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DEPARTMENT OF ENERGY

Economic Regulatory Commission

10 CFR Parts 205, 210

Subpoenas, Special Report Orders and Investigations

AGENCY: Economic Regulatory Administration Department of Energy.

ACTION: Final Rule.

SUMMARY: This rule adopts amendments to the Department of Energy's (DOE) administrative procedure regulations regarding subpoenas, special report orders, and investigations. The amendments replace the previous three levels of review with a single level of review and generally streamline the administrative procedures applicable to the issuance and enforcement of subpoenas and special report orders. Since subpoenas and special report orders are related enforcement tools, the provisions relating to both have been consolidated into one section. In addition, the amendments set forth in detail the law enforcement authority of ERA, which is granted under existing statute and which ERA and its predecessors have exercised.

EFFECTIVE DATE: On April 18, 1979, with respect to all investigations and all subpoenas or special report orders issued on or after that date.

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SUPPLEMENTARY INFORMATION:

- I. Background,
- II. Discussion of Comments,
- III. Additional Changes.

I. Background

On January 15, 1979, the ERA issued a Notice of Proposed Rulemaking to amend 10 CFR Part 205 concerning subpoenas and investigations. 44 Fed. Reg. 4346 (January 19, 1979). At the same time ERA proposed to modify 10 CFR 210.91 concerning special report orders (SRO), and to consolidate this regulations with the subpoena regulations in Part 205. The Notice announced a Public Hearing to be held on February 15, 1979, and invited submission of written comments by March 21, 1979. Three petroleum firms and one industry association presented oral statements at the public hearing. In addition, a total of 13 petroleum firms, one industry association, one law firm, and one legal foundation submitted written comments with regard to the proposed rulemaking.

The ERA has fully considered all comments and has incorporated some of the suggested changes in the final regulations. Except for these modifications the final regulations are unchanged from the proposed regulation published on January 19, 1979. Therefore, the findings and analysis set forth in the Notice of Proposed Rulemaking and Public Hearing are incorporated into this Notice by reference. 44 FR 4346 (January 19, 1979).

II. Discussion of Comments

The majority of the commenters objected to the elimination of the opportunity for an administrative appeal of a subpoena or SRO. Many disagreed with the proposed provisions relating to the filing and consideration of a request for review by the respondent under Section 205.8(b) and urged the retention of the current three levels of DOE review. It was asserted that the proposed procedures denied a person served with a subpoena or SRO the opportunity to present objections to the ERA and have them heard by an impartial, disinterested body which would be required to issue findings of fact and conclusions of law in the event of a denial. The effect of the proposed procedures, it was contended, was to prevent administrative settlements of subpoenas and SROs.

After consideration of all comments, the ERA has determined that it is not appropriate to insert any further levels of review for the reasons noted in the preamble to the Proposed Regulations. The regulations are intended to facilitate investigations and do not create a right of administrative appeal. Rather, the procedures for consideration of requests for review are intended to provide the ERA with the opportunity to consider the respondent's objections prior to the time for compliance. Neither adjudicatory hearings nor findings of fact are mandatory in the case of investigative subpoenas or SROs. Furthermore, a respondent's interest in due process with respect to enforcement of a subpoena or SRO is adequately protected by his right to judicial review. Finally, the ERA has concluded that the final rule does not impede administrative settlements but in fact affords ample opportunity for the resolution of issues prior to the time for compliance.

Six of the commenters requested that the supervisor of the issuing DOE official be expressly authorized under § 205.8(b) to negotiate compromises and to extend the time for compliance. To ensure due consideration of requests for review and to further the possibility of resolving issues prior to the time for compliance, § 205.8(b) has been modified accordingly.

Upon the suggestion of eight commenters the ERA has provided for a 10-day period within which to comply with a subpoena or SRO after expiration of the 10-day period for rescission or modification of such a document. Thus, unless the supervisor or his designee otherwise notifies the recipient of such a document, compliance will be required within 20 days of the date of the supervisor's notice of receipt of a request for review. In light of this change, the ERA has determined that it is not necessary to provide for an automatic stay of the compliance period upon the filing of a request for review, as several commenters had recommended.

