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SENATE

{ REPORT
{ 104-311

DEPARTMENT OF ENERGY STANDARDIZATION ACT OF 1996

JUNE 28, 1996.—Ordered to be printed

Mr. MURKOWSKI, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany S. 1874]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 1874) to amend sections of the Department of Energy Organization Act that are obsolete or inconsistent with other statutes and to repeal a related section of the Federal Energy Administration Act of 1974, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The bill amends or repeals sections 501(b) (relating to notice of proposed rules), 501(d) (relating to explanatory statements accompanying final rules), 501(e) (providing waivers from the requirements of subsections (b) and (d)), and 624 (relating to advisory committees) in the Department of Energy Organization Act (P.L. 95-91), and section 17 (relating to advisory committees) in the Federal Energy Administration Act of 1974 (P.L. 93-275). In the two decades since the Department of Energy was established, the evolution of the Department's missions, the evolution of administrative case law, and the enactment of other government-wide statutes have rendered these provisions either obsolete, duplicative, or inconsistent with government-wide statutes governing rule making and advisory committee management.

BACKGROUND

The Department of Energy Organization Act (DOE Act) and the Federal Energy Administration Act of 1974 were enacted at a time in which addressing the problems of energy pricing and availability

was considered to be “the moral equivalent of war.” Both Acts attempted to bring together, in a unified manner, authority and programs to regulate energy in all its manifestations. For example, the Senate Report accompanying the DOE Act states that “creation of a Department of Energy will have wide-ranging benefits both for the executive branch and the American people. It will provide a comprehensive overview of and national perspective on energy matters.” Senate Report No. 95–164 at 4. The proposed economic regulatory role of the Department of Energy (DOE) was a key focus of the legislative discussions on the organization of the DOE, and particularly of the provisions of the DOE Act that are to be amended by this bill:

Merger of the economic regulatory activities of the Federal Energy Administration and the Federal Power Commission into the Department of Energy to carry out pricing and allocation decisions in the context of national energy policies, will serve to coordinate these pricing policies with the development of national energy policy goals. It is the purpose of the committee’s provisions with regard to the economic regulatory activities to assure coordination with national energy policy planning and implementation and to assure protection of due process by retaining the benefits of impartial decisionmaking. It is the further purpose of the committee’s provisions in this area to expedite the decisions by providing that some decisions be made through rulemaking rather than adjudicatory procedures. Id. at 6.

It is not surprising to find, then, that the legislative history of the subsections of the DOE Act to be stricken by this bill focus on the need for additional procedural requirements for DOE rule making and advisory committees in order to protect the public interest involved in the economic regulatory role that the DOE was inheriting from the Federal Energy Administration.

LEGISLATIVE HISTORY

SECTION 501

Section 501 of the DOE Act establishes procedures for DOE rule making. S. 1874 repeals two of section 501’s seven subsections and provides a conforming amendment to a third subsection. Section 501(b) provides requirements for notices of proposed rule making published by the DOE or by State and local government acting under delegation from the DOE. It also contains, in section 501(b)(3), an unusual “exemption to an exemption” that subjects DOE rule making on public property, grants, contracts, and loans to the Administrative Procedure Act (APA), notwithstanding the exemption for such matters contained in the APA (5 U.S.C. 553(a)(2)). Section 510(d) establishes requirements for explanatory statements that accompany final rules promulgated by the DOE. Section 501(e) provides the Secretary of Energy with authority to waive the requirement of subsections (b), (c), (d).

The report of the Committee on Government Operations of the House of Representatives, in explaining section 501 of the DOE

Act, stated that “This section makes the provisions of the Administrative Procedures [sic] Act applicable to the issuance of rules, regulations or orders issued by the Department of Energy. In addition, this section transfers some but not all protections presently incorporated in the Federal Energy Administration legislation which is to be transferred to the Department under this act.” House Report 95–346, Part I, at 25–26. With respect to sections 501(b)(1), 501(b)(2), 501(d), and 501(e) of the DOE Act, the Committee adopted language closely modeled on section 7(i)(1)(B) of the Federal Energy Administration Act of 1974 and section 523 of the Energy Policy and Conservation Act of 1975. However, the language of section 501(b)(3) was not in the version of the bill reported by the Committee.

