

**. . . . Industry Assistance to
Government Methods for
Providing Petroleum Industry
Expertise During Emergencies**

An Emergency Preparedness Report of the
National Petroleum Council. . January 1991

NATIONAL PETROLEUM COUNCIL
1625 K Street, N.W., Washington, D.C. 20006 (202) 393-6100

January 23, 1991

The Honorable
James D. Watkins
Secretary of Energy
Washington, D.C. 20585

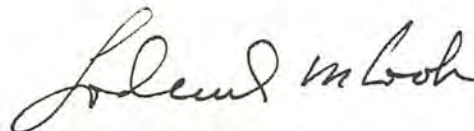
Dear Mr. Secretary:

On behalf of the members of the National Petroleum Council, I am pleased to transmit to you herewith two emergency preparedness reports, Industry Assistance to Government -- Methods for Providing Petroleum Industry Expertise During Emergencies, and Short-Term Petroleum Outlook -- An Examination of Issues and Projections. These reports were prepared in response to your requests and were unanimously approved by the membership at their meeting today. The first report recommends three types or levels of industry response to requests from government for industry information, advice, and assistance. You have already utilized Level 1, company emergency contacts, and Level 2, executive advisory groups. The third level, a petroleum-related National Defense Executive Reserve, as you know, will require legislative action to remove impediments to service by industry personnel.

The second report discusses significant issues relating to the short-term worldwide supply and demand for crude oil and refined petroleum products. Emphasis is placed on ways in which the complex but flexible petroleum distribution system can be expected to deal with the effects of various types of problems. At present, the issue of most immediate interest and concern is the potential effect of a significant further disruption of petroleum exports from the Middle East. The Council's report recommends several actions to ensure that the impact of such a disruption on military needs and the U.S. economy, if it were to occur, would be minimized. The Council also cautions against certain types of government response that could reduce the ability of the petroleum supply system to respond effectively. The National Petroleum Council is pleased that the President and you have recently taken a number of the steps recommended by the Council.

The Council sincerely hopes that these two emergency preparedness reports will be of continuing assistance to you and the President in dealing with the current situation and in preparing for future contingencies.

Respectfully submitted,



Lodwick M. Cook
Chairman

Enclosures

An Advisory Committee to the Secretary of Energy

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..... Prepared by the National Petroleum Council's Committee on Emergency
Preparedness . . . Robert McClements, Jr., Chairman . . . with the Assistance of
the Emergency Preparedness Subcommittee . . . James R. Nolan, Chairman

NATIONAL PETROLEUM COUNCIL

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U.S. DEPARTMENT OF ENERGY

James D. Watkins, *Secretary*

The National Petroleum Council is a federal advisory committee to the Secretary of Energy.

The sole purpose of the National Petroleum Council is to advise, inform, and make recommendations to the Secretary of Energy on any matter requested by the Secretary relating to oil and natural gas or to the oil and gas industries.

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INTRODUCTION

Experience has demonstrated that the nation is often faced with situations that place stress on the petroleum supply system. These stresses vary in nature and severity ranging from those with smaller or regional impacts such as extreme weather conditions, to those with severe national security implications such as war. Experience has also demonstrated that the nation's highly flexible petroleum supply and distribution system, by relying on market forces, can respond successfully to all but the most severe emergency situations. The federal government has drawn upon the petroleum industry's expertise in preparing for, assessing, and responding to past emergencies and now wishes to formalize some of the methods for such government/industry cooperation, particularly for national security emergencies.

Accordingly, by letter dated September 20, 1989, the Secretary of Energy requested the National Petroleum Council's (NPC) advice on how best to use petroleum industry personnel during emergencies. In the study request, Secretary Watkins asked the National Petroleum Council to "recommend an organizational structure of an oil-related National Defense Executive Reserve (NDER) or its equivalent for use in a severe national security emergency." Admiral Watkins also asked the Council to "identify an NDER staffing mechanism that would be supported by industry companies." (See Appendix A for the complete text of the Secretary's request letter and a description of the National Petroleum Council.)

This study request was reviewed and recommended for undertaking by the NPC Agenda Committee. In explaining the request to the Agenda Committee, the Secretary also expressed the need for a high-level policy group to advise him during severe national security emergencies. He also envisioned this group advising him in energy emergencies of a lesser nature, when market mechanisms and the Strategic Petroleum Reserve could be relied upon.

To respond to the Secretary's request, the NPC established the Committee on Emergency Preparedness, chaired by Robert McClements, Jr., Chairman of the Board and Chief Executive Officer, Sun Company, Inc. The Honorable John J. Easton, Jr., Assistant Secretary for International Affairs and Energy Emergencies, U.S. Department of Energy, served as Government Cochairman of the Committee. To assist the Committee, a Subcommittee was formed. This Subcommittee was chaired by James R. Nolan, Director, Strategic Planning, Sun Refining and Marketing Company. Julian M. Wright, Jr., Deputy Assistant Secretary for Energy Emergencies, U.S. Department of Energy, served as Government Cochairman of the Subcommittee. These study groups had a broad membership representing various sized companies, geographic regions, and functions within companies. (Rosters of the Committee and Subcommittee are contained in Appendix B.)

The scope of this report is specifically limited to the examination of methods for providing industry assistance to government over a range of energy

emergencies. It addresses the practical and legal aspects of the various methods and provides recommendations on the mission, organization, and rules of operation of each.

Several important emergency preparedness issues are not addressed because they were considered outside of the scope of the Secretary's request. This report does not address actions that could be taken in advance to lessen the United States' vulnerability to energy emergencies. Nor does it deal with the current (early January 1991) Middle East situation or government responses to further significant supply disruptions. At the Secretary's request, the current situation is addressed in a companion report of the NPC, *Short-Term Petroleum Outlook—An Examination of Issues and Projections*. Finally, this report does not address protection against or recovery from acts of terrorism at U.S. energy supply or distribution facilities. While each of the recommended approaches outlined in this report may be useful for government/industry communication, protection against state-sponsored terrorism is predominantly the role of the U.S. government.

The report's recommendations on a petroleum National Defense Executive Reserve are based on the presumption that Congress will eventually renew the Defense Production Act, which expired on October 20, 1990. This Act provided the authorities on which the NDER program is based, though the Federal Emergency Management Agency (FEMA) has advised the Department of Energy (DOE) that some alternative authority exists under the National Security Act of 1947.

Also, this report was prepared against the backdrop of several major changes and events:

- The decline in U.S. crude oil production and tightness in worldwide refinery conversion capacity
- The large share of domestic consumption supplied by imports—now over 50 percent—which increases both our dependence on foreign sources and our vulnerability to disruption of some of those sources
- The dramatic reduction in East-West tensions and the political changes in central and eastern Europe in moving from centrally planned economies to market economies, along with the emergence of democratic governments and the rise of separatism and regional conflicts
- The crude oil and petroleum product supply disruption triggered by the Iraqi invasion of Kuwait and the subsequent U.N. embargo on trade with Iraq and Kuwait.

While these illustrate the difficulty of predicting with any degree of accuracy the likely scenarios for emergencies, they do not argue against the creation of mechanisms to cope with energy emergencies. These conditions only highlight the need to design such mechanisms with the flexibility to assist in responding to a wide range of emergencies.

OVERVIEW

The National Petroleum Council supports the Secretary of Energy in his desire to find ways for industry to work with government to reduce the impact of supply shortages while relying on market forces to the fullest extent possible. The Council recognizes that individual consumers, producers, refiners, and marketers of petroleum will be affected disproportionately in a severe supply emergency. Federal, state, and local governments will be under intense pressure to intervene in the market to meet national security needs and reduce the economic hardship on some groups.

The Secretary in his request for NPC advice recognized that existing laws make it difficult for companies within the petroleum industry to make a contribution to government. The NPC, in undertaking this study, has based its recommendations on the Secretary's premise that "it should be assumed that such [legal constraints] . . . are satisfactorily resolved."

Recommendations

The NPC recommends three distinct types or levels of response by the petroleum industry to energy emergencies, depending on their nature and severity.

- Company Emergency Contacts (Level 1) for use in all types of supply disruptions and emergencies. These contacts are particularly useful in regional or local emergencies created by floods, hurricanes, earthquakes, and severe weather affecting refineries and distribution facilities. These key individuals are designated by their companies to be the contact for informal one-on-one discussions with DOE officials. Communications would focus on the severity of a disruption and what corrective actions are planned or underway by their individual companies. These individuals will generally be the initial point of entry for the federal government in communicating with and obtaining information from the companies. The DOE currently maintains a list of such contacts; the list should be updated regularly. This program is feasible and workable under existing law.
- Executive Advisory Group (Level 2) representing a cross section of the petroleum industry to provide advice and counsel in larger supply disruptions and national security emergencies, such as occurred after the Iraqi invasion of Kuwait. The NPC recommends utilization of an ad hoc approach where the Secretary of Energy calls together a group of no more than a dozen executives to give their individual assessments of the specific situation and the actions they believe the Secretary should take. The

composition of the group would vary depending on the nature of the issues to be discussed. Existing antitrust and Federal Advisory Committee Act constraints place substantial limitations on the ability of petroleum companies acting in a Level 2 format to respond fully to possible inquiries from the Secretary. In situations where the Secretary wishes industry to seek "consensus" advice or situation review, it is more appropriate to use existing procedures for requesting a formal NPC study rather than the Level 2 consultation.

- A petroleum National Defense Executive Reserve (Level 3), which would be designated and trained in advance and could be activated into federal service in a severe national security emergency such as military mobilization, war, or similar hostilities. Its mission would be to assist the DOE in the management of the emergency programs adopted by the Secretary, and direct, where necessary, activities of the oil industry to ensure that oil supplies meet the nation's essential military and civilian requirements. The National Defense Executive Reserve is a government-wide program. At present there is no NDER unit covering petroleum production, distribution, refining, and marketing. The creation and function of such a unit under existing antitrust and conflict-of-interest laws is severely restricted. For the petroleum NDER to be activated, the NPC recommends that all of the following conditions be met:
 - The United States is at war or similar hostilities are taking place or appear imminent.
 - The United States is experiencing real or impending significant shortages in oil supplies.
 - Government is intervening or is likely to intervene in the marketplace.
 - Legal impediments such as conflict-of-interest issues have been legislatively remedied.
 - Need for activation is approved by the President.

The NPC recommends an NDER organization with fewer than 50 positions, staffed with key operational individuals from the oil industry available for activation to full-time government service to assist in managing oil supplies during a severe national emergency. Such an NDER organization would rely upon the industry to operate under competitive free-market conditions, to the fullest possible extent. The proposed organization is not large enough to handle significant deviations from the free-market system.

In recommending an NDER organizational structure, the NPC recognizes the difficulty in designing it to handle an unknown emergency. The nature and extent of the emergency to be handled and the extent and manner of government involvement in the oil industry are currently unknown. Therefore, the most appropriate size and form of the emergency organization cannot be determined in advance. The NPC has recommended a basic structure of knowledgeable industry personnel who can adapt the organization to fit the exact emergency when it arises.

The NPC also recognizes that existing conflict-of-interest laws could place undue financial hardship on reservists. Although reservists may be activated for only a short period of time, these laws require that reservists:

- Disassociate themselves from their companies during activation.
- Divest themselves of all energy related financial holdings.
- Restrict the functions they can perform upon their return to the private sector.

These legal constraints, along with antitrust concerns, have been the major factor in precluding the creation of a petroleum NDER. While the NPC is recommending the staffing of the petroleum NDER, it recognizes that these legal concerns will inhibit the recruitment of reservists and may prevent their activation. The NPC recommends that the Secretary seek a prompt resolution by Congress of these legal issues. Adoption of the Administration's January 1990 proposed amendments to the Defense Production Act would represent significant progress toward correcting these problems.

Emergencies and Potential Responses

Energy emergencies may occur under a variety of circumstances such as cold weather, equipment failures, embargos, or wars. Each of the mechanisms proposed by the NPC may help the DOE respond more effectively to emergencies. The vast majority of emergencies could be handled by Level 1. In more severe emergencies, multiple responses would be employed. The Iraqi invasion of Kuwait provides a recent example of how the various response options can be utilized. Levels 1 and 2 were both employed during the early stages of the crisis. Input from the Company Emergency Contacts was used to assess the world supply-demand balance. Ad hoc executive groups also met with Secretary Watkins to discuss energy consumption, ways to increase domestic production, and the pros and cons of drawing crude oil from the Strategic Petroleum Reserve. Figure 1 describes various emergencies and the likely use of the three proposed levels of response recommended by the NPC.

Figure 1. Emergency Scenarios and Possible Response Types

Actual Events	Company Emergency Contacts (LEVEL 1)	Executive Advisory Group (LEVEL 2)	NDER Activation (LEVEL3)
World War II	X	X	X
Korean War	X	X	X
1973-74 oil shortage/embargo	X	X	
1989 oil spill interrupts Trans-Alaska Pipeline System	X		
1989 California earthquake	X		
Severe weather - Dec.'89 arctic freeze	X		
Iraqis invade Kuwait; Iraqi and Kuwaiti oil facilities shut down	X	X	
Potential Events			
War in Persian Gulf cuts oil exports by 50%	X	X	X*
Foreign terrorist nation detonates nuclear weapon in U.S. and threatens with more	X	X	
New Madrid earthquake (8.7 Richter Scale) damages all energy facilities in area bounded by Kansas City, Chicago, Pittsburgh, Atlanta, Vicksburg	X	X	

X -- Mechanism likely to be utilized.

*Assuming all conditions for NDER activation, listed on page 4, are met.

Organization of the Report

This report presents the results of the study in three levels of detail. This Overview serves as an executive summary. There is a separate chapter on each recommended response level, containing detailed discussions of the level's structure and legal issues. In addition, the report includes appendices that provide more detail and serve as reference sources on NDER and legal issues.

CHAPTER ONE

COMPANY EMERGENCY CONTACTS (LEVEL 1)

The DOE has established a system for communicating with individual energy companies to obtain information about local or regional supply disruptions and emergencies such as fires, pipeline ruptures, floods, hurricanes, and earthquakes. In most cases, this is the only mechanism needed to fully address the emergency energy situation. Participating companies have designated a key individual to be the initial point of entry for the federal government in communicating with and obtaining information from the companies. This individual, called a Company Emergency Contact, is usually reached by telephone, supplemented as needed by other means of communication.

The DOE has developed a list of such contacts, but it is somewhat dated. Participating companies should assume the obligation of informing the DOE of any change in the respective company designees. In addition, in order to develop and maintain a good working relationship with designated company representatives, the DOE official is encouraged to communicate with each of them on a regular basis, at least at six-month intervals.

A designated DOE official can telephone the contact of one or more companies to obtain information about an emergency, its duration, its impact, and what steps the company is taking or plans to take to respond to the emergency. The company representative may either provide the requested information to the DOE or provide the DOE with the name and telephone number of a company official—usually on the scene—who knows more about the emergency situation. This system, when used, helps limit the number of phone calls from federal officials to company representatives and helps ensure that the DOE and other federal agencies obtain accurate, timely, and comprehensive information about any emergency. This system permits the DOE to provide situation reports and recommendations, as needed, to federal and state officials.

Discussions between the contact and the DOE are one-on-one discussions, usually initiated by the designated DOE official. No meetings or conference calls with other participating companies occur.

Legal Issues

This type of Level 1 contact between private and government executives does not raise any conflict-of-interest or Federal Advisory Committee Act issues.

The only area of legal concern is antitrust in nature, and the limited exposure in this area of the law is discussed below.

If the DOE merely requests information from the designated contact or other company officials on a one-on-one basis, there is little likelihood of antitrust problems. Each contact may inform the DOE of the severity of the disruption from that company's point of view, and the corrective actions planned or already underway. If a company merely responds to the DOE with its assessment of the severity of a disruption and with a description of its corrective action, the fact that the DOE may adopt a policy based upon that information, which then places the particular company providing the information in a favorable position, does not entail anticompetitive conduct by the company.

To help ensure against the possibility of liability, statements to the government should be factual, without distortion or misstatement designed to obtain a competitive advantage, and should be arrived at unilaterally. Company contacts also need to be careful not to use DOE-provided information as the basis for agreements between or among companies, which ordinarily are impermissible under the antitrust laws, or to permit the DOE to serve as the organizer of agreements or competitively sensitive information exchanges that companies would not be permitted to undertake on their own. DOE involvement in these activities does not immunize the companies from antitrust liability.

The one-on-one mode of communication should be undertaken with the use of certain precautions. These include the furnishing of accurate rather than misleading information and the refusal to respond to any DOE solicitation of a commitment as to price. While a company cannot prevent the DOE from using the contacts as a means of transmitting competitively sensitive information among companies, corrective measures can be instituted. They include: (1) refusal to make the information available to the DOE or limitations on DOE communication of the material to competitors; and (2) refusal to pass on any competitively sensitive information received from the DOE to those in the company who are able to use it competitively. Another desirable precaution would be for the DOE to establish guidelines of its own to prevent use of one-on-one communications to solicit interdependent price commitments or to transmit competitively sensitive information from one company to another.

CHAPTER TWO

EXECUTIVE ADVISORY GROUP (LEVEL 2)

The Secretary of Energy, in his charge to the NPC to develop an oil-related NDER, cited the need for a group of senior executives, representing a cross section of the petroleum industry, to be available to the DOE for advice and counsel. He envisioned this group being consulted at the Secretary's discretion in situations that might not require mobilization of the NDER, but where the DOE would benefit from the perspective and experience of high-level industry representatives. Examples of issues for consideration at this level could include particular national energy policy options or the use of the Strategic Petroleum Reserve (SPR) in the face of domestic or foreign supply disruptions.

In response to the Secretary's desire for this group, the NPC recommends an ad hoc approach whereby a small body of executives, usually not more than a dozen, would be called together as needed at the request of the Secretary. The composition of the group would vary depending on the nature of the issue to be discussed. The NPC staff might be consulted to help identify an appropriate cross section of possible industry invitees, but the selection and invitations would be solely at the discretion of the DOE. Use of this approach would be responsive to the Secretary's desire for advice that could be provided on situation-specific issues in a prompt and candid manner. Though the Level 2 consultations would take place in a group setting, it is expected that the participants would be presenting their individual views. In situations where the Secretary wishes to obtain "consensus" advice or situation review from the oil and gas industries, it is more appropriate to use existing procedures for requesting a formal NPC study rather than the Level 2 individual company assessments.

Before deciding to recommend the ad hoc response to the Secretary's request, the NPC considered the alternate approach of a standing NPC Committee on Emergencies with representation from a cross section of the industry. Members of that group would be elected for fixed terms by vote of the full NPC, and procedures would be established to ensure adequate turnover in membership. Meetings would be held as needed, as with the ad hoc approach, but could also be called at regular intervals if the Secretary desired more routine consultation. This mechanism was not recommended because of a number of perceived disadvantages. These include: (1) the membership of a standing committee by its nature would be less specifically targeted to any particular issue the DOE wished to consider than would be an ad hoc group whose members could be selected to focus on the issue at hand; (2) the formality of NPC selection and the necessity for broad industry representation and geographic diversity would likely require a group of substantial size with less candor, flexibility, and responsiveness than desired by the Secretary;

and (3) Federal Advisory Committee Act (FACA) requirements for advance publication of agenda and open meetings, applicable to a standing organization, could reduce the timeliness and candor of the advice the group could provide the Secretary. These factors, plus the apparent satisfactory use by the DOE of the informal group approach on August 9, 1990, following the Iraqi invasion of Kuwait, lead the NPC to recommend the ad hoc alternative.

The Level 2 approach as envisioned by the NPC would establish attendance based on the nature of the specific issue being addressed. In the case of the meetings following the Iraqi invasion, two groups were called, representing both supply (producers) and demand (consumers). The producers were selected by the DOE to reflect a cross section of the industry in terms of energy source (oil, gas, coal), size and structure (major integrated, independent), and industry segment (producers, refiners, transporters, marketers). The intent was to seek participation from those who could comment on short- and long-term options to increase domestic energy production and to seek individual company perspectives on the need for SPR activation. An equally diverse and representative cross section was invited to the separate meeting on consumption.

Under different circumstances, such as a natural disaster causing major disruption in a region of the country, the issues to be resolved would be different, and the attendance could be varied accordingly. One principal advantage of the ad hoc approach is its ready adaptation to specific situations, allowing the DOE staff to ensure that attendance is appropriate to the problem at hand. The Secretary is encouraged to consult with the NPC staff for advice regarding participants and to seek consciously to vary attendance at meetings, based on the issues involved and particular companies or industry segments principally affected.

