

(ii) The manner in which the error can be corrected or eliminated; and

(iii) The form in which it is recommended the corrected patent or document of conveyance be issued.

§ 1865.1-3 Action on application.

The authorized officer, upon review of the factual data and information submitted with the application, and upon a finding that an error was made in the patent or document of conveyance and that the requested relief is warranted and appropriate, shall give written notification to the applicant and make a reasonable effort to give written notification to any others known to have or believed to have or claim an interest in the lands that a corrected patent or document of conveyance shall be issued. The notification shall include a description of how the error is to be corrected or eliminated in the patent or document of conveyance. The notice shall require the applicant to surrender the original patent or other document of

conveyance to be corrected. Where such original document is unavailable, a statement setting forth the reasons for its unavailability shall be submitted in lieu of the original document. The notice may include a requirement for quitclaiming to the United States the lands erroneously included, and shall specify any terms and conditions required for the quitclaim.

§ 1865.2 Issuance of corrected patent or document of conveyance.

Upon the authorized officer's determination that all of the requirements of the Act for issuance of a corrected patent or document of conveyance have been met, the authorized officer shall issue a corrected patent or document of conveyance.

§ 1865.3 Issuance of patent or document of conveyance on motion of authorized officer.

The authorized officer may initiate and make corrections in patents or other

documents of conveyance on his/her own motion, if all existing owners agree.

§ 1865.4 Appeals.

An applicant or claimant adversely affected by a decision of the authorized officer made pursuant to the provisions of this subpart shall have a right of appeal pursuant to 43 CFR Part 4.

PART 1820—APPLICATION PROCEDURES

§§ 1821.6—1821.6-6 [Removed]

§§ 1821.7—1821.7-2 [Redesignated as §§ 1821.6 through 1821.6-2]

3. Part 1820 is revised by removing §§ 1821.6 through 1821.6-6 in their entirety and by redesignating §§ 1821.7 through 1821.7-2 as §§ 1821.6 through 1821.6-2.

[FR Doc. 84-23490 Filed 9-5-84; 8:45 am]

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September 6, 1984

Part III

Department of Energy

Economic Regulatory Administration

10 CFR Parts 205 and 590

Import and Export of Natural Gas; New
Administrative Procedures; Publication of
Final Rule

DEPARTMENT OF ENERGY

Economic Regulatory Administration

10 CFR Parts 205 and 590

[Docket No. ERA-R-81-05]

Import and Export of Natural Gas; New Administrative Procedures

AGENCY: Economic Regulatory Administration, Department of Energy.

ACTION: Notice of Publication of Final Rule.

SUMMARY: The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) has adopted new administrative procedures applicable to its natural gas import and export proceedings. These procedures replace those of the Federal Power Commission (FPC) that were in effect on September 30, 1977, and that have been used by the ERA since October 1, 1977. They also supersede the ERA's existing procedural rules governing off-the-record communications in import and export proceedings.

These final administrative procedures reflect the policy and regulatory responsibilities of this agency. ERA proceedings generally will be conducted in an informal manner, with records developed and parties heard through written comments and oral presentations. Trial-type hearings will be reserved for resolution of genuine disputes of material issues of fact when they are necessary for a full and true disclosure of those facts.

Moreover, these procedures are designed to expedite the government's review of import or export applications, while protecting the full rights of all parties.

EFFECTIVE DATE: September 6, 1984.

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I. Background

A. Authorities and Responsibilities

The authority to regulate imports and exports of natural gas derives from section 3 of the Natural Gas Act (NGA).¹ Until the passage of the Department of Energy Organization Act of 1977 (DOE Act),² this authority was exercised by

¹ Act of June 21, 1938, C. 556, 52 Stat. 821-833, 15 U.S.C. 717-717W.

² Pub. L. 95-91, 91 Stat. 565, 42 U.S.C. 7101 *et seq.*

the Federal Power Commission. Sections 301(b) and 402(f) of the DOE Act transferred the responsibility in this area to the Secretary of Energy who in turn delegated it to the Administrator of the ERA.³ The ERA has been administering this function since October 1, 1977, under the FPC rules in place on September 30, 1977 (except for the *ex parte* rules which the ERA adopted on August 24, 1978 (10 CFR Part 205, Subpart U).

Under Section 3 of the NGA, a proposed import or export of natural gas is to be authorized "upon application" unless it is determined that authorization "will not be consistent with the public interest." The NGA does not specify how such determinations are to be made except to indicate that an application may not be found inconsistent with the public interest without the agency first having provided "opportunity for hearing." There is broad discretion for the agency to adopt the particular procedures to be followed in the authorization process.

In addition to NGA Section 3 responsibilities, the Secretary of Energy is authorized under section 102(10) of the DOE Act to undertake activities involving the integration of domestic and foreign energy policy, which includes engaging in discussions with foreign governments and their representatives concerning international cooperation on energy matters and the establishment of a framework for individual energy arrangements of direct benefit to the United States. The procedures by which the Secretary's delegate, the ERA Administrator, makes regulatory decisions on applications to import or export natural gas have been crafted to take into account DOE consultations with other agencies (such as the State Department) and foreign governments in carrying out these broader domestic and international energy policy responsibilities.

These rules also have been developed with the goal of minimizing the regulatory burden on all parties and assuring efficiency of the proceedings. They provide the Administrator with the ability to expedite the regulatory process, as necessary, to respond to international and energy policy concerns of the U.S. Government.

B. Proposed Rule

On November 30, 1977,⁴ the ERA gave notice that it would utilize the

³ "New Policy Guidelines and Delegation Orders from Secretary of Energy to Economic Regulatory Administration and Federal Energy Regulatory Commission Relating to the Regulation of Imported Natural Gas," Delegation Order No. 0204-111, 49 FR 6684, February 22, 1984.

⁴ 42 FR 61856, December 7, 1977.

regulations of the Federal Power Commission contained in 18 CFR Chapter 1, until issuing its own regulations. On August 24, 1978,⁴³ the ERA issued its own rule of practice on off-the-record communications between DOE decision-making employees and "interested persons."

On August 26, 1981, the agency proposed new administrative procedures⁴⁴ under which natural gas import and export applications would be processed. The proposal set out the various procedures that would be available to the Administrator in a particular case. They include written comments and responses, oral presentations, conferences, and trial-type adjudicatory procedures. The Administrator could use any or all of these procedures in a case. However, as explained in the preamble to the proposal, the agency contemplates development of the issues and gathering of the facts generally through written and reply comments, supplemented as necessary by oral presentations.⁴⁵ The formal adjudicatory process would be reserved for resolving genuine disputes of material issues of fact when a trial-type hearing is necessary to obtain a full and true disclosure of those facts.

II. Final Rule

A. Introduction

After consideration of the comments received on the proposed rule, the ERA has adopted the administrative procedures essentially as proposed. The procedures are designed to accommodate both the agency's broader natural gas policy responsibilities and its institutional structure. They also will ensure that the due process rights of the parties are protected while achieving a full and fair disclosure of the facts and issues in an efficient and timely manner. There is flexibility to tailor procedures to the needs of a particular case and the nature and complexity of the issues. A discussion below of how the procedures will operate is followed by a discussion of changes from the proposed rule, primarily in response to the comments received.

B. Overall Operating Concept

Most applications or other requests for action will be processed by developing a decisional record through written responses and comments and oral presentations. Other additional procedures for presenting evidence and obtaining information will be granted as necessary to achieve a complete

understanding of the facts and issues. In a particular case, the agency may direct that supplemental written filings be made before determining whether any other additional procedures are necessary.

A proceeding will normally be initiated with the filing of an application for authorization to import or export natural gas (§ 590.201). After a Federal Register notice is published summarizing the application, 30 days normally will be allowed for the filing of motions to intervene, protests, or comments on the application (§ 590.205).

The applicant or any intervenor may file an answer to any motion to intervene or to protest within 15 days of the filing of the motion (§ 590.303 and § 590.304). The Administrator, however, may issue a final opinion and order pursuant to provision that is made for shortened proceedings (§ 590.316) prior to the expiration of the 15-day answer period. This can be done if no party requests additional procedures or if the Administrator determines that additional procedures are not required pursuant to § 590.310, § 590.311, § 590.312, and § 590.313. Further, this time period might be shortened under emergency conditions with the issuance of an emergency interim order under § 590.403.

After the close of the comment period, or after the close of the 15-day period for responding to motions to intervene and protest, the Administrator will determine whether additional procedures are required. Any party may request additional procedures based on issues raised in the response of any intervenor to the notice of application or in the answers filed to intervenor responses (§ 590.310). If no time limit is established, additional procedures may be requested at any time prior to the issuance of a final opinion and order (§ 590.310). If the Administrator determines that additional procedures are not required, either a conditional order or a final order will be issued based upon the record in the shortened proceeding (§ 590.316). If the order under the shortened proceeding denies the authorization sought, or attaches material conditions to it, the parties will be advised of the reasons for denial or material conditions and will be provided an opportunity to request additional procedures before the issuance of the final decision (§ 590.316).

While a party is not automatically entitled to additional procedures, it is the Administrator's intention to issue a notice of procedures pursuant to § 590.206 when additional procedures are requested unless the Administrator

determines that the request is frivolous or is not relevant to matters before the ERA for decision. The notice of procedures may identify and request comments on specific issues of fact, law or policy relevant to the proceeding and may establish a time limit for requesting additional procedures.

The agency has a number of approaches available to it for advancing a proceeding, building a record, and resolving disputed issues of fact, law and policy. They include the filing of written comments and replies, conferences (§ 590.311), oral presentations (§ 590.312), and trial-type hearings (§ 590.313). The Administrator shall decide which of these, singly or in combination, are necessary to advance a proceeding in response to a motion by a party or on the Administrator's own initiative. A party requesting an additional procedure must meet the requirements for obtaining the particular procedures.

A party requesting a conference should identify the reason for holding the conference and the issues to be discussed (§ 590.311). The request will normally be granted if a conference will materially advance the proceeding.

A party requesting an oral presentation (§ 590.312) should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. A request for an oral presentation will ordinarily be granted if the Administrator determines that a substantial question of fact, law, or policy is at issue.

A party requesting a trial-type hearing should identify the issues and demonstrate that they are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts (§ 590.313). The Administrator will grant a trial-type hearing if it is determined that there is a relevant and material factual issue genuinely in dispute and that a trial-type hearing is necessary for a full and true disclosure of the facts.

The Administrator may preside personally at a trial-type hearing or during any other procedure, or may designate another employee as the presiding official to conduct a proceeding while retaining decision-making authority (§ 590.301). The employee designated to act as presiding official on behalf of the Administrator need not be an Administrative Law Judge (§ 590.102(n)).

The Administrator or presiding official will make any decisions necessary to regulate the conduct of a

⁴³ 43 FR 39080, September 1, 1978.

⁴⁴ 46 FR 44696, September 4, 1981.

⁴⁵ *Ibid.*, at 44696 and 44697.

trial-type hearing in an efficient manner and to keep the record free of irrelevant, immaterial, and unduly repetitious evidence (§ 590.313). These decisions may include limiting the scope of a hearing to consideration of the disputed factual issue or denying or limiting cross-examination of witnesses and the admission of depositions into the record. In the event that additional procedures are needed, a procedural notice will be issued announcing the procedures to be followed (§ 590.206).

C. Discussion of Comments and Other Matters

1. General

A public hearing was held on the proposed administrative procedures rule on November 12, 1981. Comments were received from 23 parties in response to the proposal and at the hearing. Most of the commenters favored adoption of the proposed procedures on the grounds that they would facilitate expeditious handling of noncontroversial cases and would result in considerable savings of time and costs inherent in adjudicatory procedures. Approximately 100 suggested amendments were considered. The technical changes proposed by many commenters were particularly helpful and were adopted in many instances.