During debate on the DOE Act in the House, a comprehensive substitute amendment (of over 1700 words) rewriting most of sections 501 and 502 was offered and accepted, in which the language that eventually became section 501(b)(3) first appeared. The statement accompanying this amendment stressed the need to “keep in place all of those procedural rights and safeguards” contained in three regulatory acts: the Federal Energy Administration Act of 1974, the Energy Policy and Conservation Act of 1975, and the Emergency Petroleum Allocation Act of 1973. Congressional Record, June 2, 1977, at 17321.

A rationale for including the provision in section 501(b)(3) of the DOE Act does not appear in the floor discussion, nor does the provision of section 501(b)(3) appear in any of the three laws on which the floor amendment was based. The Federal Energy Administration Act of 1974, in section 7(i)(1)(A), makes 5 U.S.C. 553 applicable to rule making without any qualification or change. Identical legislative language is contained in section 523 of the Energy Policy and Conservation Act of 1975. The Emergency Petroleum Allocation Act of 1973 makes rule making subject to the Economic Stabilization Act of 1970, which in section 207(a) invokes the requirements of 5 U.S.C. without qualification or change.

The Senate Report on the DOE Act also spoke to the need for “additional, more specific procedural requirements than found in the Administrative Procedure Act” in adopting the provisions that eventually became sections 501(b)(1), 501(b)(2), 501(d), and 501(e) of the DOE Act. There was no provision equivalent to the present section 501(b)(3) of the DOE Act in the Senate bill. In fact, the Senate Report specifically noted that it was the intention of the Senate that “Certain interpretative, procedural, or other types of rules exempted from notice and comment requirements of the Administrative Procedure Act by 5 U.S.C. 553 will also be exempted from the requirements of this section.” Senate Report at 43.

A consideration of the implications of the above legislative history for the present bill, then, must separate the issues dealt with in section 501(b) (1) and (2) and section 501 (d) and (e) from the issue presented by section 501(b)(3).

CURRENT STATUS OF LAW WITH RESPECT TO SECTION 501

While the provisions of sections 501(b)(1), 501(b)(2), 501(d), and 501(e) were considered, in 1977, to represent additional and more specific procedural requirements than those of the APA, the evolv-

ing jurisprudence on the requirements of the APA and the requirements for reasoned decision making in agencies have substantially changed this situation.

Section 501(b) (1) and (2)

With respect to section 501(b) (1) and (2), the Senate Committee report described the rationale for these sections in the following manner:

The subsection states that notice of any proposed rule or regulation required by law to be published in the Federal Register shall be accompanied, to the degree necessary, by a statement describing the research, analysis, and other information supporting the need for, and probable effect of, any proposed rule or regulation. Currently, the research and analysis on which a proposed rule is based may be neither publicized nor made available to the public when the rule is proposed. The lack of this information places members of the public at an extreme disadvantage in attempting to evaluate and comment on a proposed rule, in part because they cannot assess the validity of the underlying information, and hence, the proposed rule itself.

The subsection further specifies that in addition to publication in the Federal Register, other means of publicity should be utilized to notify interested parties of the nature and probable effect of any proposed rule or regulation. A minimum of 30 days must be provided for public comment on the proposal. The period may only be less than 30 days where necessary to avoid serious harm or injury to the public health, safety, or welfare.

Section 501(b) further requires that public notice of all rules or regulations which are promulgated by officers of a State or local government shall be published in at least two newspapers of statewide circulation. If such publication is not practicable, notice of any proposed rule or regulation shall be given by other means which will assure wide public notice." Senate Report at 44.

However, since the enactment of the DOE Act, the issues that the Congress was attempting to address in section 501(b)(1) have been addressed more fully by a line of court cases growing out of the D.C. Circuit's decision in *Portland Cement Assn. v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973). The court in this case stated the basis for its action in terms of a broad principle of general applicability: "It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency." *Id.* at 393.