The Secretary of Energy requires no additional statutory or regulatory authority to implement an ad hoc Level 2 advisory group. However, additional precautions should be taken by meeting participants and the DOE to minimize antitrust risks, including prior conversation with company and departmental counsel regarding legal sensitivities that may be expected to arise in Level 2 sessions, and adherence to antitrust guidelines designed to minimize risks in any communications. Another precaution might be to include in Level 2 meetings a representative from the Antitrust Division of the Department of Justice to heighten antitrust awareness at these sessions.

Legal Issues

Antitrust

The appearance of anticompetitive activity is a concern at any gathering of competitors or potential competitors. The Level 2 structure presents risks of possi-

ble antitrust exposure which, while not precluding DOE use of this type of consultative mechanism, does necessitate attention to carefully implemented safeguards.

Among other issues, Level 2 discussions could include assessments of any supply disruption's impact and descriptions of the response activities the companies are undertaking. The difference from Level 1 is that each participant in a Level 2 group setting would hear the information and assessments provided by each of the other participants. Moreover, to the extent a "consensus" develops, it is possible that claims may be made that agreements were reached concerning actions to be taken in response to the situation. Therefore, care needs to be taken in these situations to ensure that competitively sensitive information is not exchanged and that agreements are not reached on subjects ruled out of bounds by the antitrust laws. The fact that the DOE requested participation in these discussions does not provide any secure antitrust immunity, especially regarding actions by private plaintiffs or state attorneys general.

Any topic that is proposed as the subject of a Level 2 meeting needs to be examined in advance to consider whether its consideration in this context has antitrust implications and to determine how best to avoid problems. Several specific examples of possible discussion topics requiring particular care are considered in Appendix C, a detailed discussion of antitrust issues. That analysis highlights the antitrust concerns with revealing competitively sensitive information and considering matters that touch, even indirectly, on price, especially when the possibility of agreement or consensus exists.

In the absence of new statutory protection for Level 2 consultations, participants should observe a number of precautions. These include avoidance of consensus (except in actions clearly designed to petition the government to follow a particular course of action, which is a protected First Amendment right); refusal to disclose certain types of company-specific information in a group setting; primary reliance on information regarding past events rather than future plans; attendance of government antitrust counsel at Level 2 meetings; and refusal to make commitments regarding future company actions. It would be helpful for the DOE to issue guidelines for its conduct of Level 2 consultations that include reference to avoiding antitrust pitfalls through limitations on procedures, topics, consensus formation, and use of information.

Conflict of Interest

Federal government employees are subject to stringent statutes and regulations to prevent apparent or actual conflicts of interest. These restrictions are a significant consideration in the design and operation of an NDER for the oil industry (Level 3) where private sector employees become government employees for the duration of a crisis situation. However, for the Level 2 advisory group,

where transfer to government employment is not involved, conflict-of-interest concerns are not a significant consideration.

Federal Advisory Committee Act

The provisions of FACA could have an impact on the usefulness of the Level 2 advisory group. That Act defines procedural requirements intended to ensure that, when a government official consults with a group that does not consist entirely of full-time government employees, the public interest is protected by use of public meetings, advance publication of agenda, and broad industry representation. However, the safeguards built into FACA may diminish the timeliness, candor, and focus of the Level 2 consultations.

The applicability of FACA to any Level 2 meeting may depend on the specific structure and operation of the group. The statute defines an "advisory committee" as "any committee, board, commission, counsel, conference, panel, task force, or other similar group . . . established or utilized by one or more agencies in the interest of obtaining advice or recommendations." In characterizing an advisory committee covered by the Act, the original implementing regulations included an organizational structure (e.g., officers and a staff) along with regular or periodic meetings.

This definition is very broad, but federal court decisions have helped provide additional interpretation. In one case, a district court held that FACA "was not intended to apply to all amorphous, ad hoc group meetings; only groups having some sort of established structure and defined purpose constitute 'advisory committees' within the context of the Act." In addition, the Supreme Court has recently rendered a decision that narrows the interpretation of what constitutes an advisory committee.

Federal regulations cite specific examples of groups not subject to FACA requirements. One example is when the federal government initiates a meeting of the group only for the purpose of exchanging facts or information. Another is when only the advice of the individual attendees is offered rather than consensus advice of the entire group. The regulations note, however, that a group could be subject to FACA if the federal agency involved accepts the group's deliberations as a source of consensus.

By these standards, a standing committee of the NPC, like the Council itself, would most probably be subject to FACA. An ad hoc group would more likely be consistent with judicial and regulatory definitions of groups not covered by FACA, especially if care is taken to ensure that individual views are being sought and that consensus advice, in fact, is not given. Appendix E presents a detailed discussion of FACA issues.

Voluntary Agreements

A voluntary agreement is a government-sanctioned device authorized by the Defense Production Act (DPA) to permit companies to cooperate in the solution of specific problems, such as the production and allocation of scarce resources. The specific section of the DPA authorizing voluntary agreements (Sec. 708) did not expire in October 1990. Participation in a voluntary agreement provides a limited defense against antitrust liability. Proposed amendments to the DPA, which were included in the conference report that was awaiting action when the 101st Congress adjourned, broadened those antitrust defenses and also facilitated expeditious advisory sessions by assuring confidential treatment of sensitive data and exempting emergency meetings from FACA requirements. Had the proposed legislation been enacted, the voluntary agreement process would have provided the Secretary with increased flexibility to seek Level 2-type advice while reducing the antitrust exposure of participating companies.

However, the utility of a voluntary agreement is limited. Before the agreement can become effective, it requires approval by the attorney general (upon the recommendation of the Antitrust Division and the Federal Trade Commission, as well as the Department of Energy) and is subject to strict rules regarding antitrust monitoring, record-keeping, scope, and duration. It is possible that these restrictions would offset the benefits of the broadened protections.

CHAPTER THREE

THE PETROLEUM NATIONAL DEFENSE EXECUTIVE RESERVE (LEVEL 3)

The Department of Energy currently has three National Defense Executive Reserve (NDER) units: electric power, coal, and natural gas. The purpose of the NDER program is threefold:

- To augment DOE management during a national security emergency with members of the National Defense Executive Reserve
- To train management reservists in emergency duties and government procedures
- To familiarize reservists with intra- and interagency coordination requirements and with the people who would be involved.

The petroleum industry has had substantial experience in responding to U.S. needs during times of war (see Appendix E). Since the early 1980s, DOE has sought petroleum industry participation in a petroleum NDER as part of a revitalization of the government-wide NDER program. Authority for the creation of a petroleum NDER by the DOE is covered in Appendix F. Conflict-of-interest concerns have been, and continue to be, major impediments to the formation of such a unit. While they do not prevent the development and training of an NDER reservist organization, these legal issues do present major obstacles to the actual call-up of the organization. It should be clearly understood that legislative action is required to remove these obstacles prior to activation. In addition, during any pre-activation training periods, questions of antitrust liability for company employees require careful attention. Assuming that these legal issues can be solved, the NPC recommends establishment of a petroleum NDER.¹ The purpose of this chapter is to address:

- The mission and principal functions of a petroleum NDER
- The organizational structure of a petroleum NDER
- The staffing mechanism for a petroleum NDER
- Training of oil industry reservists to perform the assigned tasks of a petroleum NDER

¹Although it may be desirable at some future date to consider the combination of gas and petroleum NDERs into a single unit, this report has not examined the issues involved and makes no recommendation on the subject. For this reason, the petroleum NDER is assumed to be a separate, stand-alone organization.

- Mobilization procedures of a petroleum NDER
- The manner in which a petroleum NDER will function with government agencies and other energy-related NDERs
- Legal considerations and constraints for NDER reservists.

Mission and Principal Functions of the Petroleum NDER

The mission of the petroleum NDER is to assist, coordinate, and direct, where necessary, activities of the oil industry, in order to ensure that domestic and foreign supplies of oil meet essential military and civilian requirements of the nation and its allies during severe national supply emergencies.

The principal functions of the NDER will be influenced by the conditions that may prevail during the emergency. These conditions will have varying degrees of severity, depending on the nature of the crisis and its direct impact on the oil industry, both domestically and abroad:

- Petroleum and gas requirements may increase substantially.
- Foreign supply sources may be seriously interrupted.
- Normal shipping and transportation facilities may be disrupted.
- Demand for specific military fuels at specific locations may increase severalfold.
- Shortages in product supplies may be severe in some civilian sectors and geographic areas.
- Refining capacity may be severely curtailed or shut down at some locations due to lack of crude oil supply or damage to facilities.
- Shortages in manpower and materials may occur.
- Sabotage or direct attack on domestic petroleum facilities may be a distinct possibility.
- There may be a need to shift some fuel users to alternate energy sources (natural gas, coal) to conserve oil supplies.
- Communications may not be intact and, if intact, may be subject to heavy usage.
- Government offices may not be functioning in normal locations.

Recognizing that some, or all, of the above conditions may exist at the time of activation of the petroleum NDER, the principal functions of the NDER organization will be to:

- Assess the industry capabilities and essential needs.
- Formulate and coordinate crude oil supply programs.
- Coordinate and direct, as necessary, the allocation and distribution of petroleum products from primary inventories and imports to critical end-users.
- Act as claimant for the oil industry before other government agencies to obtain supporting resources such as materials, transportation, manpower, etc.
- Establish and maintain communications with the oil industry, government agencies, other energy-related NDERs, and energy consumers to assist the DOE in the assessment of the scope and magnitude of fuel emergencies.
- Provide support to the DOE in its relationships with the International Energy Agency (IEA) and NATO.
- Advise senior DOE policy officials on the most efficient programs and response mechanisms to mitigate severe supply disruptions.
- Provide support for and be compatible with the Continuity of Government (COG) program and its authority in event the COG has been activated and is functional. COG is a government program designed to ensure the survival of national leadership and the execution of essential functions of government in case of nuclear attack.
- Ensure maintenance and readiness of full transportation, refining, and distribution capability, regardless of actual initial throughput, to protect against additional loss of capacity due to subsequent events caused by terrorism, sabotage, or other attacks on the system's infrastructure and flexibility as the crisis continues.

The NDER organization itself should be flexible enough to adapt to the circumstances of the actual crisis, and competitive market conditions should be allowed to prevail to the extent possible. This competitive market approach will need to be carefully balanced with sufficient government intervention and allocation to meet essential military and civilian needs and also to avert irreparable economic hardship to the general public and other end-users. Regional, state, and local conditions will also need to be assessed and coordinated in addition to national priorities.

The organization and functions of the petroleum NDER may be revised and modified significantly as the organization evolves through the performance of training exercises. It should also be recognized that the organizational structure will be ultimately impacted by major uncertainties that cannot be predicted in advance—the scope and nature of the crisis, and the actions by government including the degree of market intervention. For this reason, the organizational structure that follows should be viewed as a starting point only. As outlined, this initial organization addresses the key components that will be critical to the effective functioning of a petroleum NDER—principal functions, types of skills and experience required of the reservists, and the approximate number of such reservists.

Organization

The petroleum NDER organizational structure, also referred to as the Emergency Petroleum Operations, is intended to be flexible in nature and capable of efficiently assisting in the administration of a range of potential government responses to wartime emergencies. It is centralized and at one location unless otherwise dictated by actual events or COG involvement.

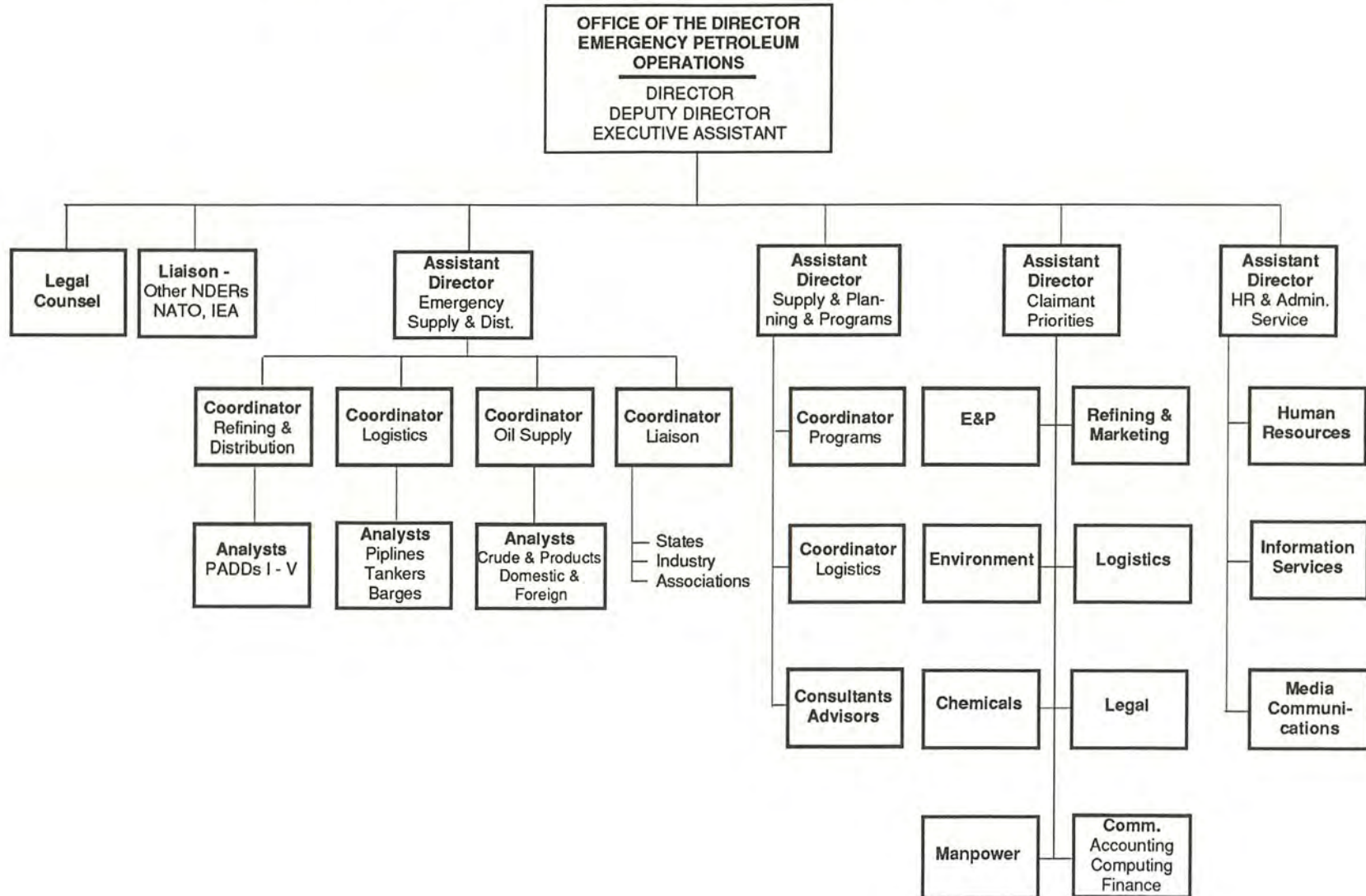
This organization should be sufficient for a range of responses up to and including a limited crude oil allocation program similar to that recommended for the most severe disruption in the NPC's 1981 report, *Emergency Preparedness for Interruption of Petroleum Imports into the United States*. This report's proposed NDER organization is designed to cope with this type of program as well as with the assessment and response to supply disruptions caused by damage to facilities from war, terrorism, or similar threats to national security. Because this report recommends maximum reliance on free-market forces, the recommended organization is not sufficient for the administration of a more substantial program of governmental intervention such as the pervasive price controls, allocations, and entitlements programs of the 1970s.

Organizational Structure

The Emergency Petroleum Operations organization is outlined in Figure 2. Upon activation, this organization would likely report to the office of the Secretary of Energy. The principal components of this organization are:

- The Office of Director (and staff): Establishes policy and provides overall management of emergency petroleum operations. Provides a high level contact point for leadership of government, industry, and other organizations. Maintains direct supervision and contact with liaison groups dealing with Congress, NATO, IEA, other DOE departments, and DOE NDERs. The Deputy Director provides day-to-day management of the group, coordinates the various assistant directors (described below), and provides

Figure 2. Organizational Structure of Emergency Petroleum Operations



overall summaries of the petroleum supply situation. The Executive Assistant, most likely an individual from DOE, provides government expertise to expedite achieving goals and objectives in working with other government organizations.

- Assistant Director - Emergency Supply & Distribution (and staff): Secures current data regarding inventories, civilian and military demands, and integrity and capability of refining, distribution, and transportation network, including pipelines, waterways, barges, tankers, and shipping terminals. Develops situation reports on domestic crude oil supply and availability of imported crude supplies. Develops availability of domestic and imported refinery feedstocks and products. Works with state agencies and other federal agency groups to determine essential needs. Works with oil industry associations, if involved, and DOE-EIA to provide continuing flow of accurate information. Coordinates and directs as necessary the allocation of petroleum from crude oil supply through primary inventories to end-users to meet military and essential civilian needs.
- Assistant Director - Supply Planning & Programs (and staff): Begins initial assessment of need for programs to stabilize energy supply and demand. Establishes minimum staff and increases staff as necessary to provide guidance and recommendations for longer term programs. Reassesses long-term crude and product supply options and programs to increase supply. Reassesses demands and requests from other agencies for essential civilian needs. Assesses the need for allocation or other prioritization programs.
- Assistant Director - Claimant Priorities (and staff): Actively represents the oil industry before other government agencies to obtain necessary support services to maintain and restore industry capability, e.g., transportation, materials, manpower, etc. Assesses and establishes priorities for modification, expansion, new construction, and reconstruction of essential system facilities and capability. Actively represents the oil industry in mitigating environmental constraints to improved energy capability.
- Assistant Director - Human Resources & Administrative Services (and staff): Provides administrative services for NDER personnel, including personnel recruitment, relocation services, and personnel information services. Provides employee communications and office and secretarial services. Administers NDER personnel replacement program. Provides computer services to accumulate, compile, and produce data and reports as required by the organization. Coordinates data and other information and prepares statements for release through the DOE to the media and the public.

- Liaison: Provides liaison with other energy-related NDERs and other sections of the DOE. Provides support to other DOE staff responsible for primary contact with IEA and NATO organizations.

The total personnel requirements for the petroleum NDER organization, shown on Figure 2, are 45 employees. The total needed upon activation may be substantially less than 45, perhaps as few as 10. Because individual companies can best optimize U.S. petroleum operations, the NPC prefers that the Emergency Petroleum Operations organization be restricted in number, to the extent possible.

This NDER organization, although having the structure of a stand-alone organization, also needs to be flexible enough to permit the addition of an adequate number of DOE employees to assist in the proper functioning of the NDER organization within the framework of the DOE and other government agencies, and also to permit the dispersion of some NDER reservists into other departments of the DOE organization as may be necessary.

Organizational Dynamics

The organizational dynamics, including policy-making needs and the initial activation requirements, are described below.

Policy-Making Authority

Considerable discussion was directed to the question of whether the Director and Deputy Director should have policy-making authority or merely advise on policy matters. Policymakers must be government paid employees and, therefore, fall under more difficult salary and conflict-of-interest constraints. The NPC recommends that, in order for the petroleum NDER unit to be responsive to DOE needs, the top two assignments in the organization should be delegated some policy-making authority, particularly in the areas of allocation and prioritization of available petroleum supplies. Filling these two slots will, therefore, be made more difficult because of the conflict-of-interest issues relating to stock ownership and other deferred company compensation. These issues need to be addressed with appropriate waivers or legislative action, or both.

Initial Activation

Initially, the Emergency Petroleum Operations organization will be activated to assess available capacity, inventories, and essential needs, and to recommend distribution of available supply. The emphasis at this initial stage is on the Emergency Supply & Distribution team. The positions likely to be activated include the following:

- Director, Deputy Director, and Executive Assistant will provide overall management for Emergency Petroleum Operations.

- Personnel reporting directly to the office of the Director, including all Assistant Directors, would likely be activated to determine staffing requirements for their respective groups. Depending on the circumstances, they will provide advice and counsel to the office of the Director based on contacts within the U.S. oil industry.
- Personnel reporting directly to the Assistant Director - Emergency Supply & Distribution will be activated for contacting the U.S. oil industry and making detailed assessments. The number of reservists activated would be determined by the Assistant Director and his superiors dependent upon the magnitude of the crisis. This group will provide a summarized report with recommendations for action in terms of movements of petroleum, support functions, and coordination with agencies and governments at all levels.
- The Assistant Directors of Supply Planning & Programs, Claimant Priorities, and Human Resources & Administrative Services will activate personnel under their direction as determined by needs developed at the time. To a great extent, their information will flow from the Assistant Director - Emergency Supply & Distribution. They will also use information from industry and identify the need for programs and policies. In all cases, priorities will be assigned and the speed of activities will be determined consistent with circumstances.

