel efficiency could be attained by changing the present method of auditing major integrated companies. Under the present system, refiner teams travel from one region to another to complete audits. This often involves

travel to many locations because of the diverse location of records. For example, Mobil which is headquartered in New York, has its accounting records in Philadelphia and Dallas plus additional terminal operations in other parts of the U.S. This situation is typical of the major refiners. The Task Force believes in certain instances that the efficiency of personnel utilization could be enhanced by using interregional assignments to complete audits. This action should be especially appropriate for large centers where refiners maintain records.

1.7 Recommendations

1.7.1 Quality of Auditors/Investigators

a. Require FEA's Office of Management to take action very rapidly to reclassify investigators, if qualified, to auditors. For those investigators, except those with special criminal investigative skills, that cannot qualify, FEA should institute replacement action. To the extent possible, FEA should make every effort to encourage or provide training to assist personnel in upgrading their skills. However, in implementing any reclassification action, FEA should be sure to recognize the specific auditing and investigative skills that are required to adequately perform FEA's Compliance function.

b. Improve the supervisory techniques over inexperienced audit personnel. These improvements should involve (i) instilling a sense of urgency to complete a professional audit package

within established time frames, and (ii) detailed supervision in the proper use of investigative techniques.

c. Obtain the Office of Management assistance in replacing personnel unqualified to work in the National Compliance Office. Consideration should be given to placing these personnel in other Agency programs requiring their skills.

d. Review the capabilities of personnel presently occupying supervisory positions at all levels (including team leaders, area managers, and Compliance Directors) and take action to upgrade satisfactorily the supervisory skills and to enhance the sense of urgency among supervisory personnel.

e. Seek additional ways to provide meaningful job enrichment and promotion opportunities to the staff.

f. Make a study and, where necessary, develop restrictive regulations on outside employment for Compliance personnel.

g. FEA should enhance its internal review (Compliance Review) capability by upgrading the staff with persons with audit expertise.

h. Take action to expedite the hiring of Compliance personnel to bring the office up to its authorized level.

1.6.2 Quality of Audits and Use of Professional Audit Techniques

a. Make a concerted effort to fully implement the provisions in the Compliance Manual dealing with workpaper preparation and the Common Audit Approach (CAA). Since the program has been in existence for several months and has been ignored by several regions, it is now time for FEA to act with decisiveness to assure full implementation of the Manual's provisions. The fact that an audit was started prior to including the CAA in the manual should not be permitted as an excuse for not upgrading ongoing audits.

b. Begin efforts immediately to upgrade and enhance the capability to audit "through the computer." Due to the urgency of obtaining this expertise rapidly, FEA should consider, among other options, contracting for this expertise.

c. The acceptance of sampling techniques, including statistical sampling, should be fully endorsed as an auditing tool by FEA management at all levels.

d. Develop a training program on sampling techniques for Compliance auditors and attorneys.

e. Compliance should review and adjust the Compliance Manual to provide for any significant omissions or deviations from the concept discussed in Section 1.2.6.

1.6.3 Training and Relationship with Counsel

a. In light of the Task Force findings, restructure the basic auditor/investigator course along the following lines:

- o Include materials that impart a sense of the purposes, public policies and economic rationale of the statutes and regulations being administrated.
- o Shorten the time spent on Agency administrative indoctrination material. Such material can be read easily by new employees and specific important questions, if any, can be answered locally if there is not time at the school.
- o Shorten the time spent on the background of the FEA and speciality areas so that it is truly an overview.
- o Expand the time of instruction for basics of accounting in the industry, use of computers by the firms and how to audit the computer output and through the computer, the common audit approach,

the techniques used in setting up an audit (including review of internal control procedures and financial and managerial records), the audit workpapers and the execution of an investigative audit.

- o Separate the area of specialization schools (Producers, RARP, NGL) from the basic school and allow employees to attend a specialization school only after a working indoctrination period of at least 6 weeks.

b. Require attorneys that support the Compliance function to attend Compliance training courses.

1.6.4 Personnel Deployment

a. Perform an analysis of the deployment of personnel to assure that it is in line with the present audit strategy. This analysis should give full consideration to the economic feasibility and the appropriate alternatives to maintaining small offices. As a by-product of this analysis, the desirability of the present locations of Regional Offices should be assessed. Such determinations should consider closing, merging, and dividing regional offices if the workload analysis support such conclusions.

b. Consider using inter-regional assignments to audit the large record centers maintained by the major refiners.

*U.S. GOVERNMENT PRINTING OFFICE: 1978-261-325/516