The ERA believes that the 10-day period for filing, together with the 10-day period for consideration of requests for review and the 10-day period for compliance, will provide ample opportunity for resolution of issues prior to the time for compliance.

Although eight commenters requested that the 10-day time period for filing a request for review be expanded to a 20 or 30 day period, ERA does not believe this is necessary. The time for filing can be extended under 10 CFR 205.6.

Many commenters indicated that the definition of "DOE Official" in 10 CFR 205.8(a) appeared to be overly broad, and somewhat circuitous, and granted excessive authority to low-level DOE employees. This subsection has been modified as described below to indicate specifically the officials within DOE who are included within the definition.

The majority of commenters objected to the requirement that documents submitted be accompanied by a sworn certification under penalty of perjury. Administrative agencies typically require such certifications to accompany documents or information required to be furnished to the United States Government in recognition of the requirement for full compliance. Many commenters, however, indicated that in the case of a voluminous number of documents or a large firm, it would be impossible for the respondent to make such an unqualified certification. Accordingly, the ERA has modified this provision of § 205.8(f) to permit an authorized agent of the respondent to make the certification in case of a subpoena as well as an SRO. In addition, language has been added to § 205.8(f)(1) to indicate that the respondent certifies that each document responsive to a subpoena is being produced "to the best of his knowledge, information, and belief."

All commenters objected to the requirement of § 205.8(h) that upon written request a person served with a subpoena or SRO shall be notified of the "general purpose" of the document. Many commenters incorrectly assumed that the general purpose of a subpoena or SRO would be provided only upon written request. It was ERA's intention to include a statement of general purpose in each subpoena or SRO. However, in order to eliminate any confusion, the ERA has deleted proposed § 205.8(h) from the final rule. A statement of the general purpose of a subpoena or SRO will be included in each subpoena and SRO.

Proposed § 205.201(e) has been modified so that it permits a person requested to furnish documents or testimony, without the issuance of a subpoena, to obtain a statement of the purpose upon written request.

A few commenters stated that the decision to record testimony under proposed § 205.8(i) should not be discretionary with the DOE Official.

Rather, testimony should be required to be recorded in all instances or when requested by the witness whose testimony is taken. Other commenters suggested that the witness or his attorney should have the right to review and correct the transcript. Although such practices may be appropriate in an adjudicatory proceeding, the ERA has determined that they should not be mandatory in cases where testimony is taken as part of an investigation. For this same reason, the ERA also has concluded that the modification suggested by three commenters that the witness' attorney be allowed to ask questions at the conclusion of the witness' testimony should not be implemented.

Some commenters stated that § 205.8(h) should be revised to require that a witness be provided with a copy of his testimony. Testimony may be recorded under § 205.8(h) for investigatory purposes. As the ERA need not provide copies of notes of a witness' testimony, it likewise is not required to furnish the witness with a copy of his testimony.

Four commenters suggested that any document or statement submitted during an investigation under § 205.201(g) be considered part of the "official record". There is no "official record" as that term is used in adjudicatory proceedings. The ERA intends that any document submitted would be considered in the same manner as all other documents or information gathered during an investigation.

A few commenters suggested that § 205.8(k) should specify the "necessary action" that could be taken to regulate testimony and "prevent or restrain contemptuous or obstructionist conduct. . . ." The ERA believes that such enumeration is unnecessary since the action that may be taken or authorized in a particular case will depend upon the particular circumstances.

The primary objection to the amendments to 10 CFR 205.201 centered on the elimination of subsection (a), which expresses DOE's policy of encouraging voluntary cooperation. Many commenters appeared to be concerned that this deletion reflected a change in current DOE policy. As indicated in the preamble to the proposed rulemaking, the ERA intends to continue its policy of encouraging voluntary cooperation. However, the ERA has concluded that it is not appropriate or necessary to include such a general statement of policy as part of these regulatory provisions.

A few commenters stated that the authority to conduct investigations should be limited to senior DOE officials. The ERA has determined that it is not desirable to foreclose administrative flexibility by specifically enumerating in regulatory provisions specific individuals who are authorized to conduct investigations. This is especially so when the authority to conduct investigations is granted solely by statute or delegation of authority.