Staffing

Emergency Petroleum Operations—Functions and Corresponding Company Levels

Figure 3 identifies key positions in the proposed Emergency Petroleum Operations and contains a brief description of the position's function. The skills and experience required differ from one function to the next. For that reason, the figure contains a column that attempts to match the Emergency Petroleum Operations function with its corresponding level in oil industry organizations. Because managerial levels and titles differ from one company to the next, the column is a rough approximation and should be adapted to the organizational practices of individual companies. The figure also provides a range for the number of reservists that could be activated during initial mobilization.

Staff Selection

In the selection of candidates, individuals should be evaluated to ensure the "best fit" between the candidate and the function and to ensure that the personnel burden is equitably distributed among companies.

This report recommends that companies nominate candidates for the Emergency Petroleum Operations positions identified, clearly indicating the

Figure 3. Emergency Petroleum Operations: Functions/Organization Level

POSITION	FUNCTION	CORRESPONDING COMPANY LEVEL	INITIAL MOBILIZATION RANGE
Director	Sets policy and manages overall operations	Corporate Officer Level	1
Deputy Director	Coordinates Assistant Directors' day-to-day management	Senior Management Level	1
Executive Assistant	Expedites goals of government organizations/agencies	Probably DOE Upper Management	1
Legal Counsel	Provides guidance on legal problems	Senior Staff Attorney	1
Liaison	Interacts with DOE and other NDERs. Provides support to DOE for interaction with NATO and IEA	Senior Staff External Relations	1
Assistant Director: Supply & Distribution	Provides oversight of data on all supply/distribution variables	Upper Middle Management	1
Coordinators: Supply & Distribution	Reports to Assistant Director on refining and distribution, logistics, oil supply, and liaison needs	Middle Management	0-4
Analysts: Supply & Distribution	Reports to Coordinators on PADD-level refining capabilities, transportation capacity, crude/product availability, and liaison to industry associations	Senior Company Analysts	0-15
Assistant Director: Supply Planning & Programs	Provides oversight of programs to stabilize energy supply/demand	Upper Middle Management	1

Figure 3. (Continued)

POSITION	FUNCTION	CORRESPONDING COMPANY LEVEL	INITIAL MOBILIZATION RANGE
Coordinators: Supply Planning & Programs	Reports to Assistant Director on program needs, and logistics and reallocation needs	Middle Management	0-3
Consultants: Supply Planning & Programs	Advises Coordinators and Assistant Directors where needed	Middle Management or could be consulting firm analysts	0-3
Assistant Director: Claimant Priorities	Represents oil industry before other government agencies to obtain support services	Upper Middle Management Level	1
Claimants Coordinators	Staff to Assistant Director, Claimant Priorities	Senior Staff	0-4
Assistant Director: HR & Admin. Services	Provides Admin. Services for personnel, recruitment, information systems support	Upper Middle Management for HR/Admin. Services	1
Media Communications	Coordinates and prepares information for release by DOE to the media	Senior Staff Public Relations	1
Information Services	Provides systems capability to process information	Senior Systems Manager	1
Specialists	Staff to Assistant Director, HR & Admin. Services	Staff Analyst Level	0-5
TOTAL RANGE			10-45

position for which the individual is being put forward. It is expected that the initial nomination process would be coordinated by the NPC. Responsibility for final selection of the reservists rests with the DOE. Over the longer term, the NDER organization and the DOE should develop, in conjunction with individual oil companies, an ongoing replacement program for filling reservist positions vacated by resigned or terminated reservists.

Administration, Qualifications, Training, Mobilization, and Termination of Reservists

The topics identified above—administration, qualifications, training, mobilization, and termination—are discussed briefly in this section. More detail can be found in Appendix G.

Administration

The administration of each NDER unit is the responsibility of the agency sponsoring the unit. For a petroleum NDER the responsible agency is the DOE, which is responsible for recruitment (though oil company management will identify NDER candidates), security clearance, training, travel, pay, personnel records, and other administrative matters.

Qualifications

In addition to possessing the technical qualifications required to perform their assignments, reservists must satisfy citizenship and other criteria to qualify as reservists. If qualified, members are appointed to serve for a minimum of three years.

Once activated, reservists obviously cease being reservists. They become employees of the federal government. The continuation of compensation and benefits from their employer depends on their employment classification. The classification types are discussed in the conflict-of-interest section later in this chapter and in Appendix H.

Training

The Defense Production Act authorizes the government to train "a nucleus executive reserve." The DOE responds to this mandate by conducting regular training sessions for its NDERs. An enumeration of these training tools is contained in Appendix G.

Participants in this NPC study attended a DOE NDER training session in order to gain a better understanding of the training program and its responsiveness to projected industry and societal needs during a time of crisis. The session

provided some useful insights into the requirements and overall organization of the NDER program. Based on this experience, the NPC recommends that the industry NDERs work closely with DOE to enhance the training program to meet the specific needs of both government and industry. More specifically, the NPC recommends that:

- Adequate funding be provided by the government for an effective training program.
- The training sessions provide a condensed presentation of the background information on the NDER system, its underlying legal structure and the relationship between DOE and other government organizations in crisis periods.
- The training sessions focus on simulated exercises to prepare the petroleum NDER to respond to emergency needs and to interact with the NDERs of other industries.
- The exercises focus on large-scale, and to the extent possible, realistic scenarios.
- Material be developed on the mechanics of responding to emergency situations and that exercises use this material.
- The organizational effectiveness of the recommended Emergency Petroleum Operations and its ability to interact with other energy sectors be tested in training.
- Criteria be developed to evaluate the effectiveness of the NDER training team in responding to the exercise requirements.

Mobilization

For the petroleum NDER to be activated, the NPC recommends that all of the following conditions be met:

- The United States is at war or similar hostilities are taking place or appear imminent.
- The United States is experiencing real or impending significant shortages in oil supplies.
- Government is intervening or is likely to intervene in the marketplace.
- Legal impediments such as conflict-of-interest issues have been legislatively remedied.
- Need for activation is approved by the President.

Reservists will be activated by way of an activation notice. More information on activation procedures and reservist requirements upon activation is contained in Appendix G.

Reappointment, Transfer, and Termination

Information on reappointments, transfers, and terminations is contained in Appendix G.

Interaction with Other Government Agencies and NDERs

The NDER is a government-wide program under the central coordination of the Federal Emergency Management Agency, the primary agency responsible for U.S. emergency response.

Appendix F contains information on the overall, government-wide NDER structure, its regional aspects, legal authorities, and the relationship among the various NDERs. Some of the principal observations in that appendix are summarized below.

Regional Considerations

The basic NDER organization recommended in this report is a centralized organization at a single national location. DOE on the other hand maintains small staffs located in several regional headquarters. In a time of emergency, these regional staffs may need to be expanded. Similarly, the government's COG programs are decentralized, providing a potential need for oil industry support at several locations.

The exact nature of the regional staffing requirements, particularly those relating to the federal COG program, is best developed by the members of the petroleum NDER program, who will have the opportunity of obtaining security clearances and participating in training exercises that will provide a better understanding of how this requirement should be met. This report assumes that the staffing requirement can be met by temporary assignment or reassignment of reservists. As noted above, this assumption is subject to change by those who become members of this NDER organization.

Resource Management and Claimancy

In a time of war, each agency is responsible for the adequacy of the resources under its jurisdiction. This will require that "priority uses" be assigned to the resources by the responsible agency. Currently, each agency is authorized to determine those matters that will receive priority and those that will not. Resolution

of interagency disagreements may require an organization akin to the War Production Board in operation during World War II.

Organizational Interactions

The proposed petroleum NDER organization is intended to provide maximum flexibility for activation of only that portion of it which is justified by the nature of the emergency. Interaction with other DOE NDER units and other agencies and their NDER units would vary according to the portions of the organization that are activated. For example, if only the Emergency Supply & Distribution Coordination staff of the petroleum NDER is activated, its contact with other agencies would likely be limited. However, contact with the other DOE NDER units would also be likely in order to assess fuel switching capabilities, etc.

If the situation deteriorates so that the Assistant Directors of Supply Planning & Programs and Claimant Priorities activate some of their staffs, additional interagency communications will develop. Supply programs would be developed under policy guidance from the President or his delegate. Interagency working groups would provide coordinated advice to the policymakers. Claimant Priorities staff would present their requirements to the other resource agencies such as the Department of Commerce for manufactured goods, the Department of Labor for manpower, and the Department of Transportation for transportation other than pipelines, etc.

Legal Considerations for NDER Reservists

Under present law, NDER reservists would be subject to extremely restrictive conflict-of-interest statutes involving financial disclosure, limitations on activities during and after their government employment, and, in some cases, requirements to divest energy holdings including common stock. These requirements, which are outlined below and detailed in Appendix H, are so restrictive that activation of an NDER may be impractical without legislated exemptions. It may also be difficult to attract qualified personnel even for the purpose of training in advance of activation. Operation of an NDER may raise continuing antitrust questions regarding the effect of reservists' actions on competition within the petroleum industry, but reservists acting in good faith and within the scope of their authority as temporary government employees should generally not be liable.

Though activation of an NDER may not be practical without legislative relief, the nomination and training of potential reservists can proceed, utilizing strict guidelines to minimize antitrust exposure. Persons who may become part of the NDER should consult with Counsel regarding their individual situations under conflict-of-interest requirements and any antitrust sensitivities.

Conflict of Interest

DOE employees are subject to a variety of statutory restrictions intended to minimize the risk of a conflict of interest. Some of these restrictions apply to all federal government employees, and some are unique to the DOE. Various waivers and exemptions may be available depending on the level of responsibility, the number of days of service within any 365-day period, and whether the service is with or without compensation. However, the waiver authority is quite limited.

The restrictions on reservists fall into three broad categories: financial disclosure requirements; divestiture of energy holdings, including common stock; and limitations on activities during and after government employment. Several definitions are important to the understanding of which restrictions may apply.

- Regular government employees are full-time employees paid according to established federal pay scales. These employees are subject to the financial disclosure requirements and post-government employment prohibitions of the Ethics in Government Act of 1978, as well as certain other statutory participation restrictions. In addition, if employed by the DOE, they may be subject to conflict-of-interest restrictions, including the divestiture requirements of the DOE Organization Act.
- Special government employees are federal employees who serve less than 131 days in any 365-day period. They are subject to the same conflict-of-interest requirements as regular employees with certain limited exceptions. Special government employees may serve with or without compensation.
- "Without compensation" employees (WOCs) are individuals who are employed by the government but continue to receive salary and benefits from their private-sector employer. WOCs cannot serve in policy-making positions, and the Defense Production Act encouraged the President to use full-time salaried employees whenever possible. WOCs are subject to the same conflict-of-interest requirements as compensated employees serving in comparable positions.
- A "supervisory employee" is defined in the DOE Organization Act as an individual in a position at GS-16 or above or a comparable level on any other federal pay scale (currently approximately \$71,000 per year); the Director or Deputy Director of any DOE field office; an individual who has primary responsibility for the award, review, modification, or termination of any grant, contract, award, or fund transfer; or any other individual who, in the opinion of the Secretary, exercises sufficient decision-making or regulatory authority so that the divestiture and other provisions applicable to "supervisory employees" should apply. All DOE employees holding positions in the Senior Executive Service are "supervisory employees."

Referring to the Emergency Petroleum Operations positions defined in Figure 3, it is assumed that the Director and Deputy Director would, of necessity, be policy-making positions and would, therefore, be Senior Executive Service employees. As such, they would be required to file full financial disclosure reports annually. In addition, as supervisory employees, they would be required to divest all energy holdings, including stocks and bonds, as well as energy-concern employment and other relationships. The Secretary may grant waivers of the divestiture requirements in cases of exceptional hardship, or where the interest is a pension or other similarly vested interest, with *Federal Register* notification.

For the remaining NDER positions listed in Figure 3, the disclosure and divestiture requirements are less clear since they depend on administrative interpretations by the Office of Government Ethics or the DOE. The most favorable interpretations would involve two rulings. The first is that the positions are not policy-making. In that event, the positions could be filled by WOCs who could continue to be paid by their private-sector employer. In addition, if the positions were ruled to be not supervisory, reservists in those positions would not be subject to the DOE Organization Act divestiture requirements.

The disclosure requirements under the DOE Organization Act and the DPA differ in several aspects. Under the DOE Organization Act, a WOC files DOE Form 3735 (see Appendix H) upon entry into government service and annually thereafter. The DOE form requires the disclosure of the employee's private employer and general categories of income as well as lists of creditors and other financial interests. Under the DPA, a WOC must report the name of his private employer and, for the 60-day period prior to the filing, the names of any corporations in which he is an officer or director or has stocks, bonds, or financial interests. Under the DPA, actual amounts of compensation and earnings do not have to be disclosed. This form must be updated every six months. Whether both the DOE and DPA reports would have to be filed is unclear at this time; therefore, interpretative regulations would have to be issued.

Other conflict-of-interest statutes that apply to WOCs and NDERs include the participation restrictions of Section 208, Title 18, United States Code (18 U.S.C. 208) and the post-employment restrictions of Section 207, Title 18, United States Code (18 U.S.C. 207). Because WOCs as well as NDERs will be regular or special government employees, the participation restrictions of Section 208 would prohibit them from participating personally and substantially in any particular matter that may have a direct and predictable effect upon their private-sector employers. "Particular matters" include policy- and rule-making activity affecting an industry segment that may include the reservist's employer. Thus WOCs and NDERs, called to duty for their industry expertise, are prohibited by statute from participating in matters affecting their industry employers. While limited waivers of these restrictions may be available, waivers must be obtained on a case-by-case basis, a time-consuming and cumbersome process.

Finally, Section 207 contains restrictions on the activities of employees after their service with the government has terminated. These restrictions would prevent former WOCs and NDERs from representing others before the government with respect to particular matters in which they had participated or for which they had responsibility as government employees. In addition, NDERs may be subject to "cooling-off" periods following government employment, depending upon the level of position and pay of their former government employment. These "cooling-off" periods prohibit appearances and communications before the former agency on any subject, whether or not the former employee had prior involvement in the matter.

Antitrust

As a general proposition, federal employees are not liable under the antitrust laws for good faith actions taken within the scope of their government authority. This is true for both regular and special government employees.

Questions of good faith or scope of authority, however, may arise whenever an NDER reservist is involved in decision-making affecting the competitive position of a former or future employer. Therefore, care should be taken to maintain adequate records regarding all NDER-related recommendations and policy decisions in order to establish that the reservists involved in decision-making processes have acted in good faith and within their authority.

Training Considerations

Prior to activation, an important element of NDER preparation is the training of enrolled reservists. Training can proceed, even in the absence of any additional antitrust or conflict-of-interest relief, if the training program is carefully constructed and directed by the federal government with antitrust sensitivities and possible exposure in mind. Specifically, training exercises should involve hypothetical situations and data, and should not be based on or require release of proprietary or confidential information. In addition, attendees should be cautioned that they could be subject to antitrust scrutiny if the actions of their individual companies were found to be similar to anti-competitive responses developed in simulations of NDER contingencies.

Legal Remedies

A number of legal remedies are required to allow the NDER to be activated and to operate. The National Petroleum Council believes that the Administration's January 1990 proposed amendments to the Defense Production Act, described in Appendix I, would represent progress toward correcting these problems. The conference version of H.R. 486 (Report No. 202-933) does not appear to meet the concerns raised in this discussion and future enactment of these

provisions need not be expected to eliminate the legal obstacles to activation of a petroleum NDER. In particular, the waiver provisions for various conflict-of-interest restrictions are especially inadequate.

Summary

The NPC recommends that:

- Competitive market forces be relied upon to the fullest extent possible to ensure product supply even during severe emergencies
- A petroleum NDER be established to assist, coordinate, and direct, where necessary, activities of the oil industry, in order to ensure that domestic and foreign supplies of oil meet essential military and civilian requirements of the nation and its allies during national supply emergencies
- Legislative action be taken to remove the conflict-of-interest impediments to NDER recruitment and activation
- The petroleum NDER be activated only when the conditions defining the "trigger mechanism" (as contained in this report) are met
- The organizational structure of the petroleum NDER be flexible and be revised by NDER members as the result of training exercises and post-activation experiences
- Industry NDERs work closely with DOE to develop a training program that focuses on preparing reservists to respond to emergency needs and interact effectively with the NDERs of other industries
- The call-up of NDER reservists be restricted to a minimum of personnel to provide oversight, direction, and coordination of emergency efforts by private industry to ensure continued petroleum supply to essential military and civilian needs.

APPENDICES

APPENDIX A



REQUEST LETTER AND
DESCRIPTION OF THE
NATIONAL PETROLEUM COUNCIL



The Secretary of Energy
Washington, DC 20585

September 20, 1989

Mr. Lodwrick M. Cook
Chairman
National Petroleum Council
1625 K Street, N.W.
Washington, DC 20006

Dear Mr. Cook:

The energy industry has a vital role in the national security of our country. The Department of Energy seeks to draw upon the petroleum industry's expertise to prepare for and respond to emergencies.

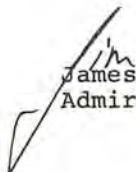
Accordingly, I request that the National Petroleum Council (NPC) recommend an organizational structure of an oil-related National Defense Executive Reserve (NDER) or its equivalent for use in a severe national security emergency. The report also should identify an NDER staffing mechanism that would be supported by industry companies. The national security emergencies considered should include catastrophic damage to oil industry facilities such as might possibly occur with multiple earthquakes of unprecedented severity, coordinated multi-site sabotage, mobilization, war or attack recovery. Your report addressing the use of industry expertise for responding to national security emergencies is a high priority for the Department.

The Department of Energy is addressing separately the perceived legal constraints on industry NDER service. Thus, for purposes of this study, it should be assumed that such issues are satisfactorily resolved. You will be interested to know that the Administration submitted to the Congress proposed amendments to the Defense Production Act which contain language to accomplish this objective.

As we look back on the excellent support the Council has provided us in the past, we note that the last NPC study on emergency preparedness, in 1981, was limited to petroleum import interruption emergencies. Previous NPC studies on emergency preparedness for mobilization and war are over 20 years old. These studies need to be reexamined in light of the substantial changes over the years, and in consideration of the growth of worldwide terrorism and increasing concerns about massive earthquakes. Thus, this request may be considered to be the first step in the updating process, and other study requests related to emergency preparedness may follow over the next few years.

The office of the Assistant Secretary for International Affairs and Energy Emergencies will provide liaison and coordination as required by the Council.

Sincerely,


James D. Watkins
Admiral, U.S. Navy (Retired)

DESCRIPTION OF THE NATIONAL PETROLEUM COUNCIL

In May 1946, the President stated in a letter to the Secretary of the Interior that he had been impressed by the contribution made through government/industry cooperation to the success of the World War II petroleum program. He felt that it would be beneficial if this close relationship were to be continued and suggested that the Secretary of the Interior establish an industry organization to advise the Secretary on oil and natural gas matters.

Pursuant to this request, Interior Secretary J. A. Krug established the National Petroleum Council on June 18, 1946. In October 1977, the Department of Energy was established and the Council was transferred to the new department.

The purpose of the NPC is solely to advise, inform, and make recommendations to the Secretary of Energy on any matter, requested by him, relating to oil and natural gas or the oil and gas industries. Matters that the Secretary of Energy would like to have considered by the Council are submitted in the form of a letter outlining the nature and scope of the study. This request is then referred to the NPC Agenda Committee, which makes a recommendation to the Council. The Council reserves the right to decide whether it will consider any matter referred to it.

Examples of recent major studies undertaken by the NPC at the request of the Secretary of Energy include:

- *Refinery Flexibility* (1980)
- *Unconventional Gas Sources* (1980)
- *Emergency Preparedness for Interruption of Petroleum Imports into the United States* (1981)
- *U.S. Arctic Oil & Gas* (1981)
- *Environmental Conservation—The Oil & Gas Industries* (1982)
- *Third World Petroleum Development: A Statement of Principles* (1982)
- *Petroleum Inventories and Storage Capacity* (1984)
- *Enhanced Oil Recovery* (1984)
- *The Strategic Petroleum Reserve* (1984)
- *U.S. Petroleum Refining* (1986)
- *Factors Affecting U.S. Oil & Gas Outlook* (1987)
- *Integrating R&D Efforts* (1988)
- *Petroleum Storage & Transportation* (1989).