Those commenters who opposed adoption of the proposed rule asserted that proceedings under section 3 of the NGA were required to conform to the adjudicatory "hearing" requirements of the Administrative Procedure Act (APA). The final rule would not significantly alter parties' existing procedural rights and would be similar to those conferred by the APA in general "on-the-record" adjudications. The rule fully meets the requirement of section 3 of the NGA that "opportunity for hearing" be provided. The formal adjudicatory procedures of sections 556 and 557 of the APA are not applicable to natural gas import and export proceedings, since the NGA does not require that decisions be "determined on the record after opportunity for an agency hearing," as provided by section 554(a) of the APA.⁶ For Section 3 import and export proceedings, which are known as "hybrid" proceedings combining aspects of rulemaking and adjudication, or as "informal" adjudications, an agency has considerable flexibility in conducting the proceeding in reference to the facts,

law, and policy at issue in a particular case.⁹

2. Significant Issues

(a) *Off-the-Record Communications—Separation of Functions and Other Matters* (§ 590.108; § 590.102(c)). The final rule adopts, with some minor revisions, the proposed rule prohibiting *ex parte*, off-the-record communications between an "interested person" and any DOE decisional employee regarding the merits of a contested natural gas import or export proceeding pending before the ERA. Under this rule, all DOE employees who are or may reasonably be expected to be involved in the decision making process in a natural gas import or export proceeding are treated as decisional employees. This includes DOE staff assisting the Administrator in the conduct of trial-type hearings. The off-the-record communications rule is designed to avoid all possibilities of prejudice, real or apparent, to the public interest and to persons involved in a natural gas import/export authorization proceeding.

Most of the commenters who opposed the off-the-record communications rule did so because they were concerned that separation of investigative and trial-type functions from decision-making was essential to impartial decisions. They believed that combining trial and investigative functions with activities directly supporting the decision process would compromise the objectivity of agency decisions. The final rule adopts the provision essentially as proposed, in recognition of the fact that there is no separate independent staff performing prosecutorial or investigative functions at the DOE. All DOE employees involved in a natural gas import/export proceeding operate solely on behalf of the Administrator or presiding official; none operates in an independent, adversarial role.

In response to comments, the ERA has made some modifications to help assure that all parties to a proceeding know when the prohibition against off-the-record communications has been triggered. The *ex parte* rules go into effect when a proceeding is contested. The definition of "contested proceeding" in § 590.102(b) has been clarified by requiring that all notices of opposition to

an action be in writing. § 590.108(b), which describes when the *ex parte* rules go into effect, was also amended to provide that opposition and the reasons for opposition be expressly stated in a motion to intervene, notice of intervention, protest, or in some other written form.

Further, some commenters stated it was not clear in the proposed rule that a party must be given both reasonable prior notice and the opportunity to respond to an off-the-record communication. Accordingly, the definition of "off-the-record communication" in § 590.102(k) has been amended to provide that both notice and opportunity to respond are required by the rule. Thus, for example, if a party was given reasonable prior notice, but not the opportunity to be present at an off-the-record communication made at a conference on the merits of a contested proceeding, then that communication constitutes a prohibited off-the-record communication.

Section 590.102(k) has been amended to clarify that certain discussions are exempted from the prohibition against off-the-record communications even though relevant to the merits of a proceeding. Section 590.102(k) now provides that general background discussions about an entire industry or market are exempted from the prohibition even though they may relate to the merits of specific contested cases.

(b) *Off-the-Record Communications: Foreign Governments* (§ 590.102(h)). The final rule adopts, with one minor modification, the proposed rule excluding discussions and negotiations with foreign governments from the prohibition against off-the-record communications.

Several of the commenters opposed this exclusion. Generally, the concern was that off-the-record discussions with foreign governments on energy policy and the framework for commercial trade would involve negotiation of terms of individual agreements without the participation of affected parties.

The agency has concluded that, to be effective, DOE officials must be able to conduct sensitive, international discussions on energy matters in private. These discussions characteristically provide avenues for information transmission and foster a free and open exchange of ideas on energy problems that are only possible when confidentiality is maintained.

Discussions with foreign governments and their representatives will generally deal with overall policy. However, should any discussions lead to a formal statement or agreement affecting an

⁶ See *American Public Gas Assn v. F.P.C.*, 567 F.2d 1016 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978); *Phillips Petroleum Corp. v. F.P.C.*, 475 F.2d 842 (10th Cir. 1973), cert. denied, 414 U.S. 1146 (1974).

⁹ *Ibid.*; *Costle v. Pacific Legal Foundation*, 445 U.S. 198 (1980); *Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, 435 U.S. 519 (1978); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *West Chicago, Ill. v. U.S. N.R.C.*, 701 F.2d 832 (7th Cir. 1983); *Izacc Walton League v. Marsh*, 655 F.2d 346 (D.C. Cir. 1981), cert. denied, 454 U.S. 1092 (1981); *The Bell Telephone Co. v. F.C.C.*, 503 F.2d 1250 (3rd Cir. 1974), cert. denied, 422 U.S. 1026 (1975).

application for the import or export of natural gas, the formal agreement or statement shall be identified in a Federal Register notice of the application. Further, § 590.205(c) is being amended to provide that if a formal agreement is concluded after publication of the notice of application in the Federal Register, a description of the agreement or statement shall be placed in the official record of the proceeding. The parties will then be given opportunity to comment. This amendment to § 590.205(c) will ensure that opportunity for public comment, consistent with due process requirements, is provided at the earliest practical stage of the proceeding consistent with the need for confidentiality in international discussions.

3. Other Issues

A number of technical revisions have been made in response to comments received on the proposed rule to enhance the clarity and effectiveness of the rule.

(a) *Computation of Time* (§ 590.105(c)). Section 590.105(c) has been clarified to provide that an order is effective at the time stamped on it by the agency after the order has been signed, unless another effective date is specified in the order.

(b) *Service* (§ 590.107). As proposed, § 590.107(a) could be read to require that documents served upon the parties had to be a copy of the documents filed with the ERA and stamped with the time and date of receipt. Some commenters said this could require personal delivery of documents filed near the end of a filing period in order for parties to meet service and filing requirements. Section 590.107(a) now permits parties to serve a true copy of the document filed which does not have to be a "stamped" copy. A provision has also been added to § 590.103(b) expressly requiring that service of documents be made not later than the filing date of the documents. These changes should give the parties more flexibility in meeting service and filing requirements.

(c) *Good Cause* (§ 590.108(a)(5); § 590.201(b); § 590.204; § 590.303; § 590.304; § 590.310). The final rule adopts "good cause" as the standard the Administrator or presiding official will apply in exercising his or her discretion whether or not to grant certain actions requested. For example, the Administrator or presiding official will determine whether good cause exists for allowing late interventions (§ 590.303(a)), after considering whether the party filing late (1) had reason for failure to file on time, (2) would provide

information material to the proceeding, and (3) had an interest which may be directly affected by the outcome of the proceeding. The Administrator or presiding official will also take into account any disruption of the proceedings or prejudice to any existing party or intervenor which might result from the late filing.

(d) *Filing of Applications or Other Requests* (§ 590.201). Section 590.201 as proposed provided only for the filing of applications to import or export natural gas and related amendments. Section 590.201 has been revised to include the phrase "or any other requested action." This change was made to identify a method by which parties could request other actions by the agency, such as the issuance of an order or information letter to remove an ambiguity as to the meaning or effect of a previously issued decision.

(e) *Contents of Applications* (§ 590.202). Section 590.202 as proposed did not make any provision for safeguarding confidential information filed with the ERA. A few commenters urged that some specific provision should be included for this purpose. Section 590.202(e) now permits parties confidential treatment of proprietary information.

Further, § 590.202 has been revised to include the requirement that the applicants demonstrate that the proposed import is competitive, and is consistent with the criteria established in the Secretary of Energy's policy guidelines issued February 15, 1984, for evaluating applications for authorization to import or export natural gas.¹⁰

(f) *Amendment or Withdrawal of Application* (§ 590.204). Proposed § 590.103(c) (general filing requirements) was deleted to eliminate duplication of the responsibilities placed on an applicant by § 590.204(a) (amendment or withdrawal of application). Section 590.103(c) would have required an applicant continually to update the record in a proceeding with any new or newly discovered information relevant thereto, a responsibility already covered by § 590.204(a), which requires an applicant to amend the application whenever a material change in facts or conditions occurs.

(g) *Notice of Applications* (§ 590.205). Section 590.205(a) as proposed allowed 15 days for responding to a notice of application. Several commenters stated that this did not allow enough time for evaluation and response. Accordingly, § 590.205(a) now provides 30 days for responding to notices of application. This change should help assure that all

interested parties receive the notice and have ample opportunity to comment. The exception to this is found under § 590.403 where, under emergency conditions, emergency interim orders may be issued in less than 30 days.

(h) *Small Volume Exports* (§ 590.208). The ERA has adopted as proposed a provision which permits exports of up to 100,000 cubic feet of natural gas for scientific, experimental, or other non-utility use without prior authorization. In a change from the proposed rule, the final rule eliminates the requirement for reports to the ERA on these *de minimus* exports. This will accomplish significant savings in administrative burden to those making such small volume exports and to the agency in processing the reports.

(i) *Exchanges By Displacement* (§ 590.209). A provision has been added to clarify that, as long as there is no net effect on authorized imports or exports, and no actual gas flow across the border under the terms of the deferred exchange, no prior authorization is required for exchanges by displacement of imported gas with other gas for the purpose of storage. For example, in one type of exchange allowed under this provision, an importer would place imported gas into seasonal storage for the account of a third party rather than deliver it into his system supply. Withdrawal would subsequently be accomplished by displacement, with stored volumes being delivered into system supply concurrently with delivery of equivalent volumes by the exporter to the third party and a corresponding reduction in volumes delivered by the exporter to the importer. This provision provides additional flexibility to importers and exporters to meet market conditions.

(j) *Interventions and Answers* (§ 590.303). As proposed, § 590.303(e) required answers to motions to intervene to be under oath. There were no corresponding requirements with respect to other filings with the ERA. Some commenters suggested that the under oath requirement should either be deleted or made applicable to all allegations of fact in documents filed with the ERA. Section 590.103(b) (general filing requirements) now requires all documents filed with the ERA to be verified under oath or affirmation. The general application of the under oath requirement may also reduce the need for trial-type hearings to resolve issues of fact. Section 590.303(c) as proposed required intervenors to state their position and the legal and factual basis underlying it in responding to a notice of application. A few

¹⁰ 49 FR 6684, February 22, 1984.

commenters indicated that intervenors may not have an established position in the early stages of a proceeding. Section 590.303(c) now permits intervenors to state their positions "to the extent known." This allows the parties to modify positions as facts and issues are developed in the proceeding.

(k) *Informal Discovery* (§ 590.305). A new § 590.305 has been added to clarify the implicit right of the parties to engage in discovery through procedures such as written interrogatories or production of documents. Under new § 590.305, if the parties cannot agree on discovery procedures, then the Administrator or presiding official will determine what discovery procedures are to be conducted.

(l) *Settlements* (§ 590.309). A new § 590.309 has been added to clarify the implicit right of parties to engage in settlement negotiations. Under new § 590.309, the Administrator or presiding official may order that off-the-record negotiations be conducted. No offer of settlement, comment, or discussion by the parties with respect to an offer of settlement shall be subject to discovery or admissible into evidence against any parties who object to its admission.

(m) *Additional Procedures* (§ 590.310, § 590.311, § 590.312, § 590.313). The comments on the proposed section for additional procedures reflected some confusion over the test to be applied for obtaining procedures in § 590.311 (conferences), in § 590.312 (oral presentations), and in § 590.313 (trial-type hearings). Accordingly, the rule has been clarified (§ 590.310) to indicate that the Administrator on his or her own initiative may determine at his or her discretion to hold additional procedures. Also, § 590.312(a) was revised to provide that an oral presentation ordinarily will be granted in response to a request by a party if the Administrator or presiding official determines that a substantial question of fact, law or policy is at issue and if illumination of that issue will be aided materially by an oral presentation. The criteria for granting a conference or a trial-type hearing have not been changed. As under the proposed rule, the requesting party has a burden of showing the need for the additional procedure requested and the Administrator has the responsibility for determining which of the procedures, singly or in combination, are most appropriate for a particular proceeding.

(n) *Trial-type Hearings* (§ 590.313). The term "evidentiary" hearing used throughout the proposed rule has been replaced with the term "trial-type" hearing in order to make it clear that a formal adjudicatory hearing with cross-

examination is the type of hearing referred to. The purpose of this change was to eliminate any confusion that evidence could only be gathered in an adjudicatory hearing.