Portland Cement has been followed and expanded on in many cases in numerous circuits since the enactment of the DOE Act. For example, rules have been overturned because underlying studies were not exposed to public scrutiny. *Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Commission*, 569 F.2d 831, 842 (5th Cir. 1978). "An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in

time for meaningful commentary.” *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 531 (D.C. Cir. 1982), cert. denied, 459 U.S. 835 (1982). A supplemental notice containing new data and analysis was held inadequate when it was received one day before the rule was promulgated in *Solite Corp. v. EPA*, 952 F.2d 473, 499–500 (D.C. Cir. 1991). At the same time, the post-*Portland Cement* jurisprudence has introduced some nuances missing from the statutory language in the DOE Act. In *Air Pollution Control Dist. v. EPA*, 739 F.2d 1071 (6th Cir. 1984) the court held that data submitted after close of the comment period may be considered when members of the public were aware of it and the petitioner had responded to it. An agency may change calculations in response to comments without providing opportunity to challenge the changes. *Air Transport Assn. v. CAB*, 732 F.2d 219 (D.C. Cir. 1984). The test as to whether *Portland Cement* requires publication of a study on which a rule is based is whether the new study provides critical new understanding. *Community Nutrition Institute v. Block*, 749 F.2d 50, 58 (D.C. Cir. 1984). Given that the problem stated by the drafters of the DOE Act, that “currently, the research and analysis on which a proposed rule is based may be neither publicized nor made available to the public when the rule is proposed,” has been addressed with considerable sophistication in the post-*Portland Cement* case law, this statutory requirement may be removed from the DOE Act without affecting the rights of the public to know “the technical basis for a proposed rule in time to allow for meaningful commentary.” 673 F.2d at 531.

With respect to the requirements on State and local government promulgation of DOE rules under section 501(b)(2), it should be noted that there have been no such rules in the entire history of the DOE, and that no current DOE statutory authority provides for such delegated rule making. States have their own laws governing administrative rule making, and many are of more recent vintage, and are more detailed in their requirements, than the Administrative Procedure Act. There would appear to be no rationale for maintaining a superfluous Federal supplementation of State law.

Section 501(d)

The need for section 501(d) was also predicated on the belief, at the time of the enactment of the DOE Act, that the corresponding provision in the Administrative Procedure Act, section 553(c) was too weak. The Senate Committee explained this rationale as follows: “Following the notice and comment period, including any oral presentations required by section 501(b) [moved in the final bill to 501(c)], the Secretary or the Board may promulgate the rule if it is accompanied by an explanation responding to the major comments, criticisms, and alternative proposals offered in the comments. The committee believes that such a requirement will help assure full consideration of all comments submitted by interested persons, and help the public understand the full basis and nature of the ultimate decision reached by the Board or the Secretary.” Senate Report at 45. Case law interpreting section 553(c), though, has reached an identical state of development since 1977. As described in Professors Kenneth C. Davis and Richard J. Pierce, Jr. in “3 Administrative Law Treatise” at 310–311:

Over the decades since Congress enacted §553(c), the courts gradually have attached greater significance to the language Congress used to describe the statement of basis and purpose in the Committee reports [accompanying the enactment of the Administrative Procedure Act]. * * * No court today would uphold a major agency rule that incorporates only a “concise general statement of basis and purpose.” To have any reasonable prospect of obtaining judicial affirmance of a rule, an agency must set forth the basis and purpose of the rule in a detailed statement, often several hundred pages long, in which the agency refers to the evidentiary basis for all factual predicates, explains its method of reasoning from factual predicates and expected effects of the rule, related the factual predicates and expected effects of the rule to each of the statutory goals or purposes the agency is required to further or to consider, responds to all major criticisms contained in the comments on its proposed rule, and explains why it has rejected at least some of the most plausible alternatives to the rule that it has adopted. See, e.g., *American Gas Assn. v. FERC*, 888 F.2d 136 (D.C. Cir. 1989); *Mobil Oil Co. v. DOE*, 610 F.2d 796 (TECA 1979), cert. denied, 446 U.S. 937 (1980); *National Tire Dealers & Retreaders v. Brinegar*, 491 F.2d 31 (D.C. Cir. 1974). Failure to fulfill one of these judicially prescribed requirements of a “concise general statement of basis and purpose” has become the most frequent basis for judicial reversal of agency rules.