The NPC does not concern itself with trade practices, nor does it engage in any of the usual trade association activities. The Council is subject to the provisions of the Federal Advisory Committee Act of 1972.

Members of the National Petroleum Council are appointed by the Secretary of Energy and represent all segments of the oil and gas industries and related interests. The NPC is headed by a Chairman and a Vice Chairman, who are elected by the Council. The Council is supported entirely by voluntary contributions from its members.

NATIONAL PETROLEUM COUNCIL
MEMBERSHIP—1991

ADAMS, William L.
Chairman and
Chief Executive Officer
Union Pacific Resources Company

ALCORN, Charles W., Jr.
President
Alcorn Production Company

ALLEN, Jack M.
Chairman of the Board
Alpar Resources, Inc.

ANDERSON, Robert O.
President
Hondo Oil & Gas Company

ANGELO, Ernest, Jr.
Petroleum Engineer
Midland, Texas

ANSCHUTZ, Philip F.
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The Anschutz Corporation

ASHMUN, John B.
Chairman of the Board and
Chief Executive Officer
Wainoco Oil Corporation

BAILEY, Ralph E.
Chairman of the Board and
Chief Executive Officer
United Meridian Corporation

BAIRD, D. Euan
Chairman, President and
Chief Executive Officer
Schlumberger Limited

BEGHINI, Victor G.
President
Marathon Oil Company

BLACKBURN, Charles L.
Chairman, President and
Chief Executive Officer
Maxus Energy Corporation

BLANTON, Jack S.
President and
Chief Executive Officer
Eddy Refining Company

BOOKOUT, John F.
Former President and
Chief Executive Officer
Shell Oil Company

BRINKLEY, Donald R.
President and
Chief Executive Officer
Colonial Pipeline Company

BURKE, Frank M., Jr.
Chairman and
Chief Executive Officer
Burke, Mayborn Company, Ltd.

CALDER, Bruce
President
Bruce Calder, Inc.

CAMPBELL, Scott L.
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APPENDIX B



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APPENDIX C



ANTITRUST ISSUES

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ANTITRUST ISSUES

This appendix considers the status under the antitrust laws of three general types of Department of Energy (DOE) uses of petroleum industry personnel. It is not an exhaustive discussion of all antitrust questions that may arise; additional review by counsel should be undertaken if any of these proposals are implemented.

Level 1 involves one-on-one contacts by DOE officials with designated company personnel, in the event of regional and smaller supply disruptions, on the subject of the severity of a disruption and the corrective actions being taken.

Level 2 involves the convening of a group of high-ranking industry personnel for the purpose of providing the Secretary of Energy with advice in the event of larger supply disruptions and/or national security emergencies. The interchanges between the Secretary of Energy and this group of industry leaders could focus on the severity of an emergency, on the actions that should be taken by the government, and on other major, long-term issues of general concern that may be present prior to national emergencies.

Level 3 involves the formation of a petroleum National Defense Executive Reserve (NDER), which would be available in severe national security emergencies. Here, key operational individuals from the companies would be mobilized for temporary government service to assist the DOE in coordinating and directing, where necessary, activities of the oil industry, in order to ensure that domestic and foreign supplies of oil meet essential military and civilian requirements. The reservists would be trained in emergency duties and in government procedures, and would be familiarized with intra- and interagency coordination requirements. When mobilized, the reservists would assess industry capabilities and essential needs, formulate and coordinate supply programs, develop plans to restore facilities and supplies, and establish and maintain communications among the government, industry, and consumers at all levels.

In presenting the possible antitrust exposure that may result from each of the three levels of industry participation, it will be necessary to speculate on how the different levels of participation will work in practice. Such speculation will no doubt be imprecise and less than all-inclusive. But it will, hopefully, suggest certain categories of antitrust issues that could be presented.

In the course of reviewing possible antitrust exposures, consideration is given to some possible modifications in the proposed modes of government-industry interaction that could lessen antitrust difficulties and still provide some of the interchange that appears to be desired.

The scope of the limited protection from antitrust provided by case law is then reviewed. In the absence of any still extant statutory protection, protection that would be afforded were the lapsed Defense Production Act to be reenacted, or were other pertinent legislation that had been under consideration by the last Congress to be enacted by the next Congress are also reviewed.

This appendix reviews legal questions related only to antitrust concerns. It does not attempt to cover other legal issues, such as those related to conflict of interest or the Federal Advisory Committee Act (FACA), which are treated in separate appendices. However, it should be noted that while the following discussion includes possible "consensus" formation among company representatives and analyzes the risks of accords of that type from an antitrust perspective, this review does not integrate that analysis with other, and perhaps conflicting, legal risks associated with consensus formation, such as the constraints on this type of activity under FACA. Therefore, the points made in this appendix concerning the antitrust implications of consensus formation should be considered together with the impacts on such activity from other legal constraints.

Principal Antitrust Concerns

In considering the antitrust status of the proposed use of industry personnel, particular attention is given to the sensitivity and sweep of the antitrust laws in their application to agreements among competitors that directly or indirectly deal with price or production.

Cases under the Sherman Act have made it clear that the concept of "price-fixing" for antitrust purposes consists of any conduct raising, depressing, fixing, pegging, stabilizing, or in any other respect tampering with the price structure. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 (1940). Agreements limiting production or capacity are regarded in much the same light as agreements on price.

The Sherman Act has also been interpreted broadly in its application to an agreement, combination, or conspiracy. It is clear that, for Sherman Act purposes, an agreement need not be written. Moreover, "explicit agreement is not a necessary part of a Sherman Act conspiracy," *United States v. General Motors Corp.*, 384 U.S. 127, 142-43 (1965). Tacit agreements may be inferred from a course of conduct. See, for example, *United States v. Parke, Davis & Co.*, 362 U.S. 29, 43-45 (1959). Hence, agreements may be inferred from circumstantial evidence such as a uniform course of conduct not otherwise explicable, together with some indication of a meeting or other discussion at which the course of conduct could have been agreed upon. In certain contexts, an agreement to exchange information on price might be regarded as an agreement in violation of Section 1 of the Sherman Act. *United States v. Container Corp.*, 393 U.S. 333 (1969).

While the situations to be examined here are unusual in view of the involvement of the DOE, it would be unwise to rely heavily on this fact. Ordinarily, the fact that a government officer knew of, approved of, or requested action by a private company or its representatives does not provide antitrust immunity unless Congress had expressly so provided. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-28 (1940) (only Congress may exempt private conduct from the Sherman Act).

With these basic considerations in mind, a more detailed analysis of possible antitrust issues in the activities contemplated under Levels 1, 2, and 3 follows.

Antitrust Issues in Level 1 Activities

The Level 1 proposal envisions that in the event of regional or smaller supply disruptions, the DOE would contact designated employees in several oil companies in a region for one-on-one discussions regarding the severity of the disruption and the corrective actions that the individual company is planning or has already undertaken.

Were the DOE merely to request information from these contacts on a one-on-one basis, there would be no likelihood of antitrust problems. Each contact may advise the DOE of the severity of the disruption from that company's point of view, and the corrective actions planned or already underway. Even if the government adopts policies injurious to other competitors or to consumers based on the receipt of such information from various competing oil companies in a region, there is no actionable Sherman Act Section 1 conduct (prohibition on contracts, combinations, or conspiracies whose purpose or effect is an unreasonable restraint of trade) because there is no agreement among competitors. It is not necessary in this scenario to consider the special antitrust exemptions for concerted attempts to influence governmental actions, which were developed following *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (limited antitrust protection for concerted actions designed to influence governmental action, referred to hereinafter as *Noerr*).

This conclusion as to absence of an agreement assumes that the disclosure of information to the DOE by each company's contact person is truly unilateral—i.e., it is not the result of an agreed-upon script devised consensually by competing companies for the purpose of inducing a certain government response. (The status of the latter conduct is discussed below.)

A Sherman Act Section 2 theory (prohibition on monopolization, attempt to monopolize, or combination or conspiracy to monopolize any part of interstate commerce) that can be based on the contemplated one-on-one discussions is also very unlikely. If a company merely advises the DOE of the severity of a disruption

and of corrective action, the fact that the DOE adopts a policy based upon that information, which places the particular company providing the information in a monopoly or near-monopoly position, does not entail monopolizing conduct by the company. This analysis does not require use of the *Noerr* exemption, but that doctrine should also afford protection. Hence, even if in the one-on-one discussion the company actively solicited DOE action that conferred monopoly power upon it and succeeded, the *Noerr* doctrine would protect it. These conclusions assume that the information provided was not distorted or misstated.

It is possible to conceive of unusual scenarios in which, if reasonable care is not taken, antitrust issues could surface. If, for example, in advance of one-on-one discussions, a group of competitors agrees that each will use certain deliberate misstatements for the purpose of inducing governmental action detrimental to competition, and succeeds in doing so, they may not be protected by the *Noerr* doctrine.

Another such unusual but preventable scenario is one in which the DOE approaches the various company contact persons on a one-on-one basis and, in effect, organizes a price-fixing agreement by, for example, telling company B that company A is willing to confine its price rise to 4 percent if and only if companies B, C, and D are also willing to commit to do so. The fact that it is the DOE that organizes the price agreement would not of itself provide reliable antitrust protection. Obviously, it should be easy for the DOE to avoid this problem. More generally, to help avoid even the possibility of problems, the DOE should not transmit competitively sensitive information from one competing company to another.

By and large, the one-on-one mode of communication should not create serious antitrust problems provided certain precautions are taken. These include the furnishing of accurate rather than deliberately misleading information; and a refusal to respond in the unlikely event there were a DOE solicitation of a commitment as to price to be used by it to secure corresponding commitments from others. While a company cannot as easily prevent the DOE from transmitting, in one-on-one conferences, its competitively sensitive information to other companies, or prevent receipt of such information, it can take corrective measures: (a) it can refuse to make competitively sensitive information available to the DOE or it can clearly make company-specific competitively sensitive information available to the DOE only on condition that it not be communicated to competitors; and (b) if competitively sensitive information is transmitted to a company contact person, the recipient can take steps to avoid further dissemination of that information to those others in the company who are able to use it competitively.

Obviously, another desirable precaution would be for the DOE to have guidelines of its own that prevented use of one-on-one communications to solicit interdependent price commitments or to transmit competitively sensitive information from one company to another.

Antitrust Issues in Level 2 Activities

The Level 2 proposal envisions that the DOE, particularly the Secretary of Energy, would have discussions with a group of high-level oil executives at a time of multi-regional or national supply disruptions and/or national emergencies, and on major long-term issues before a national emergency crisis occurs. This group of executives is expected to provide "practical" advice and, to an unspecified extent, may do so on a "consensus" basis.

It is assumed that the proposed discussions, when held in time of disruptions or emergencies, would include, as in Level 1, discussions of the disruption's impact and of the activities the companies are undertaking or plan to undertake to cope with the disruption. However, since, unlike Level 1, such discussions would probably be in a group context, each participant would hear the disruption appraisals and the responsive actions or plans of the other executives. In addition, to the extent that there is an expectation that the group's discussions would be on a "consensus" basis, it is possible that agreements by members of the group will consciously be reached on the extent of the disruption and on the proper responsive actions. Moreover, even if no overt effort is made to reach a "consensus," a discussion by a group of competitors of appropriate responsive actions (for example, rationing by price increases) followed by uniform action could result in vulnerability to a charge that a tacit agreement as to appropriate conduct had been reached.

It is apparent that Level 2 discussions are also intended to include a variety of other topics. At this time there can only be speculation that these topics may include the following: a Presidential request that the petroleum industry restrain gasoline price rises in the wake of disruptions following situations such as the August 1990 Iraqi invasion of Kuwait; the question of whether and when the Strategic Petroleum Reserve should be drawn upon or, perhaps, whether it should be enlarged; the question of contingency planning by the petroleum industry and the DOE for disruptions that may be caused by major earthquakes or hurricanes or other natural disasters; exploration and production investments required to lessen reliance on Middle Eastern oil; the question of whether the ban on export of North Slope crude oil should be lifted; and questions concerning the opening up of new sites for exploration in federally controlled areas to lessen dependence on foreign oil.

There undoubtedly are other topics that fall into the category of "major, long-term general concerns of the Secretary of Energy" which could be the topic of Level 2 discussion.

Again, in assessing the antitrust status of these possible discussions one should take into account that there may be some expectation, not clearly defined, that the oil company group will on some occasions be developing a consensus.

The fact that the Secretary of Energy or others in the DOE requested the participation of a group of oil company executives in Level 2 discussions does not, of itself, suspend the antitrust laws. While it is conceivable that, as a matter of comity within an Administration, the Department of Justice might not choose to enforce the antitrust laws against participants in a meeting called and encouraged by the Secretary of Energy, there is no legal requirement that such respect be shown, that comity might not endure after a change in Administration, and, in any event, such intra-Administration restraint would not apply to private plaintiffs or state attorneys general.

On the other hand, it is also worth noting in any antitrust analysis of Level 2 activities that the mere fact of meetings by a group of officials of competing oil companies does not necessarily result in antitrust difficulties. Representatives of competitors meet frequently in trade associations and for other purposes without antitrust exposure. Moreover, not all information exchanges raise antitrust questions, and not all agreements among competitors violate the antitrust laws. It is desirable, therefore, to examine more closely each of the above mentioned examples of possible Level 2 discussions and consider whether and why they have antitrust implications.

A. Group discussion with DOE on appraisals of the extent of a disruption. If all that occurs in this scenario is that representatives of different competing oil companies express their company's respective appraisals of the scope of a disruption, such conduct might not of itself raise any antitrust questions. But this very much depends on the detail of the discourse and the extent to which, in the course of estimating a disruption, a company might disclose to its competitors competitively sensitive information as to the extent of its own resulting marketing disability, or its plans for corrective action, or expansion plans not yet announced, or reserve estimates not otherwise made public. By and large, however, such a discussion, with some appropriate monitoring (through the presence of counsel or through guidelines), need not raise antitrust questions. (For example, company representatives could be instructed to present appraisals of total market disruption and not of individual company impacts.)

It is probably also the case that the antitrust laws are not violated even if the members of the oil company group formed a consensus as to the extent of a disruption. Again, much will depend on the particular context of the discussion that leads to the formation of the consensus. If in context a consensus as to the extent of a disruption implicitly carried with it a consensus on the corrective conduct thereby to be volitionally taken by the company participants, then there could be antitrust issues, as discussed below.

B. Group discussion with DOE on actions taken or planned to be taken in reaction to a disruption. In this situation there is a greater risk under the

antitrust laws, but the precise degree of risk will depend on the specifics of what is or is not encompassed in the discussion. If, for example, the companies disclose to one another and to the DOE that in response to a disruption they plan to ration supplies by raising prices by a specified amount, competitors are disclosing to one another their future pricing plans, a discussion that, depending on the facts (such as whether uniform price changes are thereafter made), contains the risk of being viewed as resulting in a tacit agreement on prices. And there clearly would be a violation of the antitrust laws if a consensus was arrived at regarding the proper level of such a corrective price increase.

But there may be other discussions of activities or planned activities in response to a shortage that are of little competitive significance. For example, disclosures by various companies that they intend to cope with a disruption by increasing production in unstated amounts from unspecified sources should not ordinarily lead to antitrust difficulties. On the other hand, disclosure to competitors of the details of expansion plans could begin to get into troublesome areas and if a consensus were reached on each company's level of corrective expansion, an antitrust problem would clearly exist. (The antitrust laws apply to agreements among competitors as to their production or expansion decisions as well as to pricing.)

C. Group discussion with DOE of restraint on gasoline price increases. It is permissible for a meeting to occur in which DOE officials lecture a group of company officials on the importance of avoiding certain gasoline pricing behavior, as was the case following the Iraqi invasion of Kuwait. Each company representative can listen politely and keep his or her own counsel on what the company plans to do in response. But if the members of the oil group receiving such a lecture were thereupon asked to disclose and discuss company responses to the President's plea, and in the course of such discussion clearly indicated their intended pricing and invited statements by others, an antitrust problem could begin to exist, depending on the nature of the discussions, because of the risk of a possible inference of a tacit agreement on price. Any development of a consensus on a response to the President's price restraint plea could be troublesome, even if it were a consensus not to raise prices.

D. Group discussion with DOE of the Strategic Petroleum Reserve. It is probable that this topic could be the subject of Level 2 discussion without running afoul of the antitrust laws. Decisions as to the Reserve are for the government to make, and all that members of the industry can do is provide the government with advice. Indeed, even if a consensus were to be developed by the industry group on what the government should do and that consensus was communicated to the DOE, the *Noerr* doctrine should protect the parties from antitrust exposure.

There is an inevitable risk that a wide-ranging discussion of the desired size of the Strategic Petroleum Reserve, or of its being drawn upon, could result in the disclosure of competitively sensitive information by individual companies. But this need not be the case and some proper monitoring or guidance should handle the problem.

E. Group discussion with DOE of contingency planning for natural disasters. It should be possible to have some Level 2 discussions of this subject without antitrust exposure; however, monitoring or guidance will be necessary. Given the future, contingent, and entirely uncertain nature of the event being addressed, discussion of contingency plans could be framed so as not to involve disclosure of competitively sensitive or commercially useful information. Development of a consensus on each company's response in the event of a natural disaster may, conceivably, raise antitrust problems, in part because a consensus on a contingent future course of action may have spillover effects into present-day noncontingent situations.

To the extent that the discussion pertains to what the DOE should do or require to be done in the event of a natural catastrophe, the *Noerr* doctrine should protect the private parties from liability for their recommendations, even if they were consensus recommendations.

F. Group discussion with DOE of alternate exploration and production. To the extent that these discussions simply result in the furnishing of previously announced and available materials, there should be no antitrust problem. If, however, the discussion results in the disclosure of previously proprietary investment plans, an information exchange problem may begin to arise. If from that information exchange a consensus was developed on future exploration and production decisions, there could be antitrust exposure.

G. Group discussion with DOE of the ban on the export of North Slope crude oil. This topic need not raise antitrust problems. The government is entirely in control of the question of whether or not the ban should be lifted. Discussion by the group participants and even consensus on the part of the group participants as to the wisdom of lifting the ban should be protected by *Noerr*. (Again, as in all references to the availability of *Noerr* protection, it is assumed that no false or deliberately misleading information is provided.) The only risk present here is that in the course of a discussion of the impact of the ban there is a disclosure of competitively sensitive marketing or production plans of the companies which lead to further discussion of a consensus-forming nature. But with appropriate monitoring or guidance this need not take place.

H. Group discussion with DOE of exploration in federally controlled areas. The analysis of this question should be much the same as that of the ban on

exports of North Slope crude oil. The government controls the ultimate decision and even a consensus on the part of the companies as to what position should be urged upon the government would be protected by *Noerr*. Proper monitoring or guidance can prevent discussions from extending into competitively sensitive areas.

There are, no doubt, other antitrust issues that may emerge in the course of actual Level 2 activities. Antitrust plaintiffs are unusually inventive, and antitrust concepts are somewhat amorphous. For example, it is conceivable that under certain states of fact antitrust concerns can begin to arise were the DOE to provide members of the group with valuable, non-public information as to DOE plans that are somehow collectively misused for anticompetitive purposes. Such additional issues, if any, can best be addressed when more information is available regarding the DOE Secretary's planned or actual use of the Level 2 mechanism and its real world manifestations. For this reason, some antitrust analysis of the risks raised by any proposed discussion is recommended whenever the DOE proposes to activate the Level 2 format and agenda items are suggested.

What can be concluded for now is that there are significant antitrust risks inherent in certain types of possible Level 2 activities. For example, in Level 2 hypotheticals A, B, C, E, and F, consensus-forming by the group can raise antitrust problems of varying degrees of seriousness. Moreover, even were the deliberate consensus-forming process avoided, risks remain that Level 2 discussions would disclose competitively sensitive information and that, under certain circumstances such as post-disclosure uniformity of conduct, tacit agreements may be inferred. Such risks are present, for example, in group discussions of company corrective plans for disruptions, of company responses to a request for price restraint, of company contingency planning, and of company alternate exploration and production investments.