(o) *Complaints* (§ 590.317). In order to clarify certain existing practices, the agency has added § 590.317 to describe the procedures by which interested parties may file complaints. A complaint may be filed by any person about an existing import or export authorization over which the agency has jurisdiction. The complaint may be based on changed circumstances, improper conduct of the holder of the import or export authorization, or on any other facts that have a significant bearing on continuation or manner of continuation of the import or export authorization. The Administrator shall determine whether a complaint merits any action and what the appropriate action should be. If the Administrator determines that action on a complaint is appropriate, the Administrator may issue a show cause order under § 590.401 to frame the issues for consideration.

(p) *Reports of Contract Amendments* (§ 590.407). Proposed § 590.407 (reports of changed circumstances) is now designated "reports of contract amendments" and has been revised to require parties filing such amendments to specifically identify the ERA dockets to which they relate. This will facilitate expeditious processing of the documents.

(q) *Conditional Orders* (§ 590.402). Conditional orders will generally be issued to announce a final decision subject to completion of actions required by the National Environmental Policy Act¹¹ or to grant an authorization subject to subsequent showing by the applicant that an import project meets certain conditions. For example, a conditional order may authorize an import of natural gas provided that the pricing provisions in place when the gas begins to flow will assure that the imported gas will remain competitive over the term of the project.

(r) *Reopening of the Record*. The agency has deleted proposed § 590.315 (reopening of the record). The agency will keep the records open in its proceedings until final opinions and orders are issued to ensure consideration of any new or newly discovered evidence of a material nature during the latter stages of a proceeding. Information received after a final order has been issued and after the opportunity for rehearing has expired which has a material bearing on

continuation of the import or export will be considered in any new proceeding the Administrator elects to open for the purpose of reviewing that project. Accordingly, the provision for reopening the record in a proceeding where a final order has been issued is not needed and has been deleted.

4. Filing and Processing Fees (§ 590.207)

In the preamble of the proposed rule, there was a request for comments on whether application fees should be sufficient to cover the direct costs associated with the filing and processing of import and export applications. Very few comments were received in response to this request. However, the agency did not propose specific filing and processing fees. Further, on February 7, 1984, the FERC issued the first two of a series of rules concerning changes in its filing and processing fees¹² which involve many of the issues that would be raised by any change in filing and processing fees that the ERA might propose. Accordingly, the agency has decided to make filing and processing fees the subject of a separate rulemaking to be initiated at a later time. This will permit a review of the FERC experience under its new rules.

III. Additional Matters

A. Environmental Review

After reviewing this rule pursuant to DOE's responsibilities under the National Environmental Policy Act (NEPA), the DOE has determined that it is procedural in nature and does not constitute a major Federal action significantly affecting the quality of the human environment. Accordingly, preparation of an environmental impact statement is not required.

B. Executive Order 12291

Executive Order 12291 (46 FR 13193, February 19, 1981) requires the agencies subject to it to prepare a regulatory impact analysis for all major rules, as defined in the Order. This agency has determined that this procedural rule is not a major rule and therefore that a regulatory impact analysis is not required.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (Pub. L. 93-354, 94 Stat. 1164, 5 U.S.C. 601 *et. seq.* (September 19, 1980)), requires federal agencies to consider the impact of proposed regulations on small businesses, small governments, and other small entities. The DOE certifies that this final rule will not have a

¹¹ NEPA, Pub. L. 91-190, 83 Stat. 852, 42 U.S.C. 4321.

¹² 49 FR 5074-5091, February 10, 1984.

significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required.

D. Paperwork Reduction Act

The information collection requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980, Pub. L. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*). They have been assigned OMB control number 1903-0081.

E. Index of Subjects in Part 590 and Part 205

List of Subjects in 10 CFR Parts 205 and 590

Administrative practice and procedure, Exports, Imports, Filing fees, Natural gas, Environmental protection, Electric power.

F. Amendment of Part 205

At present the only ERA rules applicable to natural gas import and export proceedings are those contained in 10 CFR Part 205, Subpart U—Procedures for Natural Gas and Electricity Import and Export Cases. Because this rulemaking is not applicable to Subpart U as it relates to electricity export proceedings, this rule only amends Subpart U to the extent necessary to eliminate all applicability to natural gas import and export proceedings. The substance of the rule will remain the same with respect to electricity export cases.

Authority: Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101, *et seq.*); Natural Gas Act, Act of June 21, 1938, c. 556, 52 Stat. 821 (42 U.S.C. 717, *et seq.*); E.O. 12009, 42 FR 46267, September 15, 1977; DOE Delegation Order No. 02 04-111 (49 FR 6684, February 22, 1984).

In consideration of the foregoing, Chapter II of Title 10, Code of Federal Regulations, is amended by adding a Part 590 to Subchapter G, and by revising Part 205, as set forth below.

Issued in Washington, D.C., on August 29, 1984.

Rayburn Hanzlik,

Administrator, Economic Regulatory Administration.

1. Subchapter G of Chapter II of Title 10, Code of Federal Regulations, is hereby amended by adding a new Part 590, to read as follows:

PART 590—ADMINISTRATIVE PROCEDURES WITH RESPECT TO THE IMPORT AND EXPORT OF NATURAL GAS

Subpart A—General Provisions

- Sec.
- 590.100 OMB Control Numbers.
- 590.101 Purpose and scope.
- 590.102 Definitions.
- 590.103 General requirements for filing documents with ERA.
- 590.104 Address for filing documents.
- 590.105 Computation of time.
- 590.106 Dockets.
- 590.107 Service.
- 590.108 Off-the-record communications.
- 590.109 ERA investigations.

Subpart B—Applications for Authorization to Import or Export Natural Gas

- 590.201 General.
- 590.202 Contents of applications.
- 590.203 Deficient applications.
- 590.204 Amendment or withdrawal of applications.
- 590.205 Notice of applications.
- 590.206 Notice of procedures.
- 590.207 Filing fees.
- 590.208 Small volume exports.
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Subpart C—Procedures

- 590.301 General.
- 590.302 Motions and answers.
- 590.303 Intervention and answers.
- 590.304 Protests and answers.
- 590.305 Informal discovery.
- 590.306 Subpoenas.
- 590.307 Depositions.
- 590.308 Admissions of facts.
- 590.309 Settlements.
- 590.310 Opportunity for additional procedures.
- 590.311 Conferences.
- 590.312 Oral presentations.
- 590.313 Trial-type hearings.
- 590.314 Presiding official.
- 590.315 Witnesses.
- 590.316 Shortened proceedings.
- 590.317 Complaints.

Subpart D—Opinions and Orders

- 590.401 Orders to show cause.
- 590.402 Conditional orders.
- 590.403 Emergency interim orders.
- 590.404 Final opinions and orders.
- 590.405 Transferability.
- 590.406 Compliance with orders.
- 590.407 Reports of contract amendments.

Subpart E—Applications for Rehearing

- 590.501 Filing.
- 590.502 Application is not a stay.
- 590.503 Opinion and order on rehearing.
- 590.504 Denial by operation of law.
- 590.505 Answers to applications for rehearing.

Authority: Sec. 301(b), Sec. 402(f), and Sec. 644, Pub. L. 95-91, 91 Stat. 578, 585, and 599 (42 U.S.C. 7151(b), 7172(f), and 7254), Sec. 3, Act of June 21, 1938, c. 556 52 Stat. 822 (15 U.S.C. 717b); E.O. 12009 (42 FR 46267, September 15, 1977; DOE Delegation Order No. 0204-111 (49 FR 6684, February 22, 1984).

Subpart A—General Provisions

§ 590.100 OMB Control Numbers.

The information collection requirements contained in this Part have been approved by the Office of Management and Budget under Control No. 1903-0081.

§ 590.101 Purpose and scope.

The purpose of this Part is to establish the rules and procedures required to be followed by persons to obtain authorizations from the Administrator of the Economic Regulatory Administration (ERA) to import or export natural gas under the Natural Gas Act and by all other persons interested in participating in a natural gas import or export proceeding before the agency.

This Part establishes the procedural rules necessary to implement the authorities vested in the Secretary of Energy by sections 301(b) and 402(f) of the DOE Act, which have been delegated to the Administrator.

§ 590.102 Definitions.

As used in this Part:

(a) "Administrator" means the Administrator of the ERA or any employee of the DOE who has been delegated final decisional authority.

(b) "Contested proceeding" means a proceeding (1) where a protest or a motion to intervene, or a notice of intervention, in opposition to an application or other requested action has been filed, or (2) where a party otherwise notifies the Administrator and the other parties to a proceeding in writing that it opposes an application or other requested action.

(c) "Decisional employee" means the Administrator, presiding officials at conferences, oral presentations or trial-type hearings, and any other employee of the DOE, including consultants and contractors, who are, or may reasonably be expected to be, involved in the decision-making process, including advising the Administrator on the resolution of issues involved in a proceeding. The term includes those employees of the DOE assisting in the conduct of trial-type hearings by performing functions on behalf of the Administrator or presiding official.

(d) "DOE" means the Department of Energy, of which the ERA is a part.

(e) "DOE Act" means the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*).

(f) "ERA" means the Economic Regulatory Administration.

(g) "FERC" means the Federal Energy Regulatory Commission.

(h) "Interested person" means a person, other than a decisional employee, whose interest in a proceeding goes beyond the general interest of the public as a whole and includes applicants, intervenors, competitors of applicants, and other individuals and organizations, including non-profit and public interest organizations, and state, local, and other public officials, with a proprietary, financial or other special interest in the outcome of a proceeding. The term does not include other federal agencies or foreign governments and their representatives, unless the agency, foreign government, or representative of a foreign government is a party to the proceeding.

(i) "Natural gas" means natural gas and mixtures of natural gas and synthetic natural gas, regardless of physical form or phase, including liquefied natural gas and gels primarily composed of natural gas.

(j) "NGA" means the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821 (15 U.S.C. 717 *et seq.*).

(k) "Off-the-record communication" means a written or oral communication not on the record which is relevant to the merits of a proceeding, and about which the parties have not been given reasonable prior notice of the nature and purpose of the communication and an opportunity to be present during such communication or, in the case of a written communication, an opportunity to respond to the communication. It does not include communications concerned solely with procedures which are not relevant to the merits of a proceeding. It also does not include general background discussions about an entire industry or natural gas markets or communications of a general nature made in the course of developing agency policy for future general application, even though these discussions may relate to the merits of a particular proceeding.

(l) "Party" means an applicant, any person who has filed a motion for and been granted intervenor status or whose motion to intervene is pending, and any state commission which has intervened by notice pursuant to § 590.303(a).

(m) "Person" means any individual, firm, estate, trust, partnership, association, company, joint-venture, corporation, United States local, state and federal governmental unit or instrumentality thereof, charitable, educational or other institution, and others, including any officer, director, owner, employee, or duly authorized representative of any of the foregoing.

(n) "Presiding official" means any employee of the DOE who has been

designated by the Administrator to conduct any stage of a proceeding, which may include presiding at a conference, oral presentation, or trial-type hearing, and who has been delegated the authority of the Administrator to make rulings and issue orders in the conduct of such proceeding, other than final opinions and orders, orders to show cause, emergency interim orders, or conditional decisions under Subpart D and orders on rehearing under Subpart E.

(o) "Proceeding" means the process and activity, and any part thereof, instituted by the ERA either in response to an application, petition, motion or other filing under this Part, or on its own initiative, by which the ERA develops and considers the relevant facts, policy and applicable law concerning the importation or exportation of natural gas and which may lead to the issuance of an order by the Administrator under Subparts D and E.

(p) "State commission" means the regulatory body of a state or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the state or municipality.

§ 590.103 General requirements for filing documents with the ERA.

(a) Any document, including but not limited to an application, amendment of an application, request, petition, motion, answer, comment, protest, complaint, and any exhibit submitted in connection with such documents, shall be filed with the ERA under this Part. Such document shall be considered officially filed with the ERA when it has been received and stamped with the time and date of receipt by the Natural Gas Division, ERA. Documents transmitted to the ERA must be addressed as provided in § 590.104. All documents and exhibits become part of the record in the official ERA docket file and will not be returned. An original and fifteen (15) copies of all applications, filings and submittals shall be provided to the ERA. No specific format is required.