Perhaps the most important contributor to the evolution of jurisprudence relating to the statement of basis and purpose has been the evolving judicial interpretation of the requirement in the APA for courts “to hold unlawful and set aside agency action” that is “arbitrary, capricious, and abuse of discretion of otherwise not in accordance with law.” 5 U.S.C. 706(2)(A). In *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), the Supreme Court provided a generalized standard concerning the content of a statement of basis and purpose required to support or avoid a conclusion that a rule is “arbitrary” or “capricious”:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. 463 U.S. at 43.

Seen in the light of this evolution of case law on section 553, most of which occurred after the passage of the DOE Act in 1977, the need for a separate section 501(d) is not readily apparent. The disadvantage of retaining this subsection can be seen by the presence of a waiver for the requirements of subsection (d) in section 501(e) of the DOE Act. Given that courts, in developing their stand-

ards for reasoned decision making, have not seen fit to conclude that agencies need waivers from such standards, one could argue that the DOE Act now provides less protection on this score than the case law interpreting section 553. At best, then, section 501(d) is surplusage, and it could be argued that retaining this subsection risks allowing an obsolete provision to remain the U.S. Code that may be out of step with the future evolution of the APA through legislation or case law on rule making.

Section 501(b)(3)

As stated above, the rationale for the provision of section 501(b)(3) is much more difficult to understand in light of the legislative history of the DOE Act. It appears without any specific explanation and the general explanation provided for the amendment in which it initially appeared does not apply to it. The conference report on the DOE Act similarly provides no explanation of the need for or intention of this provision. In 1984, Congress provided, by enacting a new section 22 of the Office of Federal Procurement Policy Act (41 U.S.C. 418b), that procurement policies, regulations, procedures, and forms must be published in the Federal Register for at least 30 days of public comment prior to their adoption. Thus, there are now two separate laws requiring rule making procedures that apply to DOE procurement-related rules, while other Federal agencies have only one. Given this, the anomalous provision in the DOE Act is no longer required.

SECTION 624

The Senate bill authorized the Secretary to establish advisory committees to assist in the performance of his functions, and made these advisory committees subject to section 17 of the Federal Energy Administration Act of 1974. The House bill limited the applicability of section 17 to the regulatory activities of the Department. As we stated during the floor debate on the House bill, "there are other operational needs to close advisory committee meetings such as when trade secrets or other private business, confidential information, or other privileged information of a personal or private nature will have to be discussed," and the DOE was intended to be "an operational as well as regulatory agency." Congressional Record, June 3, 1977, p. 17406. In the conference report, it was decided to keep the Senate provision, with the addition of exemption number 4 in the Government in the Sunshine Act (5 U.S.C. 552b(c)(4); relating to trade secrets and confidential business information) as an additional ground to close advisory committee meetings.

CURRENT STATUS OF LAW WITH RESPECT TO SECTION 624

In the years since the enactment of the DOE Act, the regulatory mission of the Department has waned dramatically, while the operational mission of the Department in research and development (not prominent in the originally reported bills to create the Department) has grown substantially. There has also been further development in the implementation of the Federal Advisory Committee Act (FACA). Responsibility for implementation of FACA was transferred to the General Services Administration (GSA) in October