Moreover, there are at present no statutory provisions that provide antitrust protection for participants in Level 2 discussions. They are not executive branch employees and do not enjoy the limited protection that may be afforded such employees under case law when acting in good faith in the scope of their federal employment. Even under the recently lapsed Defense Production Act, discussed later in this appendix, they had no broad or automatic protection.

If the companies were to engage in the full panoply of Level 2 activities as described above, they therefore require statutory protection they do not now have. Legislative proposals for some statutory protection presumably will be proposed again to the next Congress. But even if statutory protection were to be afforded, it may be limited. For this reason, and because when Congress concludes its review of legislative remedies there may not be any statutory protection afforded, it would be prudent to observe a number of precautions before engaging in Level 2 activi-

ties. (These could be partially relaxed should ample statutory antitrust protection in fact be provided.)

To start with, if competitors are to meet as a Level 2 group, they should avoid arriving at a consensus except in cases clearly covered by *Noerr*. Beyond that general advice, it will be necessary to tailor different kinds of prophylactic advice to the different topics of discussion. Depending on the topic, company representatives may in some instances be instructed not to disclose certain company-specific information in a group meeting. If the DOE demands it, it could be provided separately. To the extent possible, discussions should be confined to advice to the DOE as to what it should or should not do. Again, depending on the topic, commitments as to future company action should not be made. To the extent possible, information provided to the group should reflect past events that are in the public domain. It may be necessary in some instances to use a "Chinese Wall" device to insulate meeting attendees from operational decision-making personnel. If feasible, it would also be desirable to make greater use of legal counsel, including, in particular, representatives of the Antitrust Division of the Department of Justice, at Level 2 meetings.

In effect, in order to reduce antitrust risks, it may be necessary substantially to curtail certain aspects of proposed Level 2 interactions below those currently contemplated by both the DOE and the NPC.

Thus, it is apparent that, for the purpose of mitigating antitrust risks, considerable instruction and guidelines would have to be given to the executives attending Level 2 meetings. It would also be useful for this purpose for the DOE to establish guidelines for its own conduct of Level 2 sessions, which will help ensure that meeting procedures, topic selections, and use of information provided by and to the executive group conform to antitrust safeguards. Preliminary legal consideration has been given to the question of whether the NPC should propose a specific, predefined group of personnel for all Level 2 meetings, or whether there should be different ad hoc groups as different issues become the basis for Level 2 discussions. There are competing considerations that ultimately weigh in favor of the ad hoc approach. Having a single preselected group will simplify the instruction and education process. On the other hand, changes in the identity of the groups meeting with the DOE may help reduce the exposure to claims of the existence of a tacit agreement—i.e., such claims may be somewhat more plausible where the same group of company representatives meet together with the DOE on a repeated basis covering a gamut of issues. On balance, unless extensive statutory immunity is provided, it appears desirable to keep the Level 2 relationship in an ad hoc form rather than having a particular standing committee that is the group with which the DOE meets for all Level 2 purposes.

Antitrust Issues in Level 3 Activities

In Level 3, a National Defense Executive Reserve would be formed to be available in severe national security emergencies, to be activated in temporary

government service to assist in managing oil supplies. The reservists would be trained in their emergency duties and in government procedures. They may possibly engage in all the functions that Level 2 personnel engage in, though not necessarily using the same procedures. (Representatives of competing companies, while they may not be organized into a group similar to a Level 2 group, may well be serving together in the NDER and making joint recommendations; to the extent that consensus-forming is involved, the question of exposure to claims of illegal joint action would have to be considered, as in Level 2.) They would also be involved in the actual development and implementation of government activity, and might have periodic training sessions for their government emergency functions.

From an antitrust point of view, ignoring for the moment their special status as government employees, Level 3 employees might be exposed to the antitrust risks that Level 2 personnel face plus, perhaps, some additional risks arising from their greater involvement in implementing DOE policy. However, case law provides some antitrust protection for government officials performing discretionary functions, provided they act within the scope of their government authority. This derives from cases such as *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982), *Butz v. Economou*, 438 U.S. 478, 507 (1979), and *Alabama Power Company v. Alabama Electric Co-op, Inc.*, 394 F.2d 672, 675 (1968), which, viewed together, support the proposition that the antitrust laws were not intended to constrain the federal government or its officials and that federal officials would not be liable under those laws for carrying out their authorized federal functions.

The Administration had proposed an amendment to the Defense Production Act that would codify this principle by authorizing the President to exempt executive reservists from federal and state antitrust laws as to activities undertaken "in good faith within the scope of the employee's official governmental duties." Presumably, were such legislation to be proposed again and enacted, this would confirm the case law protection.

It is appropriate to note that the protection now accorded to the reservist under case law might not be adequate if the antitrust claim is that the reservist was acting as a company official in tacitly colluding with another company reservist. Nonetheless, our research has not disclosed any antitrust case that, so far as we could tell, involved personnel with an NDER status. Perhaps the complexities introduced by the availability of the protection for good faith performance of valid governmental functions are sufficient to deter antitrust plaintiffs from suing reservists for conduct occurring during an emergency. But despite the dearth of suits thus far, the possibility of some exposure would seem to be present, and some substantial statutory protection would be desirable.

Protection from Antitrust Under Case Law and Statutes

The Defense Production Act of 1950, codified at 50 U.S.C. App. §§ 2158 and 2160 (1951 & Supp. 1990) ("DPA"), was permitted to lapse (except one section) at the

end of the last session of Congress. It is assumed that in 1991 Congress will consider a new enactment of the DPA, either in its previous form or with a set of amendments such as those provided in the never-enacted Defense Production Act Amendments of 1990 ("Amendments"), H.R. Conf. Rep. No. 101-933, 101st Cong., 2d Sess. (1990). (Those Amendments were approved by the House of Representatives by voice vote on October 25, 1990, but were never approved by the Senate.)

The following sections briefly review (a) the already-referred-to protection from antitrust liability accorded by case law; (b) the protection that was accorded by the DPA; and (c) the protection that would be afforded were the DPA to be enacted with the Amendments.

Case Law on Inapplicability of the Antitrust Laws to Federal Officials

The courts have construed the Sherman Act and the Clayton Act as not applicable to federal officials. For example, "Accordingly, we hold that the United States, its agencies and officials, remain outside the reach of the Sherman Act." *Sea-Land Serv. Inc. v. Alaska R. R.*, 659 F.2d 243, 245 (1981). See also, *Rex Systems, Inc. v. Holiday*, 814 F.2d. 994 (1987). The Justice Department has stated that actions taken by reservists within the scope of their governmental authority would normally not subject them to antitrust liability as long as the reservists' actions are made in "good faith within the scope of the reservists' government employment."¹ This view is based on the cases which hold that the antitrust laws do not apply to actions taken by federal agencies, as well as to the cases that protect the discretionary activities of government officials within the scope of employment from attack.² The protection afforded by these cases has not been deemed adequate, perhaps in part because of the special problems raised by the dual capacities of the oil company reservist,³ and efforts have been made to provide a statutory defense.⁴

¹Office of Counsel, Department of Justice, *Memorandum of Law: Legal Authorities Available to the President to Respond to a Severe Energy Supply Interruption or Other Substantial Reduction in Available Petroleum Products*, 40-41 (1982).

²E.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) ("Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."); *Butz v. Economou*, 438 U.S. 478, 507 (1979) ("Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law.").

³The Justice Department has described a number of activities that might subject the reservists to antitrust scrutiny:

"1. advice to government policymakers with respect to governmental actions to be taken in markets in which the individual's company is involved;

The Protection That Had Been Afforded by the DPA

DPA Section 708(c), codified at 50 U.S.C. App. § 2158(c) (1951 & Supp. 1990), allowed the President "upon finding that conditions exist which may pose a direct threat to the national defense or its preparedness programs" to consult with private-sector representatives and create "voluntary agreements" to "help provide for the defense of the United States through the development of preparedness programs and the expansion of productive capacity and supply beyond levels needed to meet essential civilian demand in the United States."

DPA section 708(j), codified at 50 U.S.C. App. § 2158(j) (1951 & Supp. 1990), provided an antitrust defense for a participant in a voluntary agreement where the participant's action "was taken in good faith by that person."⁵

The "good faith" defense was available for a "violation of the antitrust laws (or any similar law of any State) with respect to any act or omission to act to develop or carry out any voluntary agreement."⁶ The act or omission had to occur in

2. decisions that affect particular energy markets;

3. agreements as to what actions are to be taken by their private firms, particularly if those individuals implement such actions in their private capacities; or

4. exchange between private industry executives of confidential industry information, gained pursuant to training activities or governmental responsibilities."

Memorandum of Law, supra, note 1, at 41.

⁴In the 1980s, on more than one occasion bills were introduced, without success, to provide a statutory antitrust defense for executive reservists. See Letter from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, to the Honorable James A. McClure, Chairman, Committee on Energy and National Resources, U.S. Senate (Feb. 6, 1984) (describing § 1678, the "Energy Emergency Preparedness Act Amendments of 1983"). The latest Administration bill, § 2168, 101st Cong., 2d Sess. (1990), would have amended section 710 of the DPA to allow the President to exempt executive reservists from the antitrust laws, provided that the reservist's activities were "undertaken in good faith within the scope of the employee's official government duties." § 2168 was not passed by the Senate.

⁵"There shall be available as a defense for any person to any civil or criminal action brought for violation of the antitrust laws (or any similar law of any State) with respect to any act or omission to act to develop or carry out any voluntary agreement under this section that--(A) such act or omission to act was taken in good faith by that person--(i) in the course of developing a voluntary agreement under this section, or (ii) to carry out a voluntary agreement under this section; and (B) such person fully complied with this section and the rules promulgated hereunder, and acted in accordance with the terms of the voluntary agreement." 50 U.S.C. App. § 2158(j) (1951 & Supp. 1990).

⁶50 U.S.C. App. § 2158(j) (1951 & Supp. 1990).

the course of "developing" or "carrying out" a voluntary agreement, and the participant had to comply with the rules and terms of the voluntary agreement.

The DPA did not specify which party has the burden of proof when the defense is asserted. Presumably, the burden of proof would have been on the party asserting the defense.

The DPA thus afforded the possibility, through use of the voluntary agreement device, of antitrust protection for participants in a voluntary agreement. These participants, presumably, could be Level 2 as well as Level 3 personnel. But in the absence of the voluntary agreement, no protection was afforded by the DPA to either Level 2 or Level 3 employees.

Moreover, the "good faith" standard of the DPA had been criticized as being "unique, vague and unreasonably difficult."⁷

The Protection That Would Have Been Afforded by the Amendments

The Amendments sought to amend the DPA antitrust defense for participants in voluntary agreements. Like the DPA, the Amendments provided a defense for "any person" to federal or state antitrust actions where the person acted "in the course of developing . . . or carry[ing out] a voluntary agreement" initiated by the President.⁸

The Amendment's defense otherwise differed from the DPA defense most notably in that the Amendments did not require that the participant's actions be taken in "good faith." Another difference was that the Amendment's defense was unavailable unless the President or his or her designee had actively supervised the actions on which the antitrust claim was based.⁹ The participant was required to demonstrate that the action was "specified in, or was within the scope of, an approved voluntary agreement initiated by the President."¹⁰ The use of the defense

⁷FEMA, *Program Rationale for DPA Amendments* (Jan. 1990).

⁸H.R. Conf. Rep. No. 101-933, 101st Cong., 2d Sess., 17-18 (1990).

⁹"The defense established in paragraph (l) shall not be available unless the President or the President's designee has actively supervised the actions on which a claim under the antitrust laws is based and to which a defense under paragraph (l) is asserted." H.R. Conf. Rep. No. 101-933, 101st Cong., 2d Sess., 18 (1990).

¹⁰"The defense established in paragraph (l) shall be available only if and to the extent that the person asserting the defense demonstrates that the action was specified in a voluntary agreement initiated by the President and approved in accordance with this section . . ." *Id.*

was precluded where a participant's actions were taken "for the purpose of violating the antitrust laws."¹¹

The burden of persuasion was on the person asserting the defense for all elements of the defense except on the issue of whether the actions were taken with the purpose of violating the antitrust laws.¹²

¹¹"Exception for actions taken to violate the antitrust laws.—The defense established in paragraph (l) shall not be available if the person against whom the defense is asserted shows that the action was taken for the purpose of violating the antitrust laws." *Id.*

¹²"Any person raising the defense established in paragraph (l) shall have the burden of proof to establish the elements of the defense." *Id.*

APPENDIX D



FEDERAL ADVISORY
COMMITTEE ACT ISSUES

APPENDIX D

FEDERAL ADVISORY COMMITTEE ACT ISSUES

Legislation and Regulations

The Federal Advisory Committee Act (FACA) of 1972 [5 U.S.C.App. § 1 et seq.] defines procedural requirements governing the providing of advice or recommendations to a federal official by a group that is not composed wholly of full-time government employees. The purpose of the Act, as outlined in the Senate Report that accompanied the original bill, is to:

strengthen the authority of Congress and the executive branch to limit the use of Federal advisory committees to those that are necessary and serve an essential purpose; provide uniform standards for the creation, operation, and management of such committees; provide that the Congress and the public are kept fully and currently informed as to the number, purposes, membership, and costs of advisory committees, including their accomplishments; and assure that Federal advisory committees shall be advisory only.

FACA (at § 2) defines an "advisory committee" to be:

any committee, board, commission, council, conference, panel, task force, or other similar group . . . established or utilized by one or more agencies in the interest of obtaining advice or recommendations.

An advisory committee should include representatives of the various points of view of the industry and consumers under the provisions of the Federal Energy Administration Act of 1974, 15 U.S.C. § 776, which are incorporated in the DOE Organization Act by reference. 42 U.S.C. § 7234. The Federal Advisory Committee Act established procedures for chartering advisory committees and expressly limited their function to advise. 5 U.S.C. App. § 9. Meetings should be open to the public, unless the Secretary determines that the meeting may be closed to protect national security or other specified matters not relevant here. 5 U.S.C. App. § 10. Interested parties should be allowed to appear before or file statements with an advisory committee. *Id.* Detailed minutes of each meeting should be kept and certified by the committee chairman. *Id.* All advisory committee materials should be made available to the public, unless they are exempt (e.g., national security information or trade secrets). *Id.* The committee should not meet in the absence of the federal employee designated to attend its meeting and empowered to adjourn a meeting whenever he considers it to be in the public interest. *Id.* All meetings should be called by or have the advance approval of a federal employee who has authority over the agenda. *Id.*

The General Services Administration (GSA) is the executive branch agency designated to promulgate the regulations on the management of federal advisory committees. Executive Order 12024 (42 FR 61445, 3 CFR, 1977 Comp., p. 158).¹ GSA issued the final regulations providing administrative guidelines and management controls for federal agencies concerning the implementation of FACA. 41 CFR Part 101-6 (52 FR 45926, December 2, 1987). Revisions were issued to provide additional guidance (54 FR 41214, October 5, 1989).

The GSA regulations explicitly enumerate groups or meetings not subject to FACA. Particular exclusions include the following:

- Any meeting initiated by a Federal official(s) with more than one individual for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations. However, agencies should be aware that such a group would be covered by the Act when an agency accepts the group's deliberations as a source of consensus advice or recommendations. 41 CFR § 101-6.1004(i).
- Any meeting initiated by a group with the President or one or more Federal official(s) for the purpose of expressing the group's view, provided that the President or Federal official(s) does not use the group recurrently as a preferred source of advice or recommendations. 41 CFR § 101-6.1004(j).
- Any meeting with a group initiated by the President or one or more Federal official(s) for the purpose of exchanging facts or information. 41 CFR § 101-6.1004(1).

In issuing the FACA regulations, GSA included a discussion of comments received during rule making. 41 CFR Part 101-6 (52 FR 45926, December 2, 1987). Parts of this discussion provide further insight on the exclusion of certain groups from FACA. First, GSA clearly recognized that groups giving consensus or recurrent advice are covered by the Act:

Provide for Coverage Under the Act When Certain Groups Provide Consensus or Recurrent Advice

Agencies are, in effect, cautioned that the Act would apply when an agency accepts the deliberations of a group as a source of *consensus* advice,

¹The Department of Energy has promulgated supplementary policies and procedures for establishing and utilizing advisory committees by the Department. See DOE Order 1130.6 (September 23, 1982). These policies and procedures do not vary materially from GSA's regulations on the issue of groups falling within FACA's definition of advisory committee.

when heretofore the agency had been obtaining the advice of attendees on an *individual* basis only. Also, when an agency *recurrently* uses a group at the group's request, as a source of advice on a preferential basis, exclusion of coverage under the Act may become questionable even if the group continues only to express its own views without further solicitations from federal officials.

Second, GSA rejected the argument that ad hoc groups be excluded per se from the Act:

Exclude from Coverage Under the Act Groups Convened by Agencies on an Ad Hoc Basis

One commenter recommended that the final rule contain an exclusion from coverage under the Act for so-called ad hoc groups lacking formal organization, structure, or continuing existence; convened by an agency to obtain views on particular matters of immediate concern. GSA is of the opinion that such an exclusion is not appropriate since the Act itself neither defines nor specifically excludes such groups. In fact, section 6(c) of the Act, providing for the President's annual report to the Congress, requires a statement for each advisory committee, "***of whether it is an ad hoc or continuing body***." Accordingly, GSA has not accepted the recommendation to exclude ad hoc groups since GSA believes that the language of section 6(c) of the Act evidences the intent of the Congress that a group is not to be excluded from coverage merely because it is convened on an ad hoc, or temporary basis.

Third, GSA rejected the argument that one-time meetings be excluded per se from the Act:

Provide That Agencies May Exercise Policy Decisions in Issuing Exclusions for One-Time Meetings

In a comment directed toward GSA's position stated in the discussion of prior comments in the proposed rule (see 52 FR 18774, Supplementary Information:), a commenter suggested that the final rule should not preclude agencies from issuing an exclusion for one-time meetings. This commenter felt that GSA's opinion, that such an exclusion in the rule was not appropriate in view of the limited litigation history, should not bar agencies from issuing such exclusions. In fact, it was the opinion of this commenter that the absence of litigation history was not sufficient reason to limit management discretion.

GSA continues to believe that a one-time meeting exclusion in the final rule would be inconsistent with the Act, and does not intend to pro-

vide either a direct exclusion in § 101-6.1004 or provide that such a decision may be left to an agency, thereby implying GSA's support for such exclusions. Accordingly, GSA reiterates its opinion that in the absence of any judicial precedent to the contrary, meetings or groups which take place or meet only once should not be excluded from the Act's coverage solely on this basis.

Applicability to Chapter Two Recommendations

Chapter Two of this report discusses the use of an advisory group of industry executives (Level 2) to provide advice and counsel to the Secretary of Energy in the event of an emergency. The provisions of FACA could be applicable to a Level 2 group depending on the specific structure and operation of the group. The NPC recommends that only individual views should be sought with a primary focus on the exchange of facts and information. A GSA regulation specifically excludes from FACA's coverage meetings in which only individuals' views, and not group consensus views, are expressed. 41 CFR § 101-6.1004(i). Similarly, meetings only for the purpose of exchanging facts and information are excluded from FACA. 41 CFR § 101-6.1004(1). Note, however, that when an agency recurrently uses a group as a source of advice, or if the agency interprets the individuals' views as consensus views, such meetings could fall within FACA.

Additionally, the NPC recommends that the composition of the group should vary depending on the nature of the issue to be discussed. At least one federal court has recognized that variation in the composition of groups meeting with federal officials places the consultations outside the scope of FACA. In *Nader v. Baroody*, 396 F. Supp. 1231, 1232 (D.C. D.C. 1975), different groups met with officials of the federal executive branch and on occasion with the President during a series of bi-weekly meetings. In concluding that the groups were not advisory committees within the meaning of the Act, Judge Gesell noted: "The very vagueness and sweeping character of the [statutory] definition [of advisory committee] permits a reading which could include . . . any . . . conference of two or more non-government persons who advise the President." Judge Gesell refused to read the definition that broadly and concluded that the bi-weekly meetings of the various groups at the White House did not violate the Act.

The Supreme Court has recently rendered a decision that narrows the interpretation of the definition of an advisory committee. In *Public Citizen v. U.S. Department of Justice*, 109 S. Ct. 2558 (1989), the Court held that the privately established ABA Standing Committee on Federal Judiciary was not an advisory committee within the meaning of the Act, despite the fact that it consulted on a recurring basis with the Justice Department concerning judicial nominations. In so concluding, the Court limited the scope of the phrase "established and utilized" by a federal agency to cover only committees established by the federal

government and certain "quasi-public" organizations such as the National Academy of Sciences. 109 S. Ct. at 2570.