(b) Upon receipt by the ERA, each application or other initial request for action shall be assigned a docket number. Any petition, motion, answer, request, comment, protest, complaint or other document filed subsequently in a docketed proceeding with the ERA shall refer to the assigned docket number. All documents shall be signed either by the person upon whose behalf the document is filed or by an authorized representative. Documents signed by an authorized representative shall contain a certified statement that the representative is a duly authorized

representative unless the representative has a certified statement already on file in the ERA docket of the proceeding. All documents shall also be verified under oath or affirmation by the person filing, or by an officer or authorized representative of the firm having knowledge of the facts alleged. Each document filed with the ERA shall contain a certification that a copy has been served as required by § 590.107 and indicate the date of service. Service of each document must be made not later than the date of the filing of the document.

(c) A person who files an application shall state whether, to the best knowledge of that person, the same or a related matter is being considered by any other part of the DOE, including the FERC, or any other Federal agency or department and, if so, shall identify the matter and the agency or department.

§ 590.104 Address for filing documents.

All documents filed under this part shall be addressed to: Natural Gas Division, Economic Regulatory Administration, Forrestal Building, Room GA-033, RG-43, 1000 Independence Avenue, SW., Washington, D.C. 20585.

All hand delivered documents shall be filed at the above address between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

§ 590.105 Computation of time.

(a) In computing any period of time prescribed or allowed by these regulations, the day of the act or event from which the designated period of time begins to run is not included. The period of time begins to run the next day after the day of the act or event. The last day of the period so computed is included unless it is a Saturday, Sunday, or legal Federal holiday, in which event the period runs until the end of the next day that is neither a Saturday, Sunday, nor a legal Federal holiday, unless otherwise provided by this Part or by the terms of an ERA order. Documents received after the regular business hours are deemed filed on the next regular business day.

(b) When a document is required to be filed with the ERA within a prescribed time, an extension of time to file may be granted for good cause shown.

(c) An order is issued and effective when date stamped by the Natural Gas Division after the order has been signed unless another effective date is specified in the order.

§ 590.106 Dockets.

The ERA shall maintain a docket file of each proceeding under this Part, which shall contain the official record upon which all orders provided for in Subparts A and E shall be based. The official record in a particular proceeding shall include the official service list, all documents filed under § 590.103; the official transcripts of any procedures held under Subpart C, any opinions and orders issued by the ERA under Subparts D and E, and reports of contract amendments under § 590.407. All dockets shall be available for inspection and copying by the public during regular business hours between 8:00 a.m. and 4:30 p.m. Dockets are located in the: Natural Gas Division, Forrestal Building, Room GA-033, 1000 Independence Avenue, SW., Washington, D.C. 20585.

§ 590.107 Service.

(a) An applicant, any other party to a proceeding, or a person filing a protest shall serve a copy of all documents filed with the ERA upon all parties unless otherwise provided in this Part. The copy of a document served upon parties shall be a true copy of the document filed with the ERA, but does not have to be a copy stamped with the time and date of receipt by the ERA. The ERA shall maintain an official service list for each proceeding which shall be provided upon request.

(b) When the parties are not known, such as during the initial comment period following publication of the notice of application, service requirements under paragraph (a) of this section may be met by serving a copy of all documents on the applicant and on the ERA for inclusion in the ERA docket in the proceeding.

(c) All documents required to be served under this Part may be served by hand, certified mail, registered mail, or regular mail. It shall be the responsibility of the serving party to ensure that service is effected in a timely manner. Service is deemed complete upon delivery or upon mailing, whichever occurs first.

(d) Service upon a person's duly authorized representatives on the official service list shall constitute service upon that person.

(e) All ERA orders, notices, or other ERA documents shall be served on the parties by ERA either by hand, registered mail, certified mail, or regular mail, except as otherwise provided in this Part.

§ 590.108 Off-the-record communications.

(a) In any contested proceeding under this Part:

(1) No interested person shall make an off-the-record communication or knowingly cause an off-the-record communication to be made to any decisional employee.

(2) No decisional employee shall make an off-the-record communication or knowingly cause an off-the-record communication to be made to any interested person.

(3) A decisional employee who receives, makes, or knowingly causes to be made an oral off-the-record communication prohibited by this section shall prepare a memorandum stating the substance of the communication and any responses made to it.

(4) Within forty-eight (48) hours of the off-the-record communication, a copy of all written off-the-record communications or memoranda prepared in compliance with paragraph (a)(3) of this section shall be delivered by the decisional employee to the Administrator and to the Director of the Natural Gas Division. The materials will then be made available for public inspection by placing them in the docket associated with the proceeding.

(5) Requests by a party for an opportunity to rebut, on the record, any facts or contentions in an off-the-record communication may be filed in writing with the Administrator. The Administrator shall grant such requests only for good cause.

(6) Upon being notified of an off-the-record communication made by a party in violation of this section, the Administrator may, to the extent consistent with the interests of justice and the policies of the NGA and the DOE Act, require the party to show cause why the party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation.

(b) The prohibitions of paragraph (a) of this section shall apply only to contested proceedings and begin at the time either a protest or a motion to intervene or notice of intervention in opposition to the application or other requested action is filed with the ERA, or a party otherwise specifically notifies the Administrator and the other parties in writing of its opposition to the application or other requested action, whichever occur first.

§ 590.109 ERA investigations.

The Administrator or the Administrator's delegate may investigate any facts, conditions, practices, or other matters within the scope of this Part in order to determine whether any person has violated or is

about to violate any provisions of the NGA or other statutes or any rules, regulations, or orders within the Administrator's jurisdiction. In conducting such investigations, the Administrator or the Administrator's delegate may, among other things, subpoena witnesses to testify, subpoena or otherwise require the submission of documents, and order testimony to be taken by deposition.

Subpart B—Applications for Authorization to Import or Export Natural Gas**§ 590.201 General.**

(a) Any person seeking authorization to import or export natural gas into or from the United States, to amend an existing import or export authorization, or seeking any other requested action, shall file an application with the ERA under the provisions of this Part.

(b) Applications shall be filed at least sixty (60) days in advance of the proposed import or export or other requested action, unless a later date is permitted for good cause shown.

§ 590.202 Contents of applications.

(a) Each application filed under § 590.201 shall contain the exact legal name of the applicant, the names, titles, and mailing addresses of a maximum of two persons for the official service list, a statement describing the action sought from the ERA, the justification for such action, including why the proposed action is not inconsistent with the public interest, and the ERA docket number, if applicable.

(b) Each application shall include the matters listed below to the extent applicable. All factual matters shall be supported to the extent practicable by the necessary data or documents. Copies of relevant documents filed or intended to be filed with FERC may be submitted to satisfy the requirements of this section. Topics to be addressed or described shall include:

(1) The scope of the project, including the volumes of natural gas involved, the dates of commencement and completion of the proposed import or export, and the facilities to be utilized or constructed;

(2) The source and security of the natural gas supply to be imported or exported, including contract volumes and a description of the gas reserves supporting the project during the term of the requested authorization;

(3) Identification of all the participants in the transaction, including the parent company, if any, and identification of

any corporate or other affiliations among the participants;

(4) The terms of the transaction, such as take-or-pay obligations, make-up provisions, and other terms that affect the marketability of the gas;

(5) The provisions of the import arrangement which establish the base price, volume requirements, transportation and other costs, and allow adjustments during the life of the project, and a demonstration as to why the import arrangement is and will remain competitive over the life of the project and is otherwise not inconsistent with the public interest;

(6) For proposed imports, the need for the natural gas by the applicant or applicant's prospective customers, including a description of the persons who are expected to purchase the natural gas; and for proposed exports, the lack of a national or regional need for the gas; and

(7) The potential environmental impact of the project.

(c) The application shall also have attached a statement, including a signed opinion or legal counsel, showing that a proposed import or export of natural gas is within the corporate powers of the applicant and a copy of all relevant contracts and purchase agreements.

(d) The Administrator or the Administrator's delegate may at any time require the applicant and other parties to make supplemental filings of additional information necessary to resolve issues raised by the application.

(e) All information and data filed in support of or against an application will be placed in the official ERA docket file of the proceeding and will not be afforded confidential treatment, unless the party shows why the information or data should be exempted from public disclosure and the Administrator or Administrator's delegate determines that such information or data shall be afforded confidential treatment.

§ 590.203 Deficient application.

If an application is incomplete or otherwise deemed deficient, the Administrator or the Administrator's delegate may require the applicant to submit additional information or exhibits to remedy the deficiency. If the applicant does not remedy the deficiency within the time specified by the Administrator or the Administrator's delegate, the application may be dismissed without prejudice to refile at another time.

§ 590.204 Amendment or withdrawal of applications.

(a) The applicant may amend or supplement the application at any time

prior to issuance of the Administrator's final opinion and order resolving the application, and shall amend or supplement the application whenever there are changes in material facts or conditions upon which the proposal is based.

(b) The Administrator may for good cause shown by motion of a party or upon the Administrator's own initiative decline to act on, in whole or in part, an amendment or supplement requested by an applicant under paragraph (a) of this section.

(c) After written notice to the ERA and service upon the parties of that notice an applicant may withdraw an application. Such withdrawal shall be effective thirty (30) days after notice to ERA if the Administrator does not issue an order to the contrary within that time period.

§ 590.205 Notice of applications.

(a) Upon receipt of an application, the ERA shall publish a notice of application in the *Federal Register*. The notice shall summarize the proposal. Except in emergency circumstances, generally the notice shall provide a time limit of not less than thirty (30) days from the notice's date of publication in the *Federal Register* for persons to file protests, comments, or a motion to intervene or notice of intervention, as applicable. The notice may also request comments on specific issues or matters of fact, law, or policy raised by the application.

(b) The notice of application shall advise the parties of their right to request additional procedures, including the opportunity to file written comments and to request that a conference, oral presentation, or trial-type hearing be convened. Failure to request additional procedures at this time shall be deemed a waiver of any right to additional procedures should the Administrator decide to grant the application and authorize the import or export by issuing a final opinion and order in accordance with § 590.316.

(c) Where negotiations between the DOE, including the ERA, and a foreign government have resulted in a formal policy agreement or statement affecting a particular import or export proceeding, the ERA shall include in the notice of application a description of the terms or policy positions of that agreement or statement to the extent they apply to the proceeding, and invite comment. A formal policy agreement or statement affecting a particular import or export proceeding that is arrived at after publication of the notice of application shall be placed on the record in that

proceeding and the parties given an opportunity to comment thereon.

§ 590.206 Notice of procedures.

In all proceedings where, following a notice of application and the time specified in the notice for the filing or response thereto, the Administrator determined to have additional procedures, which may consist of the filing of supplemental written comments, written interrogatories or other discovery procedures, a conference, oral presentation, or trial-type hearing, the Administrator shall provide the parties with notice of the procedures the Administrator has determined to follow in the proceeding and advise the parties of their right to request any additional procedures in accordance with the provisions of § 590.310. The notice of procedures may identify and request comments on specific issues of fact, law, of policy relevant to the proceeding and may establish a time limit for requesting additional procedures.

§ 590.207 Filing fees.

A non-refundable filing fee of fifty dollars (\$50) shall accompany each application filed under § 590.201.

§ 590.208 Small volume exports.

(a) Any person may export up to 100,000 cubic feet of natural gas (14.73 pounds per square inch at 60 °F) or the liquefied or compressed equivalent thereof, in a single shipment for scientific, experimental, or other non-utility gas use without prior authorization of the Administrator.

§ 590.209 Exchanges by displacement.

Any importer of natural gas may enter into an exchange by displacement agreement without the prior authorization of the Administrator when the net effect of the exchange is no different than under the importer's existing authorization. An exchange by displacement is an arrangement whereby authorized imported volumes are displaced by other gas for purposes of storage or flexibility. The term of the exchange agreement may not exceed five (5) years, the volumes imported may not exceed the importer's existing import authorization, and no actual natural gas may flow across the United States border under the terms of the exchange agreement. Any importer who enters into an exchange agreement pursuant to this section shall file with ERA within fifteen (15) days after the start up of the exchange, a written description of the transaction, the exact volume of natural gas to be displaced, the name of the purchaser, and the

import authorization under which the exchange is being carried out.