1977, after the enactment of the DOE Act, and the GSA subsequently published government-wide regulations (codified at 41 CFR 101–6.1001 et seq.) that provide essentially the same advisory committee protections contained in the Federal Energy Administration Act of 1974 (e.g., requiring balanced membership on committees, access to minutes of advisory committee meetings and to studies considered by such committees). The unique restriction remaining as a result of section 624(b) of the DOE Act has thus become more pronounced as a bar to the use, for example, of advisory committees in peer review of grant and contract applications, without compensating benefits not found in the Federal Advisory Committee Act and its implementing regulations. In 1991, the General Accounting Office agreed with DOE that DOE’s “authorizing legislation generally prohibits closing advisory committee meetings on research and development, unless the closing is due to national security reasons or the protection of privileged information. However, this legislation does not allow the closing of panel meetings to protect personal information. Consequently, [if DOE] charters its peer review panels under FACA it would not be able to close the meeting to prevent the disclosure of personal information.” “Peer Review: Compliance with the Privacy Act and the Federal Advisory Committee Act,” GAO/GGD–91–48 (1991) at 13. The GAO recommended that “The Secretary of Energy should seek an amendment to its authorizing legislation that would allow Energy to charter its peer review panels but still protect the privacy of the grant applicants and peer reviewers.” *Id.* at 14.

Given that the original impetus for the application of section 17 of the Federal Energy Administration Act was DOE’s anticipated regulatory role; and given that the Federal Advisory Committee Act and its implementing regulations provide for the same procedural protections in section 17 while providing agencies with more latitude to protect privileged information and personal information, there is little rationale for maintaining the overlapping and excessively restrictive requirements of section 17.

LEGISLATIVE HISTORY OF S. 1874 AND COMMITTEE RECOMMENDATION

Senator J. Bennett Johnston introduced S. 1874 on June 13, 1996 and the bill was referred to the Committee on Energy and Natural Resources. The Department of Energy rendered technical assistance with the drafting of the bill. Secretary of Energy Hazel O’Leary, on behalf of the Administration, wrote to Senator Johnston on June 10, 1996 stating that the Administration “strongly supports” the amendments made by the bill.

The Senate Committee on Energy and Natural Resources, in open business session on June 19, 1996, by unanimous vote of a quorum present recommends that the Senate pass S. 1874 without amendment.

SECTION-BY-SECTION ANALYSIS

Section 1 of the bill provides the short title, the Department of Energy Standardization Act of 1996.

Section 2 of the bill consists of two subsections. The first subsection strikes redundant and conflicting sections of the Department of Energy Organization Act related to the promulgation of Department of Energy regulations. After enactment of this subsection, DOE rule making with respect to public property, contracts, loans, and grants will be conducted under the same legislative authorities as such rule making is conducted generally, i.e., under the Office of Federal Procurement Policy Act (41 U.S.C. 418b). Requirements for other proposed and final DOE rules will be governed by the applicable provisions of the Administrative Procedure Act (5 U.S.C. 553 (c) and (d)). The second subsection strikes redundant and conflicting sections of the Department of Energy Organization Act and the Federal Energy Administration Act of 1974 relating to advisory committee management. After enactment of this subsection, DOE advisory committees will be governed completely by the Federal Advisory Committee Act (5 U.S.C. Appendix).

COST AND BUDGETARY CONSIDERATIONS AND FEDERAL MANDATE
EVALUATION

The following estimate of costs of this measure and Federal mandate evaluation has been provided by the Congressional Budget Office.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 27, 1996.

Hon. FRANK H. MURKOWSKI,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1874, the Department of Energy Standardization Act of 1996, as ordered reported by the Senate Committee on Energy and Natural Resources on June 19, 1996. Assuming that appropriations are adjusted to be consistent with the bill, we estimate that enacting S. 1874 would result in discretionary savings of about \$500,000 a year because of changes in statutory guidelines for various administrative activities of the Department of Energy (DOE). Enacting S. 1874 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

S. 1874 would eliminate certain statutory requirements applicable to DOE's procurement actions and advisory committees. DOE currently must comply with two sets of standards: those that apply government-wide and some that apply only to the department. For example, before DOE procurement rules can be finalized, the department has to issue a proposed rule and provide for public notice and comment. In contrast, other agencies are authorized to issue procurement rules without going through that proposal and review process. Likewise, all meetings of DOE's advisory committees must be open to the public unless they involve documented national security interests or research and development. Based on information provided by DOE, CBO estimates that repealing these agency-specific requirements would reduce the workload associated with procurement actions, saving the department about \$500,000 a year be-

ginning in fiscal year 1997. CBO estimates that other provisions of the bill would have no significant budgetary impact.