Twelve commenters objected to the exception to the § 205.201(f) prohibition against disclosure of information obtained during an investigation, which permits public disclosure when DOE so authorizes and directs. Most asserted that this exception would permit disclosure of privileged information. However, this regulatory provision does not purport to change already existing law concerning public disclosure of privileged information.

The Federal Energy Regulatory Commission decided not to exercise its discretion to determine whether the proposed rulemaking significantly affects any function within its jurisdiction. Therefore, the Commission did not request referral of the proposal pursuant to § 404 of the DOE act.

III. Additional Changes

As a result of the comments received with respect to the Proposed Rulemaking, several modifications have been added to the final rule. First of all, "DOE Official" in § 205.8(a)(1) has been revised to include specific references to the persons included within the definition. The Assistant Administrator for Enforcement also has been included in § 205.8(a) as a "DOE Official."

Secondly, language in the current regulations has been added to § 205.8(b)(2) to indicate that an SRO requires a special report which provides "information relating to DOE regulations." This provision had been inadvertently omitted from the proposed regulations.

As noted above, the provisions of § 205.8(b)(4) relating to the procedures for filing and consideration of a request for review have been modified. Under the final rule, the Supervisor of the issuing DOE Official has the express authority to extend the time for compliance with the subpoena or SRO and negotiate and approve the terms of satisfactory compliance. This change is intended to assure due consideration of requests for review and facilitate administrative settlement of subpoenas and SROs.

The proposed regulations also have been modified to establish a 10-day

period for compliance with an SRO or subpoena after the expiration of the time for rescission or modification of a subpoena or SRO. This change will alleviate the necessity for a respondent to comply with a subpoena or SRO while a request for review is being considered by the ERA. Due to these changes to § 205.8(b), a new paragraph has been added for organizational purposes.

It should be noted that for purposes of the review provisions, time is computed in accordance with 10 CFR 205.5.

A provision has been added to § 205.8(f) to provide that the respondent to a subpoena certifies that all responsive documents are being produced "to the best of his knowledge, information, and belief." In addition, this subsection has been modified to permit an authorized agent of the respondent to make the certification for a subpoena as well as for an SRO. These changes are intended to facilitate compliance when a voluminous number of documents are being requested or when the respondent is a large firm. In such cases, as noted by many commenters, compliance by the respondent, usually a sole individual, may be extremely burdensome and an unqualified certification impracticable.

For the reasons indicated above, proposed § 205.8(h), which required a statement of general purpose only upon "written request" of the respondent, has been deleted. The remaining subsections of § 205.8 have been appropriately relettered. Proposed § 205.201(e) also has been modified to delete the requirement that a person compelled to furnish documents or testimony be informed of the general purpose "upon written request."

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, as amended; Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385, and Pub. L. 95-70; Department of Energy Organization Act, Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267)

In consideration of the foregoing, Part 205 and Part 210 of Chapter II, Title 10 of the Code of Federal Regulations, are proposed to be amended as set forth below.

Issued in Washington, D.C., April 13, 1979.

David J. Bardin,

Administrator, Economic Regulatory Administration.

1. Section 205.8 is revised to read as follows:

§ 205.8 Subpoenas, special report orders, oaths, witnesses.

(a) In this section the following terms have the definitions indicated unless otherwise provided.

(1) "DOE Official" means the Secretary of the Department of Energy, the Administrator of the Economic Regulatory Administration, the Administrator of Energy Information Administration, the General Counsel of the Department of Energy, the Special Counsel for Compliance, the Assistant Administrator for Enforcement, the Director of the Office of Hearings and Appeals, or the duly authorized delegate of any of the foregoing officials.

(2) "SRO" means a Special Report Order issued pursuant to Subsection (b) of this section.