Subpart C—Procedures

§ 590.301 General.

The procedures of this Subpart are applicable to proceedings conducted on all applications or other requested actions filed under this Part. The Administrator may conduct all aspects of the procedures of this Subpart or may designate a presiding official pursuant to § 590.314.

§ 590.302 Motions and answers.

(a) Motions for any procedural or interlocutory ruling shall set forth the ruling or relief requested and state the grounds and the statutory or other authority relied upon. All written motions shall comply with the filing requirements of § 590.103. Motions made during conferences, oral presentations or trial-type hearings may be stated orally upon the record, unless the Administrator or the presiding official determines otherwise.

(b) Any party may file an answer to any written motion within fifteen (15) days after the motion is filed, unless another period of time is established by the Administrator or the presiding official. Answers shall be in writing and shall detail each material allegation of the motion being answered. Answers shall state clearly and concisely the facts and legal authorities relied upon.

(c) Any motion, except for motions seeking intervention or requesting that a conference, oral presentation or trial-type hearing be held, shall be deemed to have been denied, unless the Administrator or presiding official acts within thirty (30) days after the motion is filed.

§ 590.303 Interventions and answers.

(a) A state commission may intervene in a proceeding under this Part as a matter of right and become a party to the proceeding by filing a notice of intervention no later than the date fixed for filing motions to intervene in the applicable ERA notice or order. If the period for filing the notice has expired, a state commission may be permitted to intervene by complying with the filing and other requirements applicable to any other person seeking to become a party to the proceeding as provided in this section.

(b) Any other person who seeks to become a party to a proceeding shall file a motion to intervene, which sets out clearly and concisely the facts upon which the petitioner's claim of interest is based.

(c) A motion to intervene shall state, to the extent known, the position taken by the movant and the factual and legal basis for such positions in order to advise the parties and the Administrator as to the specific issues of policy, fact, or law to be raised or controverted.

(d) Motions to intervene may be filed at any time following the filing of an application, but no later than the date fixed for filing such motions or notices in the applicable ERA notice or order, unless a later date is permitted by the Administrator for good cause shown and after considering the impact of granting the late motion on the proceeding. Each motion or notice shall list the names, titles, and mailing addresses of a maximum of two persons for the official service list.

(e) Any party may file an answer to a motion to intervene, but such answer shall be made within fifteen (15) days after the motion to intervene was filed, unless a later date is permitted by the Administrator for good cause shown. Answers shall be in writing. Answers shall detail each material allegation of the motion to intervene being answered and state clearly and concisely the facts and legal authorities relied upon. Failure to answer is deemed a waiver of any objection to the intervention. This paragraph does not prevent the Administrator from ruling on a motion to intervene and issuing a final opinion and order in accordance with § 590.316 prior to the expiration of the fifteen (15) days in which a party has to answer a motion to intervene.

(f) If an answer in opposition to a motion to intervene is timely filed or if the motion to intervene is not timely filed, then the movant becomes a party only after the motion to intervene is expressly granted.

(g) If no answer in opposition to a motion to intervene is filed within the period of time prescribed in paragraph (e) of this section, the motion to intervene shall be deemed to be granted, unless the Administrator denies the motion in whole or in part or otherwise limits the intervention prior to the expiration of the time allowed in paragraph (e) for filing an answer to the motion to intervene. Where the motion to intervene is deemed granted, the participation of the intervenor shall be limited to matters affecting asserted rights and interests specifically set forth in the motion to intervene, and the admission of such intervenor to party status shall not be construed as recognition by the ERA that the intervenor might be aggrieved because of any order issued.

(h) In the event that a motion for late intervention is granted, an intervenor

shall accept the record of the proceeding as it was developed prior to the intervention.

§ 590.304 Protests and answers.

(a) Any person objecting to an application filed under § 590.201 of this Part or to any action taken by the ERA under this Part may file a protest. No particular form is required. The protest shall identify the person filing the protest, the application or action being objected to, and provide a concise statement of the reasons for the protest.

(b) The filing of a protest, without also filing a motion to intervene or a notice of intervention, shall not make the person filing the protest a party to the proceeding.

(c) A protest shall be made part of the official ERA docket file in the proceeding and shall be considered as a statement of position of the person filing the protest, but not as establishing the validity of any assertion upon which the decision would be based.

(d) Protests shall be served on the applicant and all parties by the person filing the protest. If the person filing the protest is unable to provide service on any person identified as a party to the proceeding after a good faith effort, then the ERA shall effect service. However, when the parties are not known, service requirements may be met by serving a copy on the applicant and on the ERA as provided in § 590.107(b).

(e) Protests may be filed at any time following the filing of an application, but no later than the date fixed for filing protests in the applicable ERA notice or order, unless a later date is permitted by the Administrator for good cause shown.

(f) Any party may file an answer to a protest but such answer must be filed within fifteen (15) days after the protest was filed, unless a later date is permitted by the Administrator for good cause shown.

§ 590.305 Informal discovery.

The parties to a proceeding may conduct discovery through use of procedures such as written interrogatories or protection of documents. In response to a motion by a party, the Administrator or presiding official may determine the procedures to be utilized for discovery if the parties cannot agree on such procedures.

§ 590.306 Subpoenas.

(a) Subpoenas for the attendance of witnesses at a trial-type hearing or for the production of documentary evidence may be issued upon the initiative of the Administrator or presiding official, or upon written motion of a party or oral

motion of a party during a conference, oral presentation, or trial-type hearing, if the Administrator or presiding official determines that the evidence sought is relevant and material.

(b) Motions for the issuance of a subpoena shall specify the relevance, materiality, and scope of the testimony or documentary evidence sought, including, as to documentary evidence, specification to the extent possible of the documents sought and the facts to be proven by them, the issues to which they relate, and why the information or evidence was not obtainable through discovery procedures agreed upon by the parties.

(c) If service of a subpoena is made by a United States Marshall or a Deputy United States Marshall, service shall be evidenced by their return. If made by another person, that person shall affirm that service has occurred and file an affidavit to that effect with the original subpoena. A witness who is subpoenaed shall be entitled to witness fees as provided in § 590.315(c).

§ 590.307 Depositions.

(a) Upon motion filed by a party, the Administrator or presiding official may authorize the taking of testimony of any witness by deposition. Unless otherwise directed in the authorization issued, a witness being deposed may be examined regarding any matter which is relevant to the issues involved in the pending proceeding.

(b) Parties authorized to take a deposition shall provide written notice to the witness and all other parties at least ten (10) days in advance of the deposition unless such advance notice is waived by mutual agreement of the parties.

(c) The requesting motion and notice shall state the name and mailing address of the witness, delineate the subject matters on which the witness is expected to testify, state the reason why the deposition should be taken, indicate the time and place of the deposition, and provide the name and mailing address of the person taking the deposition.

(d) A witness whose testimony is taken by deposition shall be sworn in or shall affirm concerning the matter about which the witness has been called to testify before any questions are asked or testimony given. A witness deposed shall be entitled to witness fees as provided in § 590.315(c).

(e) The moving party shall file the entire deposition with ERA after it has been subscribed and certified. No portion of the deposition shall constitute a part of the record in the proceedings unless received in evidence, in whole or

in part, by the Administrator or presiding official.

§ 590.308 Admissions of facts.

(a) At any time prior to the end of a trial-type hearing, or, if there is no trial-type hearing, prior to the issuance of a final opinion and order under § 590.404, any party, the Administrator, or the presiding official may serve on any party a written request for admission of the truth of any matters at issue in the proceeding that relate to statements or opinions of fact or of the application of law to fact.

(b) A matter shall be considered admitted and conclusively established for the purposes of any proceeding in which a request for admission is served unless, within fifteen (15) days or such time limit established by the Administrator or presiding official, the party to whom the request is directed answers or objects to the request. Any answer shall specifically admit or deny the matter, or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny, unless the answering party states that, after reasonable inquiry, the answering party has been unable to obtain sufficient information to admit or deny. If an objection is made, the answering party shall state the reasons for the objection.

(c) If the Administrator or presiding official determines that an answer to a request for admission does not comply with the requirements of this section, the Administrator or presiding official may order either that the matter is admitted or that an amended answer be served.

(d) A copy of all requests for admission and answers thereto shall be filed with the ERA in accordance with § 590.103. Copies of any documents referenced in the request shall be served with the request unless they are known to be in the possession of the other parties.

(e) The Administrator or presiding official may limit the number of requests for admission of facts in order to expedite a proceeding through elimination of duplicative requests.

§ 590.309 Settlements.

The parties may conduct settlement negotiations. If settlement negotiations are conducted during a conference, at the request of one of the parties, the Administrator or presiding official may order that the discussions be off-the-record with no transcript of such settlement negotiations being prepared for inclusion in the official record of the proceeding. No offer of settlement,

comment or discussion by the parties with respect to an offer of settlement shall be subject to discovery or admissible into evidence against any parties who object to its admission.

§ 590.310 Opportunity for additional procedures.

Any party may file a motion requesting additional procedures, including the opportunity to file written comments, request written interrogatories or other discovery procedures, or request that a conference, oral presentation or trial-type hearing be held. The motion shall describe what type of procedure is requested and include the information required by § 590.311, § 590.312 and § 590.313, as appropriate. Failure to request additional procedures within the time specified in the notice of application or in the notice of procedure, if applicable, shall constitute a waiver of that right unless the Administrator for good cause shown grants additional time for requesting additional procedures. If no time limit is specified in the notice or order, additional procedures may be requested at any time prior to the issuance of a final decision and order. At any time during a proceeding, the Administrator or presiding official may on his or her own initiative determine to provide additional procedures.

§ 590.311 Conferences.

(a) Upon motion by a party, a conference of the parties may be convened to adjust or settle the proceedings, set schedules, delineate issues, stipulate certain issues of fact or law, set procedures, and consider other relevant matters where it appears that a conference will materially advance the proceeding. The Administrator or presiding official may delineate the issues which are to be considered and may place appropriate limitations on the number of intervenors who may participate, if two or more intervenors have substantially like interests.

(b) A motion by a party for a conference shall include a specific showing why a conference will materially advance the proceeding.

(c) Conferences shall be recorded, unless otherwise ordered by the Administrator or presiding official, and the transcript shall be made a part of the official record of the proceeding and available to the public.

§ 590.312 Oral presentations.

(a) Any party may file a motion requesting an opportunity to make an oral presentation of views, arguments, including arguments of counsel, and

data on any aspect of the proceeding. The motion shall identify the substantial question of fact, law or policy at issue and demonstrate that it is material and relevant to the merits of the proceeding. The party may submit material supporting the existence of substantial issues. The Administrator or presiding official ordinarily will grant a party's motion for an oral presentation, if the Administrator or presiding official determines that a substantial question of fact, law, or policy is at issue in the proceeding and illumination of that question will be aided materially by such an oral presentation.

(b) The Administrator or presiding official may require parties making oral presentations to file briefs or other documents prior to the oral presentation. The Administrator or presiding official also may delineate the issues that are to be considered at the oral presentation and place appropriate limitations on the number of intervenors who may participate if two or more intervenors have substantially like interests.

(c) Oral presentations shall be conducted in an informal manner with the Administrator or the presiding official and other decisional employees presiding as a panel. The panel may question those parties making an oral presentation. Cross-examination by the parties and other more formal procedures used in trial-type hearings will not be available in oral presentations. The oral presentation may be, but need not be, made by legal counsel.

(d) Oral presentations shall be recorded, and the transcript shall be made part of the official record of the proceeding and available to the public.

§ 590.313 Trial-type hearings.