S. 1874 contains no intergovernmental or private-sector mandates as defined in Public Law 104-4 and would impose no costs on state, local, or tribal governments. This bill would delete a provision of existing law that requires state and local governments to publish proposed rules in newspapers when those governments promulgate rules pursuant to a delegation by DOE. Department officials have indicated that they have delegated no rulemaking authority to state or local governments and do not expect to do so. Therefore, we believe that no state or local governments would be affected by repeal of this provision.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Kathleen Gramp (for federal costs) and Marjorie Miller (for the state and local impact).

Sincerely,

JUNE E. O'NEILL, *Director*.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 1874.

The bill is not a regulatory measure in the sense of imposing Government established standards or significant economic responsibilities on private individuals or businesses. The bill provides for simplification and standardization of DOE rule making procedures with respect to public property, loans, grants, or contracts. Because DOE rules relating to these subjects will now be subject to the government-wide exemption in the Administrative Procedure Act (5 U.S.C. 553(a)(2)), DOE will no longer have to engage in rule making under the Administrative Procedure Act for rules on such topics in addition to rule making under the procedures provided for in the Office of Federal Procurement Policy Act (41 U.S.C. 418b). The bill also provides for simplification and standardization of DOE advisory committee procedures. The only impact would be to streamline the internal DOE administrative process relating to advisory committee management. DOE will probably need to revise its internal guidelines to implement these changes.

No personal information would be collected in administering the program. Enactment of this bill will strengthen DOE's ability to protect personal information exempt from public disclosure under the Administrative Procedure Act, so the bill would improve the protection of personal privacy.

Enactment of S. 1874 will reduce the paperwork associated with DOE advisory committee management and rule making.

EXECUTIVE COMMUNICATIONS

The pertinent legislative report and communication received by the Committee from the Department of Energy setting forth Executive agency recommendation relating to S.1874 is set forth below:

THE SECRETARY OF ENERGY,
Washington, DC, June 10, 1996.

Hon. J. BENNETT JOHNSTON,
*Ranking Democrat, Committee on Energy and Natural Resources,
 U.S. Senate, Washington, DC.*

DEAR SENATOR JOHNSTON: This responds to your request for Department of Energy views on proposed amendments to the Department of Energy Organization Act (DOE Organization Act). These amendments would repeal subsections 624(b) and 501 (b) and (d) of the Act. The Department strongly supports these amendments.

The first amendment would repeal section 624(b) of the DOE Organization Act (DOE Act) and section 17 of the Federal Energy Administration Act. The amendment would place DOE advisory committees on the same legal and procedural basis as all committees covered by the Federal Advisory Committee Act. Under current law DOE advisory committees are required to meet in public session, while other agencies may close meetings to protect information exempt from disclosure under the Administrative Procedure Act. DOE's more stringent requirement was justified at the time of its enactment by the economic regulatory role of the Department's predecessor, the Federal Energy Administration.

The second amendment would repeal subsections 501 (b) and (d) of the DOE Organization Act. Subsections 501 (b) and (d) elaborate on requirements in the Administrative Procedure Act interpreted by the Supreme Court to require agencies to provide the basis or purpose of the rule in their rulemaking (*Motor Vehicle Manufacturers Association v. State Farm*, 463 U.S. 29, 423 (1983)). With repeal of subsections 501 (b) and (d), the Department would be governed by the same standard procedural requirements as other agencies in conducting notice-and-comment rulemakings. The Department supports this change.

The Office of Management and Budget advises that there is no objection from the standpoint of the President's program to submission of this report for the Committee's consideration.

If you have further questions, please contact me, or have a member of your staff contact Douglas W. Smith, Deputy General Counsel for Energy Policy.