(b) (1) In accordance with the provisions of this section and as otherwise authorized by law, a DOE Official may sign, issue and serve subpoenas; administer oaths and affirmations; take sworn testimony; compel attendance of and sequester witnesses; control dissemination of any record of testimony taken pursuant to this section; subpoena and reproduce books, papers, correspondence, memoranda, contracts agreements, or other relevant records or tangible evidence including, but not limited to, information retained in computerized or other automated systems in possession of the subpoenaed person. Unless otherwise provided by Subpart O, the provisions of this section apply to subpoenas issued by the office of Hearings and Appeals with respect to matters in proceedings before it.

(2) A DOE Official may issue a Special Report Order requiring any person subject to the jurisdiction of the ERA to file a special report providing information relating to DOE regulations, including but not limited to written answers to specific questions. The SRO may be in addition to any other reports required by this chapter.

(3) The DOE Official who issues a subpoena or SRO pursuant to this section, for good cause shown, may extend the time prescribed for compliance with the subpoena or SRO and negotiate and approve the terms of satisfactory compliance.

(4) Prior to the time specified for compliance, but in no event more than 10 days after the date of service of the

subpoena or SRO, the person upon whom the document was served may file a request for review of the subpoena or SRO with the DOE Official who issued the document. The DOE Official then shall forward the request to his supervisor who shall provide notice of receipt to the person requesting review. The supervisor or his designee may extend the time prescribed for compliance with the subpoena or SRO and negotiate and approve the terms of satisfactory compliance.

(5) If the subpoena or SRO is not modified or rescinded within 10 days of the date of the supervisor's notice of receipt, (i) the subpoena or SRO shall be effective as issued; and (ii) the person upon whom the document was served shall comply with the subpoena or SRO within 20 days of the date of the supervisor's notice of receipt, unless otherwise notified in writing by the supervisor or his designee.

(6) There is no administrative appeal of a subpoena or SRO.

(c) (1) A subpoena or SRO shall be served upon a person named in the document by delivering a copy of the document to the person named.

(2) Delivery of a copy of the document to a natural person may be made by:

(i) Handing it to the person;

(ii) Leaving it at the person's office with the person in charge of the office;

(iii) Leaving it at the person's dwelling or usual place of abode with a person of suitable age and discretion who resides there;

(iv) Mailing it to the person by registered or certified mail, at his last known address; or

(v) Any method that provides the person with actual notice prior to the return date of the document.

(3) Delivery of a copy of the document to a person who is not a natural person may be made by:

(i) Handing it to a registered agent of the person;

(ii) Handing it to any officer, director, or agent in charge of any office of such person;

(iii) Mailing it to the last known address of any registered agent, officer, director, or agent in charge of any office of the person by registered or certified mail, or

(iv) Any method that provides any registered agent, officer, director, or agent in charge of any office of the person with actual notice of the document prior to the return date of the document.

(d)(1) A witness subpoenaed by the DOE shall be paid the same fees and mileage as paid to a witness in the district courts of the United States.

(2) If in the course of a proceeding conducted pursuant to Subparts M or O, a subpoena is issued at the request of a person other than an officer or agency of the United States, the witness fees and mileage shall be paid by the person who requested the subpoena. However, at the request of the person, the witness fees and mileage shall be paid by the DOE if the person shows:

(i) The presence of the subpoenaed witness will materially advance the proceeding; and

(ii) The person who requested that the subpoena be issued would suffer a serious hardship if required to pay the witness fees and mileage. The DOE Official issuing the subpoena shall make the determination required by this subsection.

(e) If any person upon whom a subpoena or SRO is served pursuant to this section, refuses or fails to comply with any provision of the subpoena or SRO, an action may be commenced in the United States District Court to enforce the subpoena or SRO.

(f)(1) Documents produced in response to a subpoena shall be accompanied by the sworn certification, under penalty of perjury, of the person to whom the subpoena was directed or his authorized agent that (i) a diligent search has been made for each document responsive to the subpoena, and (ii) to the best of his knowledge, information, and belief each document responsive to the subpoena is being produced unless withheld on the grounds of privilege pursuant to subsection (g).

(2) Any information furnished in response to an SRO shall be accompanied by the sworn certification under penalty of perjury of the person to whom it was directed or his authorized agent who actually provides the information that (i) a diligent effort has been made to provide all information required by the SRO, and (ii) all information furnished is true, complete, and correct unless withheld on grounds of privilege pursuant to subsection (g).