(a) Any party may file a motion for a trial-type hearing for the purpose of taking evidence on relevant and material issues of fact genuinely in dispute in the proceeding. The motion shall identify the factual issues in dispute and the evidence that will be presented. The party must demonstrate that the issues are genuinely in dispute, relevant and material to the decision and that a trial-type hearing is necessary for a full and true disclosure of the facts. The Administrator or presiding official shall grant a party's motion for a trial-type hearing, if the Administrator or presiding official determines that there is a relevant and material factual issue genuinely in dispute and that a trial-type hearing is necessary for a full and true disclosure of the facts.

(b) In trial-type hearings, the parties shall have the right to be represented by

counsel, to request discovery, to present the direct and rebuttal testimony of witnesses, to cross-examine witnesses under oath, and to present documentary evidence.

(c) The Administrator or presiding official upon his or her own initiative or upon the motion of any party may consolidate any proceedings involving common questions of fact in whole or in part for a trial-type hearing. The Administrator or presiding official may also place appropriate limitations on the number of intervenors who may participate if two or more intervenors have substantially like interests.

(d) The Administrator or presiding official may make such rulings for trial-type hearings, including delineation of the issues and limitation of cross-examination of a witness, as are necessary to obtain a full and true disclosure of the facts and to limit irrelevant, immaterial, or unduly repetitious evidence.

(e) At trial-type hearings, the Administrator or presiding official, or any other decisional employee directed by the Administrator or presiding official, may call witnesses for testimony or presenting exhibits that directly relate to a particular issue of fact to be considered at the hearing. The Administrator or presiding official, or any other decisional employee directed by the Administrator or presiding official, may also question witnesses offered by the parties concerning their testimony.

(f) Trial-type hearings shall be recorded, and the transcript shall be made part of the official record of the proceeding and available to the public.

§ 590.314 Presiding official.

(a) The Administrator may designate a presiding official to conduct any stage of the proceeding, including officiating at a conference, oral presentation, or trial-type hearing. The presiding official shall have the full authority of the Administrator during such proceedings.

(b) A presiding official at a conference, oral presentation, or trial-type hearing shall have the authority to regulate the conduct of the proceeding including, but not limited to, determination of the issues to be raised during the course of the conference, oral presentation, or trial-type hearing, administering oaths or affirmations, directing discovery, ruling on objections to the presentation of testimony or exhibits, receiving relevant and material evidence, requiring the advance submission of written testimony and exhibits, ruling on motions, determining the format, directing that briefs be filed with respect to issues raised or to be

raised during the course of the conference, oral presentation or trial-type hearing, questioning witnesses, taking reasonable measures to exclude duplicative material, and placing limitations on the number of witnesses to be called by a party.

§ 590.315 Witnesses.

(a) The Administrator or presiding official may require that the direct testimony of witnesses in trial-type hearings be submitted in advance of the hearing and be under oath, and in written form.

(b) Witnesses who testify in trial-type hearing shall be under oath or affirmation before being allowed to testify.

(c) Witnesses subpoenaed pursuant to § 590.306 shall be paid the same fees and mileage as paid for like services in the District Courts of the United States.

(d) Witnesses deposed pursuant to § 590.307 shall be entitled to the same fees as paid for like services in the District Courts of the United States.

§ 590.316 Shortened proceedings.

In any proceeding where, in response to a notice of application or notice of procedures, if applicable, no party files a motion requesting additional procedures, including the right to file written comments, or the holding of a conference, oral presentation, or trial-type hearing, or where the Administrator determines that such requested additional procedures are not required pursuant to § 590.310, § 590.311, § 590.312 and § 590.313, the Administrator may issue a final opinion and order on the basis of the official record, including the application and all other filings. In any proceeding in which the Administrator intends to deny the application or grant the application with the attachment of material conditions unknown to, or likely to be opposed by, the applicant, solely on the basis of the application and responses to the notice of application or notice of procedures, if applicable, without additional procedures, the Administrator shall advise the parties in writing generally of the issues of concern to the Administrator upon which the denial or material conditions would be based and provide them with an opportunity to request additional procedures pursuant to § 590.310, § 590.311, § 590.312 and § 590.313.

§ 590.317 Complaints.

(a) Any person may file a complaint objecting to the actions by any other person under any statute, rule, order or authorization applicable to an existing

import or export authorization over which the ERA has jurisdiction. No particular form is required. The complaint must be filed with the ERA in writing and must contain the name and address of the complainant and the respondent and state the facts forming the basis of the complaint.

(b) A complaint concerning an existing import or export authorization shall be served on all parties to the original import or export authorization proceeding either by the complainant or by the ERA if the complainant has made a good faith effort but has been unable to effect service.

(c) The Administrator may issue an order to show cause under section § 590.401, or may provide opportunity for additional procedures pursuant to § 590.310, § 590.311, § 590.312, or § 590.313, in order to determine what action should be taken in response to the complaint.

Subpart D—Opinions and Orders

§ 590.401 Orders to show cause.

A proceeding under this Part may commence upon the initiative of the Administrator or in response to an application by any person requesting ERA action against any other person alleged to be in contravention or violation of any authorization, statute, rule, order, or law administered by the ERA applicable to the import or export of natural gas, or for any other alleged wrong involving importation or exportation of natural gas over which the ERA has jurisdiction. Any show cause order issued shall identify the matters of interest or the matters complained of that the Administrator is inquiring about, and shall be deemed to be tentative and for the purpose of framing issues for consideration and decision. The respondent named in the order shall respond orally or in writing, or both, as required by the order. A show cause order is not a final opinion and order.

§ 590.402 Conditional orders.

The Administrator may issue a conditional order at any time during a proceeding prior to issuance of a final opinion and order. The conditional order shall include the basis for not issuing a final decision and order at that time and a statement of findings and conclusions. The findings and conclusions shall be based solely on the official record of the proceeding.

§ 590.403 Emergency interim orders.

Where consistent with the public interest, the Administrator may waive further procedures and issue an

emergency interim order authorizing the import or export of natural gas. After issuance of the emergency interim order, the proceeding shall be continued until the record is complete, at which time a final opinion and order shall be issued. The Administrator may attach necessary or appropriate terms and conditions to the emergency interim order to ensure that the authorized action will be consistent with the public interest.

§ 590.404 Final opinions and orders.

The Administrator shall issue a final opinion and order and attach such conditions thereto as may be required by the public interest after completion and review of the record. The final opinion and order shall be based solely on the official record of the proceeding and include a statement of findings and conclusions, as well as the reasons or basis for them, and the appropriate order, condition, sanction, relief or denial.

§ 590.405 Transferability.

Authorizations by the Administrator to import or export natural gas shall not be transferable or assignable, unless specifically authorized by the Administrator.

§ 590.406 Compliance with orders.

Any person required or authorized to take any action by a final opinion and order of the Administrator shall file with ERA, within thirty (30) days after the requirement or authorization becomes effective, a notice, under oath, that such requirement has been complied with or such authorization accepted or otherwise acted upon, unless otherwise specified in the order.

§ 590.407 Reports of contract amendments.

Any person authorized to import or export natural gas has a continuing obligation to give the Administrator written notification, as soon as practicable, of any prospective or actual changes of a substantive nature in the circumstances upon which the authorization was based, including, but not limited to, amendments or other changes in the terms and conditions of any natural gas purchase contract, in volumes accepted or offered, or the import or export price paid. Any notification filed under this section shall contain the ERA docket number(s) to which it relates. Compliance with this section does not relieve an importer or exporter from responsibility to file the appropriate application to amend a previous import or export authorization under this Part whenever such changes

are contrary to or otherwise not permitted by the existing authorization.

Subpart E—Applications for Rehearing

§ 590.501 Filing.

(a) An application for rehearing of a final opinion and order, conditional order, or emergency interim order may be filed by any party aggrieved by the issuance of such opinion and order within thirty (30) days after issuance. The application shall be served on all parties.

(b) The application shall state concisely the alleged errors in the final opinion and order, conditional order, or emergency interim order and must set forth specifically the ground or grounds upon which the application is based. If an order is sought to be vacated, reversed, or modified by reason of matters that have arisen since the issuance of the final opinion and order, conditional order, or emergency interim order, the matters relied upon shall be set forth with specificity in the application. The application shall also comply with the filing requirements of § 590.103.

§ 590.502 Application is not a stay.

The filing of an application for rehearing does not operate as a stay of the Administrator's order, unless specifically ordered by the Administrator.

§ 590.503 Opinion and order on rehearing.

Upon application for rehearing, the Administrator may grant or deny rehearing or may abrogate or modify the final opinion and order, conditional order, or emergency interim order with or without further proceedings.

§ 590.504 Denial by operation of law.

Unless the Administrator acts upon the application for rehearing within thirty (30) days after it is filed, it is deemed to be denied. Such denial shall constitute final agency action for the purpose of judicial review.

§ 590.505 Answers to applications for rehearing.

No answers to applications for rehearing shall be entertained. Prior to the issuance of any final opinion and order on rehearing, however, the Administrator may afford the parties an opportunity to file briefs or answers and may order that a conference, oral presentation, or trial-type hearing be held on some or all of the issues presented by an application for rehearing.

2. Subpart U of Part 205, Chapter II of Title 10, Code of Federal Regulations is

amended to eliminate its applicability to natural gas import and export cases. Subpart U is revised to read as follows:

PART 205—ADMINISTRATIVE PROCEDURES AND SANCTIONS

Subpart U—Procedures for Electricity Export Cases

Sec.

205.260 Purpose and scope.

205.261 through 205.269 [Reserved]

205.270 Off-the-record communications.

Authority: Federal Power Act, 41 Stat. 1063, as amended; Executive Order No. 10485 as amended by Executive Order No. 12038; 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 Policy and Conservation Act, 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.

Subpart U—Procedures for Electricity Export Cases

§ 205.260 Purpose and scope.

(a) The purpose of this section is to state the procedures that will be followed by the Economic Regulatory Administration of the Department of Energy in electricity export adjudications.

(b) Definitions.

As used in this subpart—

"Administrator" means the Administrator of the Economic Regulatory Administration.

"Decisional employees" means the Administrator, presiding officers at adjudicatory hearings, and other employees of the Department, including consultants and contractors, who are, or may reasonably be expected to be, involved in the decision-making process, which includes advising the Administrator in resolving the issues in an adjudication. The term does not include those employees of the Department performing investigative or trial functions in an adjudication, unless they are specifically requested by the Administrator or his delegate to participate in the decision-making process.

"Department" means the Department of Energy.

"Off-the-record communication" means an *ex parte* communication, which is an oral or written communication relevant to the merits of an adjudication and not on the record and with respect to which reasonable prior notice to all participants and

opportunity to be present at, or respond to, the communication is not given, but does not include a communication relating solely to procedures which are not relevant to the merits of the adjudication.

"Interested person" means a person outside the Department whose interest in the adjudication goes beyond the general interest of the public as a whole and includes applicants, intervenors, competitors of applicants, non-profit and public interest organizations, and other individuals and organizations, including state, local and other public officials, with a proprietary, financial or other special interest in the outcome of the adjudication. The term does not include other federal agencies, unless an agency is a participant in the adjudication.

"Participant" means any applicant or intervenor participating in the adjudication.

"Adjudication" means a formal proceeding employing procedures identical or similar to those required by the Administrative Procedure Act, as codified in 5 U.S.C. 551, 556, and 557, to consider an application to export electricity.

"Reasonable prior notice" means 7 days' written notice stating the nature and purpose of the communication.

"Relevant to the merits" means a communication directly related to the merits of a specific adjudication but does not include general background discussions about an entire industry or communications of a general nature made in the course of developing agency policy for future general application.

(Federal Power Act, 41 Stat. 1063, as amended; Executive Order No. 10485, as amended by Executive Order 12038; 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 Policy and Conservation Act, 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)

§§ 205.261-205.269 [Reserved]

§ 205.270 Off-the-record communications.

(a) In any proceeding which is subject to this subpart—

(1) No interested person shall make an off-the-record communication or knowingly cause an off-the-record communication to be made to any decisional employee.

(2) No decisional employee shall make an off-the-record communication or

knowingly cause an off-the-record communication to be made to any interested person.

(3) A decisional employee who receives, makes, or knowingly causes to be made an oral communication prohibited by this section shall prepare a memorandum stating the substance of the communication and any responses made to it.