The Court's interpretation of an advisory committee represents a significant departure from prior, lower federal court interpretations. As a result of this decision, fewer groups advising federal agencies will be found by federal courts to be advisory committees. Indeed, the subsequent District of Columbia Circuit case *Food Chemical News v. Young*, 900 F.2d 328 (D.C. Cir. 1990), demonstrates that the Act's reach has been shortened by that court's interpretation of *Public Citizen* as applied to the facts and situation in *Food Chemical News*. In ruling that a group of experts selected and managed by a private scientific organization pursuant to the organization's contract with the FDA was not an advisory committee, the court specifically noted that the Supreme Court's analysis in *Public Citizen* narrowed prior interpretations of the Act. 900 F.2d at 332.

The preceding comments and GSA interpretations underscore GSA's clear recognition of groups that fall within FACA's definition of an advisory committee: groups giving consensus advice and groups recurrently advising federal officials. Furthermore, GSA has rejected the arguments that ad hoc groups and one-time meetings be automatically excluded from FACA. Recent court decisions, however, have limited the Act's coverage as noted above. The focus of the cases involving FACA has been plaintiffs seeking injunctive relief forcing the sponsoring agency to comply with the requirements of the Act.

APPENDIX E

HISTORY OF U.S. OIL EMERGENCY ORGANIZATIONS AND CURRENT PERSPECTIVES

APPENDIX E

HISTORY OF U.S. OIL EMERGENCY ORGANIZATIONS AND CURRENT PERSPECTIVES

The United States has responded with the assistance of oil industry personnel to two wartime emergencies, one during World War II, and the other during the Korean War. Both of these efforts made extensive use of industry personnel and expertise in dealing with the crisis. In World War II, the Petroleum Administration for War (PAW) included industry personnel in its ranks, as well as relying heavily on industry committees for advice, coordination, and implementation. During the Korean War, the Petroleum Administration for Defense (PAD) drew the majority of its staff from industry, but with little duplication in the form of industry committees.

Assembled in a wartime emergency, PAW and PAD were primarily concerned with maximizing output from the existing refining and distribution infrastructures in a situation where domestic crude oil supplies were adequate and the United States was a major oil exporter. The focus was on providing additional facilities to produce and distribute the oil product needs for expanded civilian and defense purposes, both in this country and abroad. Price controls and rationing were administered by other agencies.

The threat of a nuclear attack on the United States and its likely disruption of the U.S. petroleum system led in 1963 to the development of an organization to deal with this type of an oil crisis. This organization, called the Emergency Petroleum and Gas Administration (EPGA), was similar to PAW and especially to PAD in its purpose, role, and organization. It relied heavily on a regional headquarters structure since it was designed to deal with the possibility of a nuclear attack on a national headquarters location.

The EPGA was never activated to deal with a national emergency, but there were several practice sessions to test its effectiveness. Moreover, in 1973-74, in response to the Arab embargo, EPGA was poised to serve, and actually positioned for a brief time in Washington. Its mission, however, was aborted because of strong concerns about antitrust and conflict-of-interest issues. This appendix contains copies of the organizational charts of each of the PAW, PAD, and EPGA organizations (see Figures E-1 through E-4).

In the 1981 National Petroleum Council study entitled *Emergency Preparedness for Interruption of Petroleum Imports into the United States*, the focus was directed at coping with a suddenly reduced supply of oil imports, but in an environment where the domestic refining and distribution system presented few, if

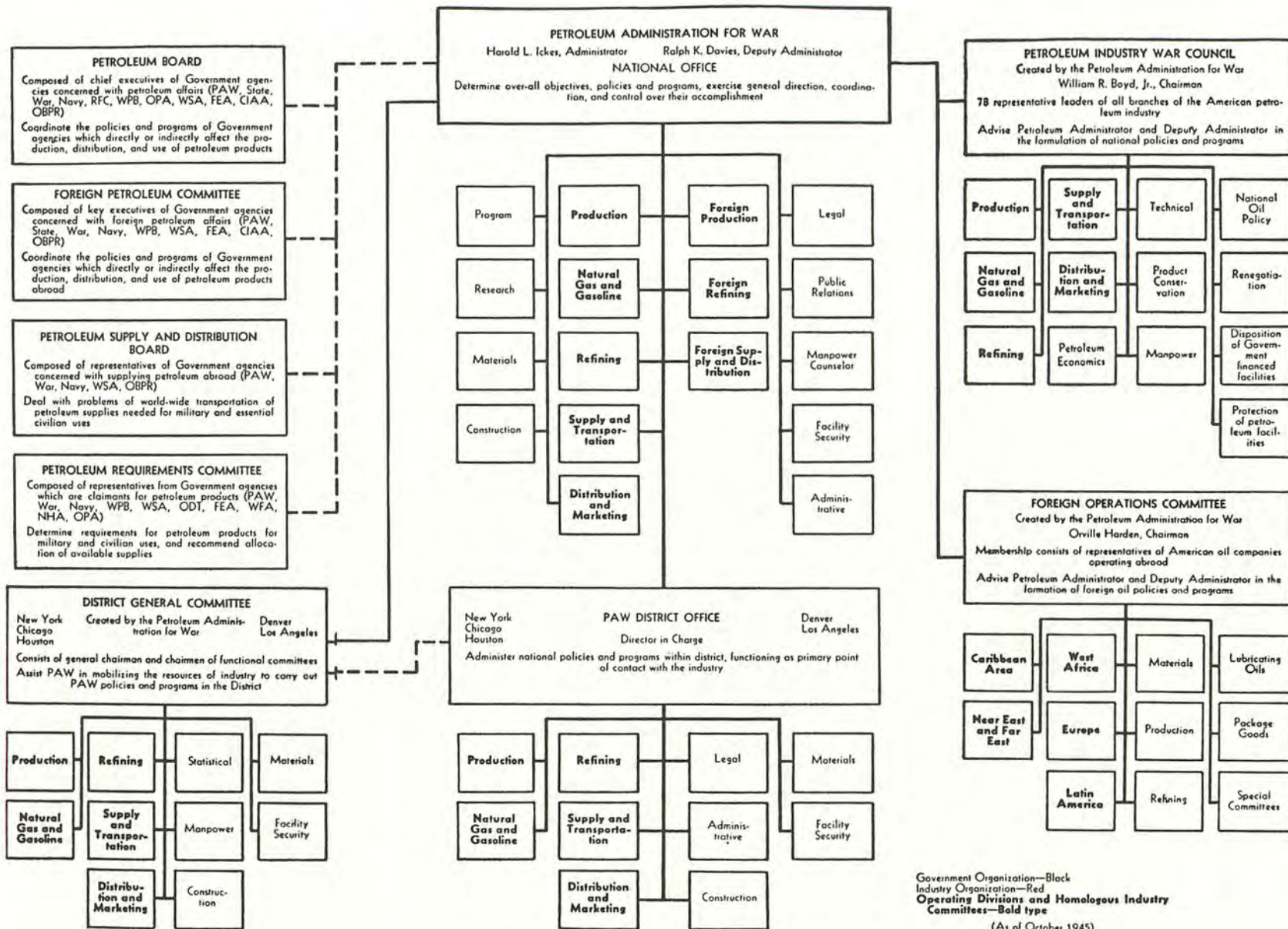


Figure E-1. Petroleum War Team.

SOURCE: Petroleum Administration for War, *A History of the Petroleum Administration for War, 1941-1945*, U.S. Government Printing Office, 1946.

E-3

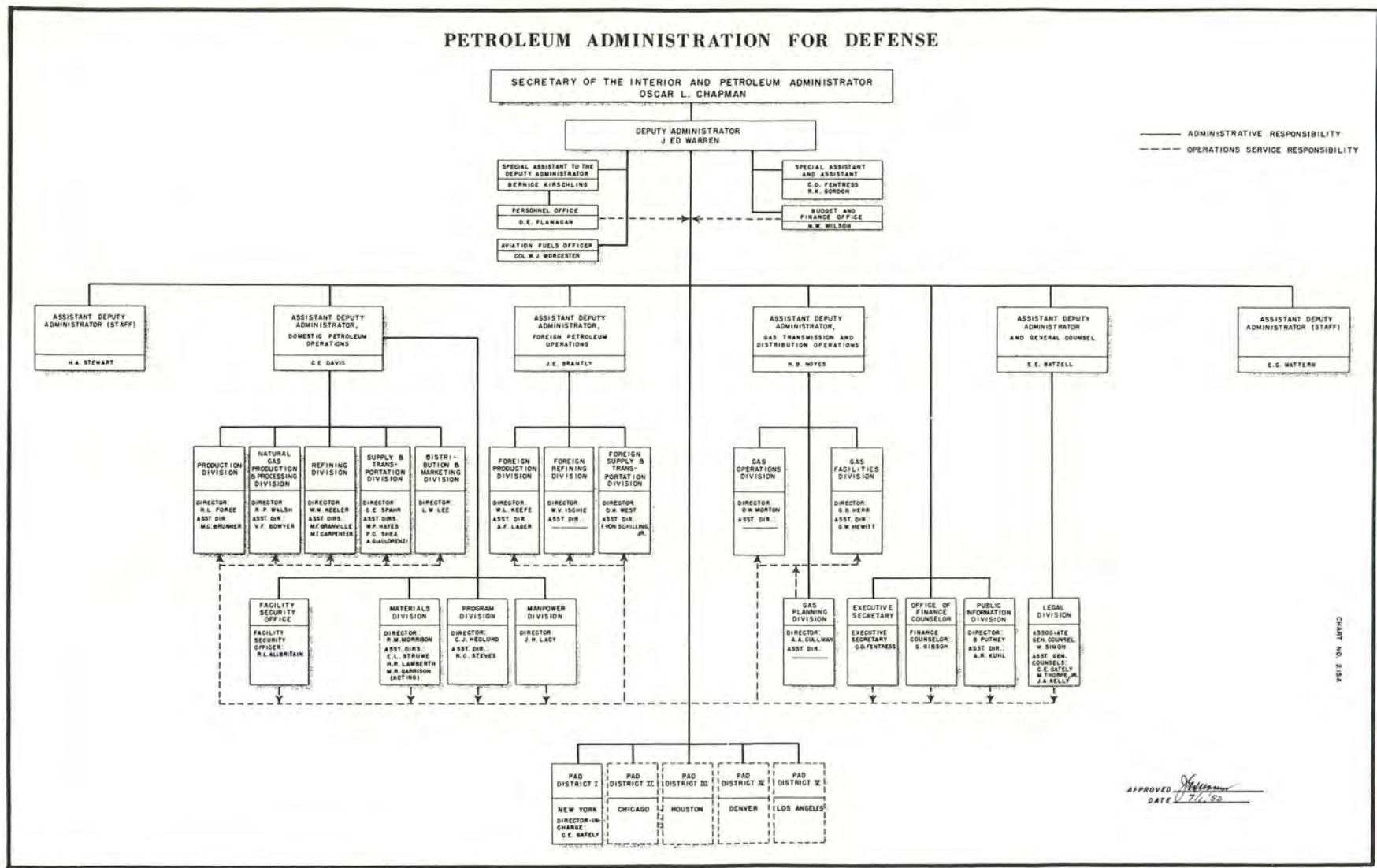


Figure E-2. Petroleum Administration for Defense.

SOURCE: "Petroleum Administration for Defense Plan of Organization," U.S. Department of the Interior, 1951.

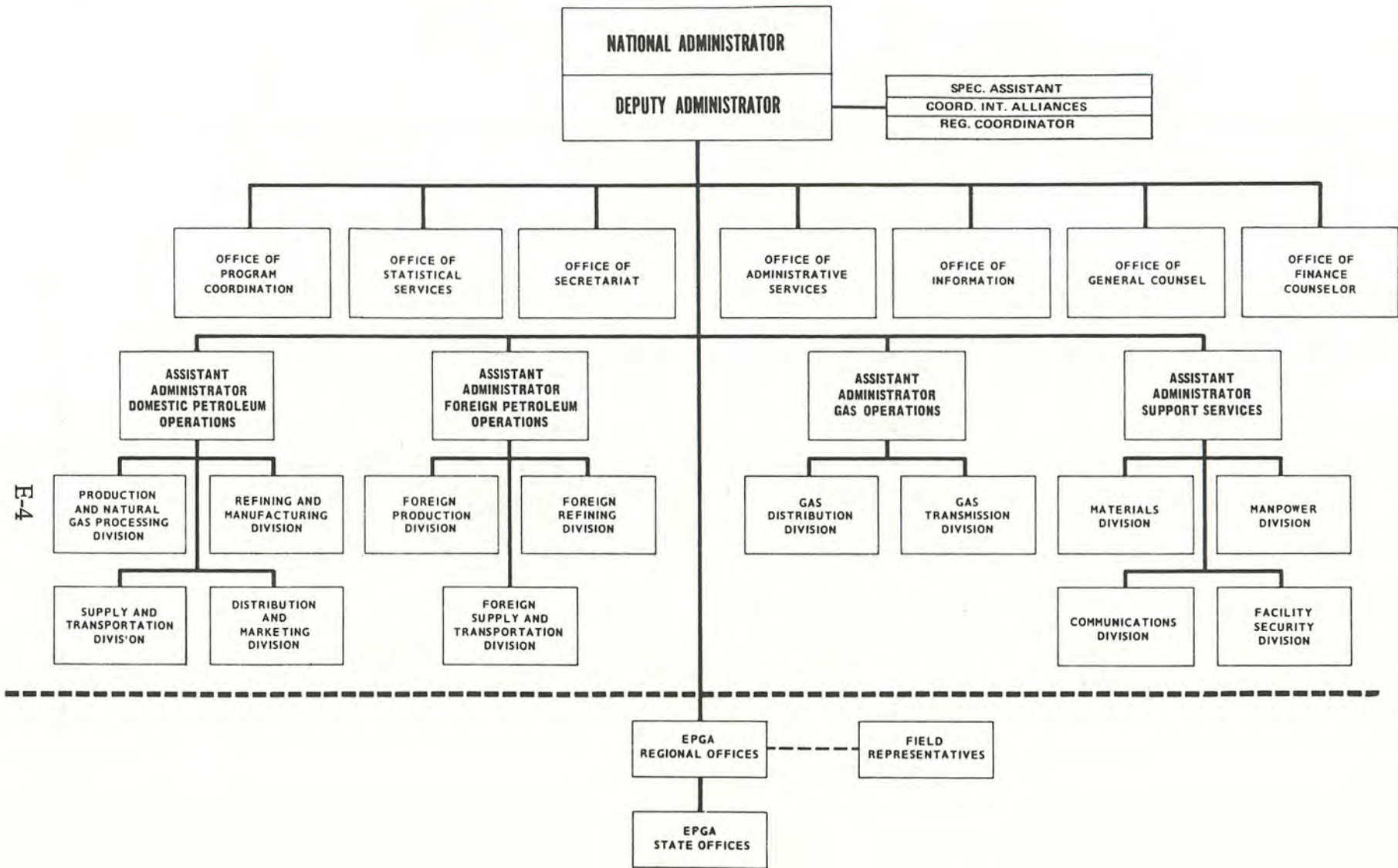


Figure E-3. National Headquarters Organization—Emergency Petroleum and Gas Administration.

SOURCE: National Petroleum Council, *What is the Emergency Petroleum and Gas Administration?*, revised by the Office of Oil and Gas, U.S. Department of the Interior, 1972.

E-5

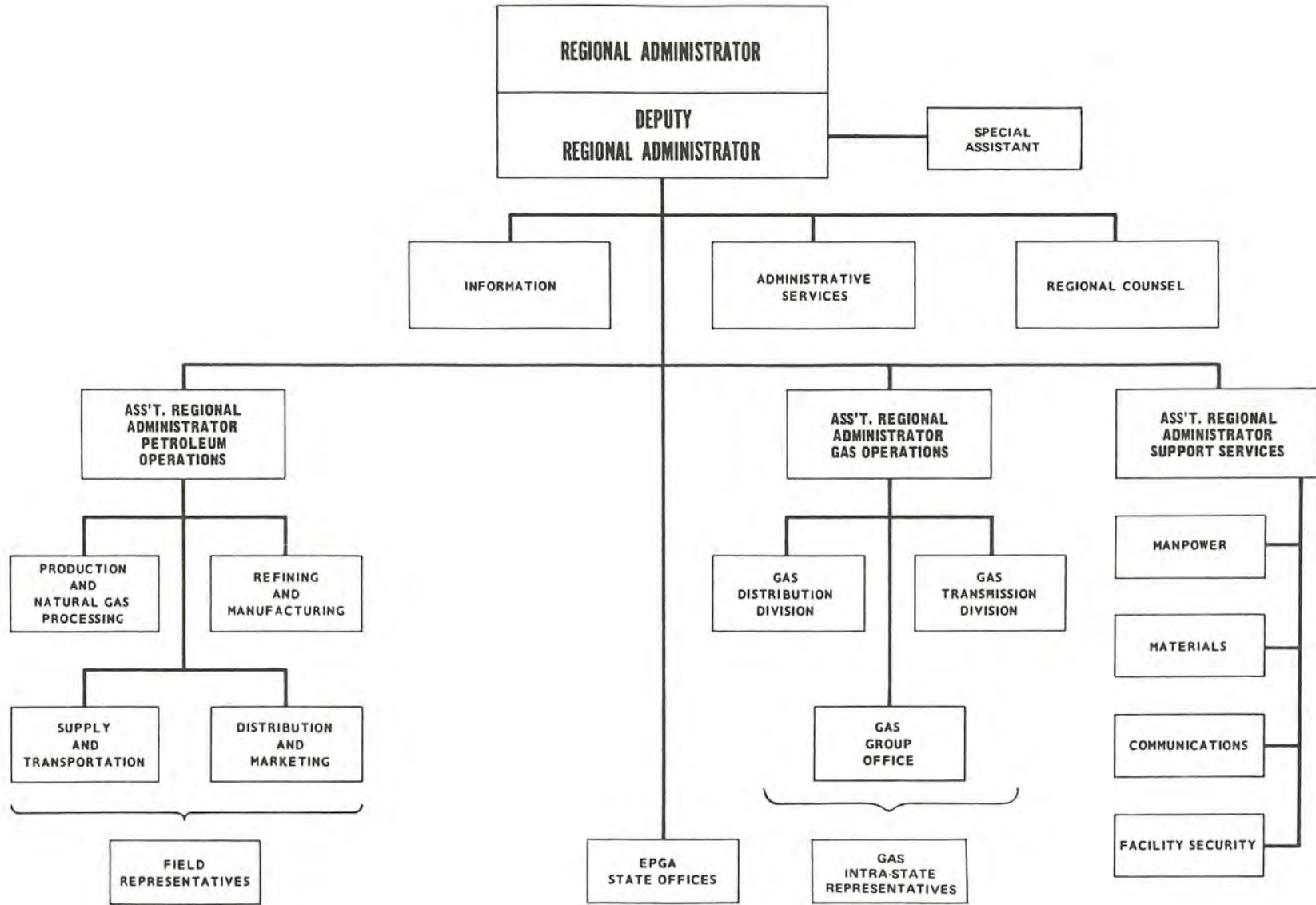


Figure E-4. Pro Forma Regional Organization—Emergency Petroleum and Gas Administration.
(Activated as required and staffed to the depth necessary in each region)

SOURCE: National Petroleum Council, *What is the Emergency Petroleum and Gas Administration?*, revised by the Office of Oil and Gas, U.S. Department of the Interior, 1972.

any, physical limitations due to war, terrorism, or similar threats to national security. Its primary purpose was to address oil shortfall issues similar to those which stemmed from the 1973-74 Arab embargo and the 1978-79 Iranian revolution as well as those that could result from more severe U.S. import disruptions of up to 4.6 million barrels per day.

In contrast, this report deals with an organization designed to be activated only under the conditions outlined for the NDER trigger mechanism stated in the Overview of this report. This organization would be called upon to assist the DOE in dealing with conditions much different than those encountered by the PAW or PAD during World War II and the Korean War. Some, but not necessarily all, of these important differences are as follows:

- The United States is now dependent on imports for about 50 percent of its oil consumption. These imports include significant quantities of finished products, unfinished products, and intermediate feedstocks, all of which are expected to increase in volume over time.
- Because of the above, a primary concern will be that of allocation and prioritization of limited available supplies to military and essential civilian needs.
- Programs to increase supplies of crude oil and other petroleum stocks from domestic and other supply sources will be a top priority.
- Efficient use and distribution of the SPR crude oil supply will have an equally high priority.
- The type and quality of fuels needed by the military have changed with time.
- Essential civilian industries and services have also changed with time.
- International Energy Agency (IEA) and NATO obligations will need to be addressed.
- Although the recent events in Eastern Europe and other Communist countries appear to have lessened the threat of nuclear attack, the potential for such an attack from these or other nations, or by organized terrorism and sabotage, remains a possibility.
- Dependent on the degree of crude oil shortfall, individual refiners will likely be disproportionately impacted. Programs to balance these effects with geographic need for product supply to meet essential military and civilian needs may be implemented by the government.