(3) If any document responsive to a subpoena is not produced or any information required by an SRO is not furnished, the certification shall include a statement setting forth every reason for failing to comply with the subpoena or SRO.

(g) If a person to whom a subpoena or SRO is directed withholds any document or information because of a claim of attorney-client or other privilege, the person submitting the certification required by subsection (f) also shall submit a written list of the documents or the information withheld indicating a description of each

document or information, the date of the document, each person shown on the document as having received a copy of the document, each person shown on the document as having prepared or been sent the document, the privilege relied upon as the basis for withholding the document or information, and an identification of the person whose privilege is being asserted.

(h)(1) If testimony is taken pursuant to a subpoena, the DOE Official shall determine whether the testimony shall be recorded and the means by which the testimony is recorded.

(2) A witness whose testimony is recorded may procure a copy of his testimony by making a written request for a copy and paying the appropriate fees. However, the DOE official may deny the request for good cause. Upon proper identification, any witness or his attorney has the right to inspect the official transcript of the witness' own testimony.

(i) The DOE Official may sequester any person subpoenaed to furnish documents or give testimony. Unless permitted by the DOE Official, neither a witness nor his attorney shall be present during the examination of any other witnesses.

(j)(1) Any witness whose testimony is taken may be accompanied, represented and advised by his attorney as follows:

(i) Upon the initiative of the attorney or witness, the attorney may advise his client, in confidence, with respect to the question asked his client, and if the witness refuses to answer any question, the witness or his attorney is required to briefly state the legal grounds for such refusal; and

(ii) If the witness claims a privilege to refuse to answer a question on the grounds of self-incrimination, the witness must assert the privilege personally.

(k) The DOE Official shall take all necessary action to regulate the course of testimony and to avoid delay and prevent or restrain contemptuous or obstructionist conduct or contemptuous language. DOE may take actions as the circumstances may warrant in regard to any instances where any attorney refuses to comply with directions or provisions of this section.

2. Section 205.201 is revised to read as follows:

§ 205.201 Investigations.

(a) The DOE may initiate and conduct investigations relating to the scope, nature and extent of compliance by any person with the rules, regulations or statutes of the DOE or any order, court decree or agency action relating thereto.

(b) Any duly designated and authorized representative of DOE has the authority to conduct an investigation and to take such action as he deems necessary and appropriate to the conduct of the investigation including any action pursuant to § 205.8.

(c) There are no parties, as that term is used in adjudicative proceedings, in an investigation under this Subpart, and no person may intervene or participate as a matter of right in any investigation under this Subpart.

(d) Any person may request the DOE to initiate an investigation pursuant to subsection (a) of this section. A request for an investigation shall set forth the subject matter to be investigated as fully as possible and include supporting documentation and information. No particular forms or procedures are required.

(e) Any person who is requested to furnish documentary evidence or testimony in an investigation, upon written request, shall be informed of the general purpose of the investigation.

(f) DOE shall not disclose information or documents that are obtained during any investigation unless (i) DOE directs or authorizes the public disclosure of the investigation; (ii) the information or documents are a matter of public record; or (iii) disclosure is not precluded by the Freedom of Information Act, 5 U.S.C. § 552 and 10 CFR Part 1004. A request for confidential treatment of information for purposes of the Freedom of Information Act shall not prevent disclosure by DOE if disclosure is determined to be in the public interest and otherwise permitted by law.

(g) During the course of an investigation any person may submit at any time any document, statement of facts or memorandum of law for the purpose of explaining the person's position or furnish evidence which the person considers relevant to a matter under investigation.

(h) If facts disclosed by an investigation indicate that further action is unnecessary or unwarranted, the investigative file may be closed without prejudice to further investigation by the DOE at any time that circumstances so warrant.

§ 210.91 [Deleted]

3. Section 210.91 is deleted.

§§ 205.180 through 205.185 [Deleted]

4. Sections 205.180 through 205.185 are deleted.

[Docket No. ERA-R-79-2]

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