(4) With 48 hours of receiving, making or knowingly causing to be made a communication prohibited by this section, a decisional employee shall deliver all written off-the-record communications and all memoranda prepared in compliance with paragraph (a)(3) of this section to the Director of the Coal and Electricity Division, ERA, who will immediately place the materials described above in the public record associated with the adjudication, available for public inspection.

(5) Upon receipt of a communication knowingly made or knowingly caused to be made by a participant in violation of this section, the Administrator or presiding officer may, to the extent consistent with the interests of justice and the applicable statutory policy, require the participant to show cause why his or her claim or interest in the adjudication should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation.

(6) The prohibitions of this section shall apply beginning at the time an adjudication is noticed for hearing (or the person responsible for the communication acquires knowledge that it will be noticed), a protest is filed, or a petition or notice to intervene in opposition to the requested Department action is filed, whichever occurs first.

(b) The prohibition, cited at 18 CFR 1.30(f), against participation in the decision-making process by Department employees who perform investigative or trial functions in an adjudication, shall no longer be applicable to ERA.

(Federal Power Act, 41 Stat. 1063, as amended; Executive Order No. 10485, as amended by Executive Order 12038; 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 Policy and Conservation Act, 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)

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Thursday
September 6, 1984

Part IV

**Department of
Education**

34 CFR Parts 75, 76, and 98

**Student Rights in Research, Experimental
Activities, and Testing; Final Rules With
Invitation To Comment**

DEPARTMENT OF EDUCATION

34 CFR Parts 75, 76, and 98

Student Rights in Research, Experimental Activities, and Testing

AGENCY: Department of Education.

ACTION: Final regulations with invitation to comment.

SUMMARY: The Secretary issues final regulations to implement a procedure for the handling of complaints under section 439 (a) and (b) of the General Education Provisions Act (GEPA). Section 439(a) of GEPA requires that, under most programs administered by the Department of Education, an award recipient or contractor make all instructional material used in connection with any research or experimental program or project available to parents of children involved in the program or project. Section 439(b) of GEPA requires a recipient of funds under these programs to obtain permission before requiring a child to submit to certain kinds of psychiatric or psychological examination, testing, or treatment.

DATES: These regulations take effect either 45 days after publication in the Federal Register or later if Congress takes certain adjournments.

If you want to know the effective date of these regulations, call or write the Department of Education contact person.

Comments should be submitted on or before November 5, 1984.

ADDRESS: Submit comments to Monika Edwards Harrison, Room 3021, 400 Maryland Avenue SW., Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT:

Monika Edwards Harrison, Special Advisor to the Deputy Under Secretary for Management, United States Department of Education, Rm. 3021 FOB-6, 400 Maryland Avenue SW., Washington, D.C. 20202, Telephone (202) 472-5123.

SUPPLEMENTARY INFORMATION:**Background**

The Secretary issues final regulations to further implement section 439 of the General Education Provisions Act (GEPA) (20 U.S.C. 1232h). Under subsection (a) of section 439, all instructional material, including teacher's manuals, films, tapes, or other supplementary instructional material which will be used in connection with any research or experimentation program or project shall be available for inspection by the parents or guardians of the children engaged in such program

or project. For the purpose of this section "research or experimentation program or project" means any program or project in any applicable program designed to explore or develop new or unproven teaching methods or techniques.

Under subsection (b) of section 439 no student shall be required as part of any applicable program to submit to psychiatric examination, testing, or treatment, or psychological examination, testing or treatment, in which the primary purpose is to reveal information concerning one or more of the following:

- (1) Political affiliations;
- (2) Mental and psychological problems potentially embarrassing to the student or his family;
- (3) Sex behavior and attitudes;
- (4) Illegal, anti-social, self-incriminating and demeaning behavior;
- (5) Critical appraisals of other individuals with whom respondents have close family relationships;
- (6) Legally recognized privileged and analogous relationships such as those of lawyers, physicians, and ministers; or
- (7) Income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program), without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent.

The Department currently has regulations that essentially restate section 439 of GEPA. These regulations are codified at 34 CFR 75.741 and 34 CFR 76.741. However, these rules do not establish procedures for the handling of complaints that arise under section 439. To establish such procedures, the Secretary issues these final regulations.

Significant Differences Between the NPRM and These Final Regulations

On February 22, 1984, the Secretary published in the Federal Register at 49 FR 6646 a Notice of Proposed Rulemaking (NPRM) for Student Rights in Research, Experimental Activities and Testing (34 CFR Parts 75, 76, and 98). Following the publication of the NPRM, the Department of Education conducted hearings in seven cities to accept testimony on the procedures proposed in the NPRM. A total of 183 persons testified at those hearings; all but 2 persons urged speedy publication of final regulations. Persons testifying were from 29 States. In addition, the Department has received more than 1900 comments in response to the NPRM. Of the total number of comments received, approximately 1625 persons wrote in

favor of these regulations, approximately 270 persons wrote against them, and approximately 25 persons provided general comments. Comments were received from residents of each State and the District of Columbia.

The major provisions of these regulations are substantially the same as those contained in the NPRM. However, after consideration of the public comments on the proposed regulations, the Secretary has made some changes.

Several commenters expressed concern that the NPRM did not require a complainant to attempt initial resolution at the local and State levels before filing a complaint with the Department. In response to this public comment, paragraph (b)(2) has been added to § 98.7. Paragraph (b)(2) requires evidence of an initial attempt at resolution with local and State officials (where there is a State process) and requires the complainant to provide the name of local and/or State officials contacted, as well as significant dates in the attempted resolution process.

Some commenters questioned whether persons other than parents or guardians of students could file a complaint under the procedure established in the NPRM. To clarify that the complaint procedure applies only to parents or guardians of students directly affected and directly affected students who are adults or emancipated minors, § 98.7(a) has been rewritten.

Commenters requested that definitions of statutory terms be included in the final regulations to ensure that complaints are limited to applicable programs and activities requiring prior consent. To respond to these comments, the final regulations provide clarifying interpretations of the terms "psychiatric or psychological testing and examination" and "psychiatric or psychological treatment." The Secretary has decided to seek additional comments on these definitions. Please read the Invitation to Comment at the end of this preamble for additional information on the opportunity to comment.

Finally, commenters requested that programs funded by the National Institute of Education (NIE) and the National Center for Education Statistics (NCES) be included as applicable programs under these regulations. After careful consideration of these comments and review of section 439 and its history and intent, the Secretary has determined that these programs should be covered.

Comments and Responses

The following is a summary of the public comments received on the proposed regulations published in the *Federal Register* on February 22, 1984 (49 FR 6646) and the Secretary's responses to those comments. The comments, responses, and changes are organized in the same order as the referenced sections in these final regulations.

Section 98.1 Applicability of Part

Comment. Many commenters requested that the provisions of the final regulations be extended to cover the National Institute of Education and the National Center for Education Statistics.

Response. A change has been made. Since the National Institute of Education and the National Center for Education Statistics fund research and data-gathering activities, it is extremely unlikely that Congress intended to exclude them from coverage under section 439, which is specifically directed at "research or experimentation" programs and projects and psychiatric or psychological "examination, testing, or treatment." By its terms, section 439 applies to all "applicable programs," which is defined in GEPA to include all programs administered by the former Education Division of the Department of Health, Education, and Welfare, including programs of NIE and NCES. Further, protections provided under section 439 are just as applicable to NIE and NCES as to other education programs, and the Secretary has broad rulemaking authority transferred to him under section 408 of GEPA and under section 414 of the Department of Education Organization Act (DEOA). These final regulations therefore apply section 439 to all programs that were administered within the former Education Division of the Department of Health, Education, and Welfare and to new programs enacted after the effective date of the DEOA and administered by the Secretary of Education.

Comment. A number of commenters requested that the provisions of these regulations apply to all experimental programs regardless of their funding source. They asked that locally, State or Federally funded programs be treated in the same way under the proposed complaint procedure.

Response. No change has been made. Section 439 applies only to activities that are part of an "applicable program." As broadly interpreted in these regulations, "applicable program" includes most programs administered by the Department of Education. The

Secretary has no authority to extend these regulations to activities funded by other Federal agencies or from State or local sources.

Comment. Two commenters requested that the regulations clarify the relationship of section 439 to Part B of the Education of the Handicapped Act.

Response. No change has been made. If further clarification becomes necessary, the Secretary would consider the possibility of addressing this matter in a separate notice of proposed rulemaking.

Section 98.3(b) Access to Instructional Material Used in a Research or Experimental Program

Comment. A number of commenters indicated that the definition of "research or experimentation program or project" was "vague." They expressed concern that the definition in the NPRM would lead to "frivolous complaints" and that the resources of local school officials would be unnecessarily used to resolve unwarranted complaints.

Response. No change has been made. It is not the Secretary's intent that these regulations encourage the filing of "frivolous complaints." However, section 439(a), to which this definition applies, requires only that instructional materials be made available for inspection by the parents or guardians of students enrolled in research or experimental programs. In the interest of providing parents the opportunity to review the materials used in educating their children, no change has been made. With regard to the burden this places on local school officials, the Secretary believes that each school district will devise methods of inspection of materials which are appropriate for the local community the schools serve.

Section 98.4 Protection of Students' Privacy in Examination, Testing, or Treatment

Comment. Many commenters requested that this section include definitions of "psychological or psychiatric examination, testing, and treatment." Commenters suggested that, without these definitions, parents would not be able to determine under which circumstances the requirements of section 439(b) of GEPA would apply. Other commenters indicated that the absence of definitions would place an undue burden on school officials because parents or students would file complaints against classroom activities for which no prior consent is required.

Response. A change has been made. The Secretary intends to provide the maximum opportunity for parents to be

informed of the activities conducted in their children's classroom, while at the same time not intruding on school district's authority to select curricula which enhance academic achievement. The definitions included in the final regulations at § 98.4(c) are intended to clarify the types of activities which require prior consent. These definitions will clarify the intent of the final regulations to establish a procedure for the handling of complaints which relate to the probing of individual students' personal lives in areas which require prior consent, while at the same time clarifying that it is not the purpose of these regulations to resolve complaints which are focused on academic subject areas selected by the school district.

The Secretary has decided to seek further comments on these definitions. For more information on the opportunity to comment, please read the Invitation to Comment at the end of this preamble.

Comment. Commenters requested that the term "primary purpose" be removed from § 98.4(a). They requested that the requirement for prior consent be triggered any time a student is asked to reveal information in any of the designated areas, for any reason.

Response. No change has been made. Section 98.4(a) is consistent with section 439(b) of the General Education Provisions Act and the Secretary does not have the authority to delete this term.

Section 98.5 Information and Investigation Office

The words "violations and" have been removed from paragraph (a) to clarify the Department's intent by these regulations to investigate complaints and not independently initiate investigations.

Section 98.6 Reports and Records

Paragraphs (a) and (b) of this section have been removed as unnecessary. GEPA requires a recipient or contractor under an applicable program to maintain records and to permit access to the Secretary and the Comptroller General. These requirements are already implemented in the Education Department General Administrative Regulations (EDGAR) §§ 75.730-75.734 and 76.730-76.734. In addition, Part 74, of EDGAR provides general rules about maintenance of records.

Paragraph (c) has been revised to remove its paragraph designation and to indicate that, under these regulations, the Secretary only requires reports necessary to resolve complaints. The Secretary wants to ensure that any

burden in preparing reports is kept to a minimum.

Comment. Some commenters requested that the final regulations require school districts to notify parents annually of the provisions of section 439.

Response. No change has been made. The Secretary defers to local practice in informing parents of these Federal requirements. However, section 439(b) of GEPA requires that students or parents provide consent prior to psychiatric or psychological examinations, tests or treatment whose primary purpose is to ask the student to reveal information listed in § 98.4.

Section 98.7 Filing a Complaint

Comment. Many of the commenters opposing the provisions of the NPRM indicated that the NPRM allowed any individual to file a complaint. School officials expressed concern that this would lead to frivolous complaints that could take local resources to resolve as well as providing a way for interest groups to reject curricula selected by local school officials.

Response. A change has been made. This section has been rewritten to make clear that these regulations limit the right to file a complaint under section 439 to students—or parents or guardians of students—who allege violations under section 439. Standing to bring a complaint is limited to students—or parents or guardians of students—who have been directly affected by such violations.