The DOE, the NDER, and the oil industry need to be poised to respond to these issues in a manner that addresses the specific circumstances of the actual war crisis. As such, the approach should be to retain the flexibility to operate within a range of competitive free-market conditions to the fullest extent possible in order to extract maximum efficiency from the oil industry. Substantial government intervention in an extreme war crisis should allow this free-market philosophy to work, tempered by allocation and prioritization programs only to the degree necessary to meet military and essential civilian needs and to avert irreparable damage to the U.S. petroleum infrastructure.

APPENDIX F

PETROLEUM
NDR INTERACTION WITH
OTHER GOVERNMENT AGENCIES
AND NDERS

APPENDIX F

PETROLEUM NDER INTERACTION WITH OTHER GOVERNMENT AGENCIES AND NDERs

The NDER Is a Government-Wide Program

The Federal Emergency Management Agency (FEMA) is the President's agent for the National Defense Executive Reserve (NDER). Other agencies come to FEMA for permission to have an NDER program and FEMA provides central coordination and general rules for such programs. Each agency has complete control of its own NDER program within the FEMA guidelines. FEMA does not interfere with how each agency plans to use the NDER to augment its management during a national security emergency such as mobilization or war. Thus, FEMA is the umbrella under which the other agency NDER programs operate.

The following agencies have established NDER units:

- Department of Commerce
- Department of Defense
- Department of Energy (3)
- Department of the Interior
- Department of Transportation (2)
- Federal Emergency Management Agency
- General Services Administration
- Interstate Commerce Commission
- National Communications System
- Office of Personnel Management
- Selective Service System

FEMA and several other agencies have substantial regional responsibilities and have full time staff in the 10 standard federal regions. In a serious national security emergency, they would expand staffs by activating NDERs.

Regional Considerations

The basic petroleum NDER organization outlined in this report is centralized at a single national location. The Department of Energy (DOE) currently has small staffs located in several of the Federal Regional Headquarters cities, primarily involved with energy conservation programs with the states. These staffs may need to be expanded in an emergency situation requiring significant regional emergency response activities such as the Continuity of Government (COG) program.

The government's COG programs are decentralized, providing a potential need for oil industry support at several locations. At each location, several industry people may be needed to provide assessments and recommendations that reflect the overall nature of the oil business in the event the COG is activated.

The exact nature of the regional staffing requirements, particularly those relating to the federal COG program, is best developed by the members of the petroleum NDER program, who will have the opportunity to obtain security clearances and participate in training exercises to get a better understanding of how this requirement should be met. This report assumes that this staffing requirement can be met by temporary assignment or reassignment of reservists. As with other parts of this study, this assumption is subject to change by those who actually become members of this NDER organization.

Resource Management and Claimancy

In mobilization or war, the nation's security would require that priorities be given to supporting the military and the supplies needed to support military activities. Each agency would be responsible for the adequacy of the resources under its jurisdiction, and for obtaining the other resources needed by its resource industries. Thus the DOE, expanded in capability by the activation of its NDER units, would have to coordinate (manage) the use of energy to meet essential military and civilian needs as well as represent the energy industries to the Department of Commerce for manufactured goods the energy industries need, and to the Department of Transportation for air, truck, rail, and water transportation.

To the extent possible, much of the federal emergency capability is organized to be done in the 10 federal regions, with appeals and national concerns decided at national headquarters. To facilitate these interactions between agencies in the regions, it would be important for the DOE to be located in the same city with these other agencies, if not the same building. The expanded DOE regional staff previously referred to may be required if this type of action becomes significant.

Each agency, including the DOE, is responsible for all priority use of the resources assigned as its responsibility in emergencies. Current plans give each agency full responsibility for making decisions on what will get priority and what will not. If there is disagreement, the question under consideration is raised to the next higher level in both the resource agency and the claimant agency. This process means that, if departmental Secretaries could not reach agreement, resolution of disagreements would be the President's responsibility. In World War II, a War Production Board was set up to resolve such problems instead of putting this burden on the President. In any major conflict, it is possible that an equivalent board may be established.

Organizational Interactions

The proposed petroleum NDER organization is intended to provide maximum flexibility for activation of only that portion of it which is justified by the nature of the emergency. Interaction with other DOE NDER units and other agencies and NDER units would vary according to the portions of the organization that are activated. For example, if only the Emergency Supply and Distribution Coordination staff of the petroleum NDER is activated, contact with other agencies would likely be limited. However, contact with the other DOE NDER units would also be likely in order to assess fuel switching capabilities, etc.

The Department of Defense's Defense Fuel Supply Center could be the first non-DOE government organization needing coordination activities involving activated oil industry reservists. They would help the Defense Fuel Supply Center obtain petroleum products for the military if requirements were not being met by normal business relationships. The next agency reservists might be involved with could be FEMA. In its coordination role in emergency response, FEMA would need to be kept aware of actions being taken by the DOE. Some of the reservists could get involved with interagency working groups where they might report on oil supply and demand assessments.

If the situation deteriorates so that the Assistant Directors of Supply Planning and Claimant Priorities commence activation of some of staff, additional interagency communications will develop. Supply programs would be developed under policy guidance from the President or his delegate. Interagency working groups would provide coordinated advice to the policymakers. Claimant Priorities staff would present their requirements to the other resource agencies such as the Department of Commerce for manufactured goods, the Department of Labor for manpower, the Department of Transportation for transportation other than pipelines, etc.

Authorities

The authority for the NDER and priority activities was given to the President by the Defense Production Act of 1950.¹ Emergency preparedness responsibilities were delegated to each department and agency by Executive Order (EO) 12656 of November 18, 1988. Emergency Authorities of the Defense Production Act were delegated to the departments and agencies by EO 10480 of August 14, 1953, as amended. A new Executive Order for this delegation is in the process of review. EO 10480 provides for administering defense mobilization programs. It delegates

¹This report's discussions are based on the presumption that Congress will eventually renew the DPA, which expired on October 20, 1990. However, FEMA has advised the DOE and other agencies that in their opinion, alternative authority for some NDER activities is contained in the National Security Act of 1947, as amended. 50 U.S.C. 401 et seq.

to the Secretary of Energy priorities and allocation authority for electric power, petroleum, natural gas, and solid fuels (coal). It gives FEMA responsibility for coordinating all Executive Branch mobilization activities except:

- EO 11790, as amended by EO 12038, provides that as an exception to EO 10480, the Secretary of Energy can exercise authority for energy production, use, control, distribution, and allocation, without approval, ratification, or other actions of the President or any other Executive Branch official.
- The definitions included in EO 10480 include: The term "petroleum" shall mean crude oil and synthetic liquid fuel, products, and associated hydrocarbons, including pipelines for the movement thereof. The term "gas" shall mean natural gas and manufactured gas, including pipelines for the movement thereof.

The DOE Organization Act provides authority for the Energy Information Administration to require data input from industry. Those data requirements may be increased during an emergency.

In a serious national security emergency that required the activation of the NDER, it is likely that the Congress would enact additional authorities, intended to meet specific additional needs.

APPENDIX G

QUALIFICATIONS, TRAINING,
MOBILIZATION, AND
TERMINATION OF RESERVISTS

APPENDIX G

QUALIFICATIONS, TRAINING, MOBILIZATION, AND TERMINATION OF RESERVISTS

The purpose of this appendix is fourfold. Specifically this section addresses:

- General qualifications of reservists
- Training the reserve
- Mobilization procedures
- Reappointment, transfer, and termination.

General Qualifications of Reservists

The National Defense Executive Reserve (NDER) is a federal government program that provides a reserve of highly qualified individuals from industry, organized labor, professional groups, and the academic community to serve in executive positions in the federal government during times of national emergency.

The Responsible Agency

The administration of each NDER unit is the responsibility of the agency sponsoring the unit. For a petroleum NDER, the responsible agency is the Department of Energy (DOE). The DOE is responsible for recruitment (though oil company management will identify NDER candidates), security clearance, training, travel, pay, personnel records, and other administrative matters.

Qualifications

Candidates for the reserve must meet the following criteria:

- They must be citizens of the United States.
- They cannot be members of the Ready Reserve (including the National Guard), retired military personnel with mobilization orders, active federal employees, or state and local government employees with emergency assignments. In addition, people campaigning for, or elected to, public office may not be eligible.
- Prospective members must possess the qualifications required to perform their planned emergency assignments.

If qualified, NDER members are appointed to serve for a minimum of three years.

Training the Reserve

The Defense Production Act authorizes the government to train "a nucleus executive reserve." The DOE responds to this mandate by conducting regular training sessions for its NDERs.

DOE Training Program

DOE periodically conducts training sessions for NDERs. Topics covered include:

- Threats to the Emergency System—The focus is on the roles of applicable government agencies and NDERs.
- Organization for Emergencies—Topics include federal and DOE organizations for emergencies. Role of federal agencies in resource allocation is also covered.
- Serving as a Reservist—Topics include legal status, conflict of interest, security clearance, and personal preparation in times of emergency for NDERs.
- Public and Media Relations—General topic of dealing with the media on topics of controversy.
- Mini-Exercises—Scenarios used to raise and resolve questions about roles and the authorities of NDERs and the DOE.
- Simulation Exercises—Simulates emergency situations and requires teams to respond to demands and prioritize competing demands.

The DOE maintains other training tools as well, including: Desktop exercises, home-study exercises, Federal Emergency Management Agency (FEMA) conferences and courses, intra-agency exercises, and courses at the National Defense University. The NPC recommends that the industry work closely with the DOE to establish a training program that satisfies the needs of FEMA and the industry. It is important that training sessions be brief and meaningful in order to ensure the participation of the type of key industry personnel identified in the previous section on staffing. More specific recommendations are contained in the section of Chapter Three on the petroleum NDER.

Funding

The cost of training sessions should be shared by the oil industry and the DOE. It is suggested that the industry cover the cost of salaries and travel expenses

of the reservists, and the DOE cover other costs of the exercise such as training facilities, communications, training materials, etc.

The likely demands on industry personnel within and between the various components of this structure must be addressed during training sessions. Accordingly, it is imperative that simulation exercises be conducted to prepare NDER representatives for working within the proposed structure. Such exercises are best developed jointly by the DOE and industry. It is expected that modifications to the organization, the job descriptions, and the proposed interaction among the various parts will emerge and prove useful.

Mobilization Procedures

Activation

The Department of Energy will activate reservists (by way of an activation notice) only in a national defense emergency. The activation notice will contain information on reporting locations. Upon reporting, reservists are to bring all previously issued documents, including ID cards. Reservists can be activated in three ways:

- The President can authorize activation.
- The Director of FEMA can recommend that the President authorize NDER activation, and the President could agree to do so.
- Agencies having NDERs could ask the FEMA Director to recommend that the President authorize NDER activation, or agency heads could apply directly to the President.

If there is general authority to activate NDER members, the sponsoring agency may call up their own reservists as they deem appropriate—individually or as units.

Procedures Upon Activation

The activation procedures depend on a reservist's status.

- An NDER being activated as a WOC ("without compensation" employee) must complete application forms related to Waiver of Compensation (SF 171) and the Financial Interest Holdings (DOE 3735.1). In addition, the DOE will have to file in the *Federal Register* a DPA disclosure regarding the WOC position with information on the proposed appointee. The reservist will then take the Oath of Office.

- An NDER who is being activated as a full-time paid federal employee (such as Director, Deputy Director) will update form SF 171 and the Financial Interest Holdings form (DOE 3735.1).
- Dependent upon the duration of the activation, physical relocation and the cost of relocation of the reservist and reservist's family will need to be addressed. This report recommends that the government pay the reservist's cost of temporary housing for the initial six months, during which period a program should be developed to provide the reservist with two options:
 - (1) temporary housing expenses would continue at government expense for the duration of the activation, or
 - (2) the reservist and the reservist's family would be relocated, at government expense, to housing at his new location comparable to that occupied by the reservist prior to activation, and upon deactivation relocated back to his original location.

In either of the above options, all moving costs should be at government expense.

Deactivation

At the conclusion of the crisis, or as the crisis de-escalates, the DOE should move promptly to deactivate the NDER unit, or portions of the unit that are no longer required.

Reappointment, Transfer, and Termination

Reappointment

Reservists are appointed for three-year terms. Reservists can be reappointed only if they have attended at least one training session during their three-year term. However, the DOE can authorize reservist reappointment if special circumstances or conditions warrant.

Transfer

Agencies may transfer a reservist from one unit to another, but must obtain advance concurrence from the releasing agency, the reservist, and the reservist's employer.

Termination

Reservists may resign at any time. In addition, agencies may terminate reservist membership if services are no longer required or the reservist no longer meets qualifications.

APPENDIX H

CONFLICT-OF-INTEREST ISSUES

APPENDIX H

CONFLICT-OF-INTEREST ISSUES

This appendix sets out the statutory bases for the financial reporting and divestiture requirements and the limitations on actions while employed by the government and after termination of government service. It also briefly describes the nature of the information that must be disclosed and the types of interests that may require divestiture as well as describing restrictions on actions. Exceptions and waivers, if available, are noted. It is not an exhaustive discussion of all possible applications of the various conflict-of-interest statutes and regulations relevant to the proposals in this report; additional review by counsel should be undertaken if any of these proposals are implemented.

Disclosure and Reporting Requirements

Federal employees are subject to disclosure and reporting requirements determined by the level and source of compensation, duration of the assignment, and whether or not the position is classified as "supervisory" or "policy making," or both. The statutes, which may apply to an employee in the Department of Energy, are:

1. Defense Production Act of 1950 (DPA), 50 U.S.C. §§ 2061 et seq.
2. Department of Energy Organization Act (DOEOA), 42 U.S.C. §§ 7211 et seq.
3. Financial Disclosure Requirements of Federal Personnel (FDRFP), 5 U.S.C. App. 6, also known as the Ethics in Government Act of 1978.
4. Crimes and Criminal Procedures, 18 U.S.C. Ch. 11.

The DPA lapsed on October 20, 1990, but it is assumed that it will be reauthorized in substantially similar form in the next Congressional session.

General Federal Employee Requirements

Any executive branch employee or officer, including special government employees (employees who serve less than 131 out of any 365 consecutive days without regard to the source of their compensation) whose position is classified at GS-16 or above or whose basic rate of pay is equivalent to or greater than GS-16, or anyone determined by the Director of the Office of Government Ethics to be of equal classification, must file financial disclosures specified in the Financial

Disclosure Requirements of Federal Personnel, Appendix 6 to Title 5 of the United States Code (also known as the "Ethics in Government Act of 1978"). Persons who serve less than 61 days are excepted, and waivers with significant limitations may be granted to persons who expect to serve more than 61 days but less than 130 in any calendar year. (FDRFP §§ 101 (h) and (i).) Unless this waiver is granted, classification as a special government employee does not affect reporting requirements.

Persons subject to the disclosure requirements must report for the preceding calendar year the source, type, and amount of income from any source; the source and a brief description of any reimbursement received; the identity and value of any interest in property held for investment or the production of income; the identity and category of liabilities owed to any creditor exceeding \$10,000 (excluding liabilities on a personal residence or automobile); a brief description, date, and value of any purchase, sale, or exchange of real property (other than a personal residence) or securities; identity of all positions held as an officer, director, employee, or consultant of any firm, nonprofit organization, or any educational or other institution; a description of the duties performed for any source compensating the employee more than \$5,000 in the prior two calendar years; and a description of the date, parties to, and terms of any agreement with respect to future employment, a leave of absence during the period of government service, continuation of payments by a former employer, or continuing participation in an employee welfare or benefit plan maintained by a former employer. Certain information must also be reported regarding the individual's spouse or dependent children. This description of the reporting requirements is very brief and is provided merely to give an outline of the categories of information required. (FDRFP § 102.)

Failure to file or filing a false report is subject to a civil penalty of \$10,000. (FDRFP §104.) The reports will be made available to the public for six years after filing. There is a prohibition against improper use of publicly available information, and a fine up to \$10,000 may be imposed. The only permissible commercial use is in the content of news stories. (FDRFP §105).

DOE Employee Requirements

Any DOE employee must file a report which discloses the amount and identity of the source of all income received from any "energy concern" by the employee, spouse, or dependent children and the value of interest held in any energy concern on an annual basis. (DOEOA § 7211(b).) Within 60 days of becoming a supervisory employee, an individual must file a report identifying any energy concern which paid him compensation in excess of \$2,500 in any of the previous five calendar years. The report must describe the relationship between the individual and the source and the duties performed or services rendered. (DOEOA § 7214.) A supervisory employee is defined in the DOE Organization Act as an individual in a position of GS-16 or above or a comparable level on any other federal pay scale (currently approximately \$71,000 per year); an individual who has primary respon-

sibility for the award, review, modification, or termination of any grant, contract, award, or fund transfer; or any other individual who, in the opinion of the Secretary of Energy, exercises sufficient decision-making or regulatory authority so that the reporting requirements should apply. (DOEOA § 7215 (b) (1).)

A former supervisory employee must file, not later than May 15 of the first and second calendar years after the first full year after termination, a report of any employment with an energy concern during the reporting period. No report is required if, at the time of termination, the individual has an agreement for future employment with an energy concern and that agreement is reported within 30 days of terminating DOE employment. An amended report must be filed if the individual accepts employment with another energy concern within the two calendar years after termination. (DOEOA § 7215 (b) (i).)

There is a multi-page form in current general federal use, and completed forms are available to the public on request. There is also a short form used by the DOE for those persons not required to file the long form, and parts of it are not disclosed to the public. The DOE has advised that most, if not all, volunteers would file the DOE short form. A copy is included at the end of this appendix.

WOCs and Disclosure Requirements

A provision of the lapsed Defense Production Act allowed an individual to be employed by the federal government but continue to be paid by his private-sector employer. Thus, he serves "without compensation" (WOC). WOCs cannot serve in policy-making positions, and the President is encouraged to use full-time, salaried employees. (DPA § 2160 (b).)

Each WOC must file a statement which contains the following for publication in the *Federal Register*: the appointee's name; the employing agency or department; title of position; name of private employer; corporations of which he is an officer or director; corporations in which he has stocks, bonds, or financial interests; partnerships in which he is a partner; and businesses in which he owns any similar interests. Follow-up statements showing changes in interest must be filed every six months. (DPA § 2160 (b)(6).)

The DOE has advised that this disclosure would be in addition to that disclosure in the previous sections.

Divestiture Requirements

DOE supervisory employees, as defined above, are prohibited by provisions of the DOE Organization Act from knowingly receiving compensation from or holding any official relationship with any energy concern or owning any stocks or

bonds of any energy concern or having any pecuniary interest therein. As with the reporting requirements, the Secretary of Energy may designate any other individual who exercises sufficient decision-making or regulatory authority as subject to the divestiture provisions. (DOEOA § 7212.)

Waiver

The Secretary is authorized to waive the divestiture requirements if exceptional hardship would result or if the interest is a pension, insurance, or other similarly vested interest. (DOEOA § 7212(c).)

Operational Limitations

There are limitations on actions that can be taken while in government service and on activities that can be engaged in after leaving government service. The limitations are found in a federal criminal statute of general applicability, 18 U.S.C. Ch. 11, and in the Department of Energy Organization Act, 42 U.S.C. §§ 7211, et seq. To avoid a repetition of the detailed, specific requirements of criminal statutes, the following shorthand terms will be used:

- (1) "covered matter" is "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter."
- (2) "specific covered matter" is "a covered matter which involves a specific party or parties and in which the U.S. is a party or has a direct and substantial interest."
- (3) "action" is "any decision, approval, disapproval, recommendation, advice, investigation, or otherwise."
- (4) "contact" is "any appearance before or, with intent to influence, any oral or written communication with."