Comment. A number of State and local officials commented that the NPRM bypassed State and local officials by allowing the initial filing of complaints at the Federal level.

Response. A change has been made. It is not the Secretary's intent to encourage potential complainants to bypass local and State officials in resolving their complaints. A new paragraph (b)(2) has been added to § 98.7 that requires complainants to provide evidence of attempted resolution with the local and State officials, including providing the names of State and/or local officials contacted as well as significant dates in the attempted resolution process.

Section 98.9 Investigation and Findings

Comment. A number of commenters requested that the final regulations impose a limit on the time available to a recipient or contractor to correct a violation of Section 439.

Response. No change has been made. The complexity of a complaint, the recipient's resources, and the remedy proposed will affect the length of time it may take to resolve a complaint. The

regulations specify that a " * * * reasonable period of time, given all of the circumstances of the * * * " is available to the recipient or contractor for voluntary compliance. Consideration of "all of the circumstances" will include the interests of the complainant as well as the resources of the recipient or contractor.

Section 98.10 Enforcement of the Findings

Comment. Some commenters asked that the final regulations include a provision to make individuals working for a recipient or contractor, against which there is a finding, personally liable for any psychological damages to the affected student.

Response. No change has been made. Section 439 does not include such a provision, and the Secretary has no authority to impose such a requirement.

Other Changes

Paragraph (a)(2) has been revised as a technical matter to make the remedies against contractors consistent with the remedies against grantees, as permitted by the Federal Acquisition Regulations, 48 CFR 12.5 and 49.1.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the Order.

Regulatory Flexibility Act Certification

The Secretary certifies that these regulations will not have a significant economic impact on a substantial number of small entities. These regulations will affect small entities that are recipients of funds under applicable programs of the Department of Education. However, the regulations will not have a significant economic impact on these entities because the regulations do not establish prescriptive reporting or recordkeeping requirements or impose other regulatory burdens in excess of statutory requirements.

Assessment of Educational Impact

Based on the comments received in response to the Notice of Proposed Rulemaking and his own review, the Secretary has determined that these regulations do not require the transmission of any information that is already gathered by or is available from any other agency or authority of the United States.

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding the definitions contained in § 98.4(c) of these final regulations. Written comments and recommendations may be sent to Monika Edwards Harrison, Room 3021, 400 Maryland Avenue SW., Washington, DC 20202. All comments should be submitted on or before November 5, 1984 to be assured consideration by the Secretary. If an amendment to the definitions is necessary, the Secretary will publish the amendment in the Federal Register.

All comments submitted in response to this request for comments will be available for public inspection, during and after the comment period, in the room specified in the preceding paragraph between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

List of Subjects

34 CFR Parts 75 and 76

Grant programs—Education, Education.

34 CFR Part 98

Educational research, Privacy, Students, Notice of complaint, Complaints, Consent, examination, Experimental programs, Family, Notice of findings, Inspection, Instructional material, Political affiliations, Psychiatric, Psychological, Reporting and recordkeeping requirements, Research, Sex, Teaching methods, Teaching techniques, Testing, Treatment.

Citation of Legal Authority

A citation of statutory or legal authority is placed in parentheses on the line following each substantive provision of these regulations.

Dated: August 31, 1984.

T.H. Bell,

Secretary of Education.

(Catalog of Federal Domestic Assistance Number does not apply)

The Secretary amends Parts 75 and 76 and adds a new Part 98 to Subtitle A of Title 34 of the Code of Federal Regulations as follows:

PART 75—DIRECT GRANT PROGRAMS

§ 75.741 [Removed]

1. Section 75.741 is removed.

PART 76—STATE-ADMINISTERED PROGRAMS**§ 76.741 [Removed]**

2. Section 76.741 is removed.
3. A new Part 98 is added, to read as follows:

PART 98—STUDENT RIGHTS IN RESEARCH, EXPERIMENTAL PROGRAMS, AND TESTING**Sec.**

- 98.1 Applicability of part.
- 98.2 Definitions.
- 98.3 Access to instructional material used in a research or experimentation program.
- 98.4 Protection of students' privacy in examination, testing or treatment.
- 98.5 Information and investigation office.
- 98.6 Reports.
- 98.7 Filing a complaint.
- 98.8 Notice of the complaint.
- 98.9 Investigation and findings.
- 98.10 Enforcement of findings.

Authority: Sec. 514(a) of Pub. L. 93-380, 88 Stat. 574 (20 U.S.C. 1232h(a)); Sec. 1250 of Pub. L. 95-561, 92 Stat. 2355-2356 (20 U.S.C. 1232h(b)); and Sec. 408(a)(1) of Pub. L. 90-247, 88 Stat. 559-560, as amended (20 U.S.C. 1221e-3(a)(1)); sec. 414(a) of Pub. L. 96-88, 93 Stat. 685 (20 U.S.C. 3474(a)).

§ 98.1 Applicability of part.

This part applies to any program administered by the Secretary of Education that—

- (a)(1) Was transferred to the Department by the Department of Education Organization Act (DEOA); and
- (2) Was administered by the Education Division of the Department of Health, Education, and Welfare on the day before the effective date of the DEOA; or
- (b) Was enacted after the effective date of the DEOA, unless the law enacting the new Federal program has the effect of making section 439 of the General Education Provisions Act inapplicable.
- (c) The following chart lists the funded programs to which Part 98 does not apply as of February 16, 1984.

Name of program	Authorizing statute	Implementing regulations
2. Programs administered by the Commissioner of the Rehabilitative Services Administration.	The Rehabilitation Act of 1973 as amended by Pub. L. 95-602 (29 U.S.C. 700, et seq.).	Parts 351-356, 361, 362, 365, 366, 369-375, 378, 379, 385-390, and 395.
3. College housing.	Title IV of the Housing Act of 1950 as amended (12 U.S.C. 1749, et seq.).	Part 614.

(20 U.S.C. 1221e-3(a)(1), 1230, 1232h, 3487, 3507)

§ 98.2 Definitions.

(a) The following terms used in this part are defined in 34 CFR Part 77; "Department," "Recipient," "Secretary."

(b) The following definitions apply to this part: "Act" means the General Education Provisions Act.

"Office" means the information and investigation office specified in § 98.5.

(20 U.S.C. 1221e-3(a)(1))

§ 98.3 Access to instructional material used in a research or experimentation program.

(a) All instructional material—including teachers' manuals, films, tapes, or other supplementary instructional material—which will be used in connection with any research or experimentation program or project shall be available for inspection by the parents or guardians of the children engaged in such program or project.

(b) For the purpose of this part "research or experimentation program or project" means any program or project in any program under § 98.1 (a) or (b) that is designed to explore or develop new or unproven teaching methods or techniques.

(c) For the purpose of the section "children" means persons not above age 21 who are enrolled in a program under § 98.1 (a) or (b) not above the elementary or secondary education level, as determined under State law.

(20 U.S.C. 1221e-3(a)(1), 1232h(a))

§ 98.4 Protection of students' privacy in examination, testing, or treatment.

(a) No student shall be required, as part of any program specified in § 98.1 (a) or (b), to submit without prior consent to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning one or more of the following—

- (1) Political affiliations;

- (2) Mental and psychological problems potentially embarrassing to the student or his or her family;
- (3) Sex behavior and attitudes;
- (4) Illegal, anti-social, self-incriminating and demeaning behavior;
- (5) Critical appraisals of other individuals with whom the student has close family relationships;
- (6) Legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or
- (7) Income, other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under a program.

(b) As used in paragraph (a) of this section, "prior consent" means—

(1) Prior consent of the student, if the student is an adult or emancipated minor; or

(2) Prior written consent of the parent or guardian, if the student is an unemancipated minor.

(c) As used in paragraph (a) of this section—

(1) "Psychiatric or psychological examination or test" means a method of obtaining information, including a group activity, that is not directly related to academic instruction and that is designed to elicit information about attitudes, habits, traits, opinions, beliefs or feelings; and

(2) "Psychiatric or psychological treatment" means an activity involving the planned, systematic use of methods or techniques that are not directly related to academic instruction and that is designed to affect behavioral, emotional, or attitudinal characteristics of an individual or group.

(20 U.S.C. 1232h(b))

§ 98.5 Information and investigation office.

(a) The Secretary has designated an office to provide information about the requirements of section 439 of the Act, and to investigate, process, and review complaints that may be filed concerning alleged violations of the provisions of the section.

(b) The following is the name and address of the office designated under paragraph (a) of this section: Family Educational Rights and Privacy Act Office, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, D.C. 20202.

(20 U.S.C. 1231e-3(a)(1), 1232h)

§ 98.6 Reports.

The Secretary may require the recipient to submit reports containing information necessary to resolve

Name of program	Authorizing statute	Implementing regulations
1. High School Equivalency Program and College Assistance Migrant Program.	Section 418A of the Higher Education Act of 1965 as amended by the Education Amendments of 1980 (Pub. L. 96-374) 20 U.S.C. 1070d-2).	Part 206.

complaints under section 439 of the Act and the regulations in this part.

(20 U.S.C. 1221e-3(a)(1), 1232h)

§ 98.7 Filing a complaint.

(a) Only a student or a parent or guardian of a student directly affected by a violation under Section 439 of the Act may file a complaint under this part. The complaint must be submitted in writing to the Office.

(b) The complaint filed under paragraph (a) of this section must—(1) Contain specific allegations of fact giving reasonable cause to believe that a violation of either § 98.3 or § 98.4 exists; and

(2) Include evidence of attempted resolution of the complaint at the local level (and at the State level if a State complaint resolution process exists), including the names of local and State officials contacted and significant dates in the attempted resolution process.

(c) The Office investigates each complaint which the Office receives that meets the requirements of this section to determine whether the recipient or contractor failed to comply with the provisions of section 439 of the Act.

(20 U.S.C. 1221e-3(a)(1), 1232h)

(Approved under OMB control number 1880-0507)

§ 98.8 Notice of the complaint.

(a) If the Office receives a complaint that meets the requirements of § 98.7, it provides written notification to the complainant and the recipient or contractor against which the violation

has been alleged that the complaint has been received.

(b) The notice to the recipient or contractor under paragraph (a) of this section must—

(1) Include the substance of the alleged violation; and

(2) Inform the recipient or contractor that the Office will investigate the complaint and that the recipient or contractor may submit a written response to the complaint.

(20 U.S.C. 1221e-3(A)(1), 1232h)

§ 98.9 Investigation and findings.

(a) The Office may permit the parties to submit further written or oral arguments or information.

(b) Following its investigations, the Office provides to the complainant and recipient or contractor written notice of its findings and the basis for its findings.

(c) If the Office finds that the recipient or contractor has not complied with section 439 of the Act, the Office includes in its notice under paragraph (b) of this section—

(1) A statement of the specific steps that the Secretary recommends the recipient or contractor take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the recipient or contractor may comply voluntarily.

(20 U.S.C. 1221e-3(a)(1), 1232h)

§ 98.10 Enforcement of the findings.

(a) If the recipient or contractor does not comply during the period of time set

under § 98.9(c), the Secretary may either—

(1) For a recipient, take an action authorized under 34 CFR Part 78, including—

(i) Issuing a notice of intent to terminate funds under 34 CFR 78.21;

(ii) Issuing a notice to withhold funds under 34 CFR 78.21, 200.94(b), or 298.45(b), depending upon the applicable program under which the notice is issued; or

(iii) Issuing a notice to cease and desist under 34 CFR 78.31, 200.94(c) or 298.45(c), depending upon the program under which the notice is issued; or

(2) For a contractor, direct the contracting officer to take an appropriate action authorized under the Federal Acquisition Regulations, including either—

(i) Issuing a notice to suspend operations under 48 CFR 12.5; or

(ii) Issuing a notice to terminate for default, either in whole or in part under 48 CFR 49.102.

(b) If, after an investigation under § 98.9, the Secretary finds that a recipient or contractor has complied voluntarily with section 439 of the Act, the Secretary provides the complainant and the recipient or contractor written notice of the decision and the basis for the decision.

(20 U.S.C. 1221e-3(a)(1), 1232h)

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