Restrictions During Employment

I. General Federal Restrictions

A. A federal employee, including a special government employee (SGE), which is an employee who serves less than 131 out of any 365 consecutive days without regard to the source of his compensation, is generally prohibited from taking action in any covered matter in which he or specified related individuals, including any person with whom he has or is negotiating an arrangement for prospective employment, has a financial interest. This

restriction does not apply if the employee fully discloses his financial interests and there is a written determination that the interest is not deemed likely to affect his action. All determinations are made available to the public. Fines and imprisonment, up to five years for a knowing violation, may be assessed. (18 U.S.C. § 208.)

B. For one year after terminating employment with an energy concern, no DOE supervisory employee, which is defined in the DOE Organization Act as an individual in a position of GS-16 or above or a comparable level on any other federal pay scale (currently approximately \$71,000 per year); an individual who has primary responsibility for the award, review, modification, or termination of any grant, contract, award, or fund transfer; or any other individual who, in the opinion of the Secretary, exercises sufficient decision-making or regulatory authority so that the reporting requirements should apply, shall knowingly participate in any DOE proceeding in which his former employer is substantially, directly, or materially involved, except a rule-making proceeding that has a substantial effect on numerous energy concerns. (42 U.S.C. § 7216(a).)

II. DOE Employee Restrictions

For one year after beginning service with the DOE, no supervisory employee shall knowingly participate in any DOE proceeding for which, within the previous five years, he had direct responsibility, or in which he participated personally or substantially while employed by an energy concern. (42 U.S.C. § 7216(b).)

Waiver

The Secretary of Energy may waive the application of this restriction by making a written finding, with respect to a particular employee, that application would work an exceptional hardship on the employee or would be contrary to the national interest. The waiver must be filed within any DOE records of the proceeding to which it applied. (42 U.S.C. § 7216 (c).)

Post-Employment Restrictions

I. General Federal Restrictions

A. Restrictions on Actions

1. No former federal employee, including SGEs, may knowingly act for another in any contact with any federal entity or employee in connection with a specific covered matter in which he participated personally and substantially. (18 U.S.C. § 207(a)(1).)

2. No former federal employee, including SGEs, may, within two years of termination, knowingly make a contact for another person with any federal entity or employee in connection with a specific covered matter which was actually pending under his official responsibility within one year prior to termination. (18 U.S.C. § 207(a)(2).)

3. No former employee compensated at a rate equal to or greater than GS-17, except an SGE who served for less than 60 days in the year prior to termination, may within one year of termination, knowingly make contact on behalf of any person with the intent to influence official action by any officer or employee of the department or agency in which he served within one year of his termination as an employee. (18 U.S.C. § 207(c).)

4. Violations of these restrictions are subject to fines up to \$50,000 or the compensation received for the prohibited conduct, whichever is greater, and imprisonment up to one year for an offense and up to five years for willful violations. (18 U.S.C. § 216.)

5. Exceptions: These restrictions do not apply to matters of a strictly personal and individual nature.

6. Waiver: The Director of the Office of Government Ethics may only grant a waiver of the restrictions in paragraph 3 if it is determined that imposition would create hardship on the department seeking qualified personnel and the waiver would not create the potential for use of undue influence or unfair advantage. (18 U.S.C. § 216(c)(2)(D).)

B. Antibribery Provisions

1. Any federal employee who receives compensation for services as a federal employee from any source other than the federal government, except contributions from the treasury of any state, county, or municipality, or any individual or entity which makes a contribution to a federal employee, as compensation for prohibited actions may be imprisoned for up to one year for a violation and up to five years for a knowing violation. A civil penalty of up to the greater of \$50,000 or the amount offered as compensation may be assessed. This does not prohibit a federal employee from continuing to participate in a bona fide pension or retirement plan; group life, health, or accident insurance; or profit sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer. (18 U.S.C. § 209(a) & (b).)

2. Exceptions: These restrictions do not apply to special government employees or to WOCs, whether or not they are SGEs, or to any person paying, contributing to, or supplementing their salary. (18 U.S.C. § 209(c).)

II. DOE Employee Restrictions

A. A former DOE supervisory employee is, for one year after termination, prohibited from knowingly making any appearance or attendance before the DOE, or making any written or oral communication to the DOE with the intent to influence its action, if the appearance or communication relates to any particular matter pending before the DOE. The prohibition does not apply if the individual is an employee of or represents the federal government, is responding to a subpoena, or is addressing an exclusively personal and individual matter. Also, an individual with outstanding scientific or technical qualifications is not prohibited from appearing in connection with a particular matter within his field of expertise if the Secretary of Energy makes a written certification, published in the *Federal Register*, that the national interest would be served by the appearance. (42 U.S.C. § 7215(a).)

B. Violations of these restrictions are only subject to fines, but the fact that a prohibited appearance or communication occurred can be considered in determining the proper outcome of the proceeding.

III. Restriction on Others

Anyone who is a partner of a federal employee, including SGEs, who acts as an agent or attorney for anyone other than the U.S. government before any federal entity in connection with a specific covered matter in which the employee participates or participated personally and substantially through action is subject to fines and imprisonment. (18 U.S.C. § 207(g).)

U.S. DEPARTMENT OF ENERGY
REPORT OF FINANCIAL INTERESTS

GENERAL INSTRUCTIONS

1. This form is for use by all DOE employees except those using Standard Form 278 and those occupying positions exempted under section 1010.403(a) of title 10, Code of Federal Regulations. If additional pages are necessary, attach them hereto and identify them by reference to the appropriate Part(s) of the form. The employee's name should be indicated on any additional pages attached to the form. The employee should complete Parts A and B of the form, and submit the form to the Reviewing Official. The Reviewing Official shall complete paragraph 1 of Part C of the form and forward the form to the Counselor.
2. This report is made on a calendar year basis and is to include interests held at any time during the reporting period even if no longer held at the time the report is made. New employees (including reappointed special Government employees) shall report for the current year through the date of the report; departing employees shall report for the current year through the date of departure *and* for the previous calendar year if such information has not previously been reported; all others shall report for the immediately previous calendar year ending December 31, except that information relating to holding a position as an employee, officer, owner, etc., in any entity shall be reported for the previous calendar year and the current calendar year to the date of the report.
3. The interest, if any, of a spouse, minor child, or dependent (as dependent is defined by Section 152 of the Internal Revenue Code of 1954) shall be reported in this statement and marked with an "(S)" or "(D)", as appropriate.
4. It is the employee's responsibility to provide all requested information. In the event the employee is not permitted access to any of the required information, such as holdings placed in certain forms of trust, but that information is known to another person, the employee should request that other person to submit the information to the Reviewing Official and should report such request in Part B(IV) of the form.
5. "Energy concern" means any person (other than an entity covered by paragraph 6):
- (i) holding an interest in property from which coal, natural gas, crude oil, nuclear material, or a renewable resource is commercially produced or obtained;
 - (ii) significantly engaged in the business of:
 - (A) developing, extracting, producing, refining, transporting by pipeline, converting into synthetic fuel, distributing, or selling minerals for use as an energy source, or in the generation or transmission of energy from such minerals or from wastes or renewable resources;
 - (B) producing, generating, transmitting, distributing, or selling electric power;
 - (C) development, production, processing, sale, or distribution of nuclear materials, facilities, or technology; or,
 - (D) conducting research, development or demonstration related to an activity described in subparagraph (i) or in this subparagraph; or
 - (iii) significantly engaged, whether or not for profit, in conducting such research, development, or demonstration related to an activity described in subparagraph (i) or (ii) or with financial assistance under any Act the functions of which are vested in or delegated or transferred to the Secretary or the Department.
- For the purposes of reports required by Pub. L. 94-163 and Pub. L. 95-39, "energy concern" includes "energy businesses" and "energy properties" as those terms are used in those Acts.
6. "Energy concern" does not include religious organizations; mutual funds; or regulated investment companies the portfolios of which are widely diversified, or similarly constituted, commercially fungible entities. Utility cooperative membership or ownership required to obtain services is not considered an interest in an energy concern.
7. Notwithstanding the filing of this report, each employee shall at all times avoid acquiring a financial interest or taking an action that could result in a violation of the conflict of interest provisions of 10 C.F.R. Part 1010.
8. Part A of this report is available to the public pursuant to section 607 of Pub. L. 95-91 (42 U.S.C. 7217) and is designed for use by employees to disclose interests in "energy concerns" as required by section 603 of Pub. L. 95-91 (42 U.S.C. 7213). Part B is not available to the public; it is designed to implement the disclosure requirements of Executive Order 11222 and implementing regulations at 5 C.F.R. Part 735. In addition, it is designed for the purpose of assuring against inadvertent failure to disclose interests in a person or entity which, pursuant to Pub. L. 95-91, is determined by the Secretary to be an energy concern. Employees may be asked to supply additional information regarding interests reported in Part B when the Counselor believes such interests may be interests in energy concerns. Such additional information will remain confidential unless and until the entity in which the interest is held is determined to be an energy concern.

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PRIVACY ACT STATEMENT

- (A) This request for information is authorized by section 207(a), title 5 (app. 4), U.S.C.; Executive Order 11222, as amended by E.O. 12565; Regulations at 5 C.F.R. Part 735 (see also Federal Personnel Manual, Chapter 735); Section 603 of Pub. L. 95-91, 42 U.S.C. 7213; and DOE Regulations at 10 C.F.R. Part 1010. This submission of information is required for all DOE employees other than those using Standard Form 278 and those occupying positions exempted under 10 C.F.R. 1010.403(a).
- (B) The information is intended to help identify employment and other financial interests of the employee or the employee's spouse, minor child, or dependent(s) which create conflicts of interest or the appearance thereof in the context of the employee's duties and responsibilities.
- (C) The uses which may be made of the requested information consist of review by the employee's Reviewing Official and the Counselor to assist in determining whether the employee's employment or other financial interests conflict or appear to conflict with the performance of official duties; counseling the employee in avoiding conflicts; and assignment of duties. The information may also be used by authorized representatives of the DOE Inspector General, the Department of Justice, the Office of Government Ethics, and the Comptroller General in the course of the performance of their law enforcement and administrative responsibilities. Part A of this form shall be available to the public in accordance with section 607 or Pub. L. 95-91, 42 U.S.C. 7217, and 10 C.F.R. 1010.402. Part B is not available to the public, but see paragraph 8 of General Instructions.
- (D) Failure to provide all the requested information may result in disciplinary action or denial of employment (10 C.F.R. 1010.502).

PLEASE FILL OUT COMPLETELY

INCUMBENT
 NEW ENTRANT
 TERMINATION FILER

1. NAME (last, first, middle initial)	2. OFFICE PHONE	3. CORRESPONDENCE SYMBOL	4. POSITION TITLE
5. DATE OF APPOINTMENT TO PRESENT POSITION	6. OFFICE AND DIVISION		7. DUTY STATION LOCATION
8. INDICATE YOUR EMPLOYMENT STATUS (mark appropriate box) <input type="checkbox"/> Regular Employee <input type="checkbox"/> Special Government Employee <input type="checkbox"/> Other, Specify: _____		9. PRESENT OR PROPOSED GRADE OR PAY LEVEL	10. DESCRIPTION OF DUTIES

PART A — ENERGY CONCERN INTERESTS ** (DO NOT ABBREVIATE NAMES OF ORGANIZATIONS)

I. EMPLOYMENT AND OTHER FINANCIAL INTERESTS:
 List the names of all corporations, companies, firms, or other business enterprises, partnerships, nonprofit organizations and educational institutions, or other entities that are, or you believe to be, energy concerns with which or in which you, your spouse, minor child or dependent:

a. are connected as an employee, officer, owner, director, member, trustee, partner, advisor, or consultant; or b. have any continuing financial interest, through pension or retirement plan, shared income or	other arrangement as a result of any current or prior employment or business or professional associations; or c. have any financial interest through ownership of stocks, stock options, bonds, securities, or other arrangements, including trusts.
--	---

(1) NAME, ADDRESS (or the exchange in which the securities are traded), and KIND OF ORGANIZATION (e.g. corp., partnership, nonprofit organization, etc.) <input type="checkbox"/> check, if NONE	(2) NATURE OF FINANCIAL INTEREST (stock, prior business, income, etc.)	(3) POSITION IN ORGANIZATION (employee, officer, owner, etc.)	(4) CATEGORY OF AMOUNT AND VALUE (indicate both by check mark (✓))							
			CATEGORY	\$1,000 or less	\$1,001 to \$2,500	\$2,501 to \$5,000	\$5,001 to \$15,000	\$15,001 to \$50,000	\$50,001 to \$100,000	Over \$100,000
			AMOUNT OF INCOME							
			VALUE							
			AMOUNT OF INCOME							
			VALUE							
			AMOUNT OF INCOME							
			VALUE							

II. CREDITORS:
 List your creditors that are, or you believe to be, energy concerns, other than those to whom you may be indebted by reason of a mortgage on property which you occupy as a personal residence or to whom you may be indebted for current and ordinary household and living expenses, such as household furnishings, automobile, education, vacation, or similar expenses.

(1) NAME AND ADDRESS OF CREDITOR <input type="checkbox"/> check, if NONE	(2) CHARACTER OF INDEBTEDNESS (e.g. personal loan, note, security)

III. INTERESTS IN REAL PROPERTY:
 List your interests in real property or rights in lands from which coal, natural gas, crude oil, nuclear material, or a renewable resource is commercially produced or obtained.

(1) NATURE OF INTEREST (e.g. ownership, mortgage, lien, investment, trust, etc.) <input type="checkbox"/> check, if NONE	(2) TYPE OF PROPERTY (e.g. residence, hotel, apartment, farm, undeveloped land, oil and gas rights, other mineral interests, etc.)	(3) ADDRESS (if rural, give RFD, or county and State)

INFORMATION ON THIS PAGE IS AVAILABLE TO THE PUBLIC

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(OMIT INFORMATION REPORTED IN PART A) **

PART B — OTHER INTERESTS

** (DO NOT ABBREVIATE NAMES OF ORGANIZATIONS)

I. EMPLOYMENT AND OTHER FINANCIAL INTERESTS:

1. List the names of all corporations, companies, firms, or other business enterprises, partnerships, nonprofit organizations and educational institutions, or other entities with which or in which you, your spouse, minor child or dependent:
 - a. are connected as an employee, officer, owner, director, member, trustee, partner, adviser, or consultant or with which you are negotiating or have any arrangement concerning prospective employment; or
 - b. have any continuing financial interest, through a pension or retirement plan, shared income, or otherwise, as a result of any current or prior employment or business or professional associations; or
 - c. have any financial interest through ownership of stocks, stock options, bonds, securities, or other arrangements, including trusts

2. Do not include any information relating to a professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization, or any similar organization not conducted as a business enterprise and which is not engaged in the ownership or conduct of a business enterprise. Educational and other institutions doing research and development or related work involving grants of money from or contracts with the Government are deemed to be "business enterprises" for the purpose of this report and should be included.
3. The information to be listed in the Part does not require a showing of the amount of financial interest, indebtedness, or the value of real property.

II. CREDITORS:

List the names of your creditors other than those to whom you may be indebted by reason of a mortgage on property which you occupy as a personal residence or to whom you may be indebted for current and ordinary household and living expenses such as household furnishings, automobile, education, vacation, or similar expenses.

(1) NAME, ADDRESS (or the exchange in which the securities are traded); and KIND OF ORGANIZATION (e.g. corp., partnership, nonprofit organization, etc.) <input type="checkbox"/> check if NONE	(2) NATURE OF FINANCIAL INTEREST (stock, prior business income, etc.)	(3) POSITION IN ORGANIZATION (employee, officer, owner, etc.)

(1) NAME AND ADDRESS OF CREDITOR <input type="checkbox"/> check, if NONE	(2) CHARACTER OF INDEBTEDNESS (e.g. personal loan, note, security)

III. INTERESTS IN REAL PROPERTY:

List your interests in real property or rights in lands, other than property which you occupy as a personal residence.

(1) NATURE OF INTEREST (e.g. ownership, mortgage, lien, investment trust, etc.) <input type="checkbox"/> check, if NONE	(2) TYPE OF PROPERTY (e.g. residence, hotel, apartment, farm, undeveloped land, mineral interests, etc.)	(3) ADDRESS (if rural, give RFD, or county and State)

IV. INFORMATION REQUESTED OF OTHER PERSONS: Complete if information is to be supplied by other persons, e.g., trustee, attorney, accountant, relative, etc. Enter information requested below.

NAME AND ADDRESS (person to furnish information)	DATE OF YOUR REQUEST	NATURE OF SUBJECT MATTER

I certify that the statements I have made on Parts A and B of this form are true, complete, and correct, to the best of my knowledge and belief. I understand falsification of statements on this form is punishable in accordance with law (18 U.S.C. 1001 and 42 U.S.C. 7218).

PRINT OR TYPE NAME AND HOME ADDRESS (include Zip Code)

SIGNATURE

DATE

INFORMATION ON THIS PAGE IS NOT AVAILABLE TO THE PUBLIC

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PART C — DETERMINATIONS
(FOR USE BY DOE)

Instructions to Reviewing Official:

CAUTION: Administrative sanctions may be imposed against you for failure to perform review functions properly. (See 10 C.F.R. 1010.502(d).) Your review functions may not be redelegated. (See 10 C.F.R. 1010.103(r).) **DO NOT REPRODUCE OR RETAIN COPIES OF THIS FORM.** Upon completion of your review, forward this form to the Counselor in a sealed envelope marked "TO BE OPENED BY ADDRESSEE ONLY — CONFIDENTIAL REPORT OF FINANCIAL INTERESTS"

Under applicable law and DOE regulations:

No employee is to participate in any particular matter of any type the outcome of which could have a direct and predictable effect upon a business entity, including nonprofit organization or educational institution, by which he is employed or with which he is negotiating for or has any arrangement concerning prospective employment, or to which he renders consultant services, or in which he has a financial interest not exempted under 10 C.F.R. 1010.302.

1. Reviewing Official: I have reviewed this report in the context of the applicable law stated above and in relation to the employee's duties and responsibilities, and I find:

- no conflict or apparent conflict of interest.
- the following interests pose potential conflict of interest situations:

The following steps have been taken to effect resolution of the potential conflict situations referred to above:

- the following questions require resolution:

Name of Reviewing Official (*print or type*)

Signature of Reviewing Official

Date

2. Counselor (or Deputy Counselor): I have reviewed the statement of the employee and the Reviewing Official's findings above and find:

- no evidence of conflict or apparent conflict of interest.
- the following interests pose potential conflict of interest situations:

The following steps have been taken to effect resolution of the potential conflict situations referred to above:

Name of Counselor (*print or type*)

Signature of Counselor

Date

INFORMATION ON THIS PAGE IS NOT AVAILABLE TO THE PUBLIC

APPENDIX I



PROPOSED AMENDMENTS TO
THE DEFENSE PRODUCTION ACT

APPENDIX I

PROPOSED AMENDMENTS TO THE DEFENSE PRODUCTION ACT

In January 1990, the Administration submitted to Congress specific proposals and legislative language to amend the Defense Production Act (DPA). The proposed amendments were intended, in part, to mitigate or eliminate conflict-of-interest, antitrust, and FACA issues that have constrained the establishment and effective utilization of a petroleum NDER. These proposed amendments were ultimately included in the House version of the DPA reauthorization, but the language did not survive the conference deliberations. In any event, the conference bill was not acted upon, and the DPA expired (with the exception of two sections) on October 20, 1990.

The Administration's proposal¹ provided detailed descriptions and rationales for the amendments. In brief, the proposed bill amended the policy statement of the Defense Production Act to introduce the "graduated mobilization response" concept. This concept provides for a graduated response to early warning indicators to ensure the timely availability of adequate industrial production and resources to meet national defense requirements.

The bill also would have repealed the prohibition in the Act against international voluntary agreements. This repeal would allow the United States to meet its oil supply commitments to NATO and other such agreements.

In addition, the bill would have provided the President with the power to grant antitrust immunity for members of the National Defense Executive Reserve and special government employees serving without compensation during training and national emergencies. It also would have provided the President with the power to grant conflict-of-interest waivers when he certifies that such action is in the national interest.

As of January 1991, the prospects for DPA reauthorization are uncertain. If reauthorization in close to its form at expiration becomes likely, the National Petroleum Council supports reconsideration of the original proposals, and also believes that the revisions included in the conference report (H.R. 486) do not provide adequate protection to allow effective activation of the NDER.

¹By letters dated January 31, 1990, FEMA submitted the Administration's proposal to amend the DPA to the leadership and appropriate committee chairmen of Congress. The submission included draft legislation along with a section-by-section analysis and program rationale for the legislation. Copies are in the DOE and NPC files.

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