Sincerely,

HAZEL R. O'LEARY.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by bill S. 1874, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 15, UNITED STATES CODE

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CHAPTER 16B—FEDERAL ENERGY ADMINISTRATION

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Subchapter I—Federal Energy Administration

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§ 776. Advisory committees

[(a) Representation of points of view and functions, government, and regulatory utility commissions. Whenever the Administrator shall establish or utilize any board, task force, commission, committee, or similar group, not composed entirely of full-time Government employees, to advise with respect to, or to formulate or carry out, any agreement or plan of action affecting any industry or segment thereof, the Administrator shall endeavor to insure that each such group is reasonably representative of the various points of view and functions of the industry and users affected, including those of residential, commercial, and industrial consumers, and shall include, where appropriate, representation from both State and local governments, and from representatives of State regulatory utility commissions, selected after consultation with the respective national associations.

[(b) Public meetings; participation of interested persons; closed meetings; determination, national security, reasons. Each meeting of such board, task force, commission, committee, or similar group, shall be open to the public, and interested persons shall be permitted to attend, appear before, and file statements with, such group, except that the Administrator may determine that such meeting shall be closed in the interest of national security. Such determination shall be in writing, shall contain a detailed explanation of reasons in justification of the determination, and shall be made available to the public.

[(c) Public inspection and copying of documents. All records, reports, transcripts, memoranda, and other documents, which were prepared for or by such group, shall be available for public inspection and copying at a single location in the offices of the Administration.

[(d) Federal Advisory Committee Act applicable. Advisory committees established or utilized pursuant to this Act shall be governed in full by the provisions of the Federal Advisory Committee Act (Public Law 92-463, 86 Stat. 770), except as inconsistent with this section.]

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TITLE 42, UNITED STATES CODE

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CHAPTER 84—DEPARTMENT OF ENERGY

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**Subchapter V—Administrative Procedures and Judicial
Review**

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§ 7191. Procedures for issuance of rules, regulations, or orders

(a) Applicability of subchapter II of chapter 5 of Title 5.

(1) Subject to the other requirements of this title, the provisions of subchapter II of chapter 5 of title 5, United States Code, shall apply in accordance with its terms to any rule or regulation, or any order having the applicability and effect of a rule (as defined in section 551(4) of title 5, United States Code), issued pursuant to authority vested by law in, or transferred or delegated to, the Secretary, or required by this Act or any other Act to be carried out by any other officer, employee, or component of the Department, other than the Commission, including any such rule, regulation, or order of a State, or local government agency or officer thereof, issued pursuant to authority delegated by the Secretary in accordance with this title. If any provision of any Act, the functions of which are transferred, vested, or delegated pursuant to this Act, provides administrative procedure requirements in addition to the requirements provided in this title, such additional requirements shall also apply to actions under that provision.

(2) Notwithstanding paragraph (1), this title shall apply to the Commission to the same extent this title applies to the Secretary in the exercise of any of the Commission's functions under section 402(c)(1) or which the Secretary has assigned under section 402(e).

[(b) Publication of proposed rules, regulations, or orders in the Federal Register; statement; minimum comment period; additional notice requirement; availability of exception.

[(1) In addition to the requirements of subsection (a) of this section, notice of any proposed rule, regulation, or order described in subsection (a) shall be given by publication of such proposed rule, regulation, or order in the Federal Register. Such publication shall be accompanied by a statement of the research, analysis, and other available information in support of, the need for, and the probable effect of, any such proposed rule, regulation, or order. Other effective means of publicity shall be utilized as may be reasonably calculated to notify concerned or affected persons of the nature and probable effect of any such proposed rule, regulation, or order. In each case, a minimum of thirty days following such publication shall be provided for an opportunity to comment prior to promulgation of any such rule, regulation, or order.

[(2) Public notice of all rules, regulations, or orders described in subsection (a) which are promulgated by officers of a State or local government or agency pursuant to a delegation under this Act shall be provided by publication of such proposed rules, regulations, or orders in at least two newspapers of statewide circulation. If such publication is not practicable, notice of any such rule, regulation, or order shall be given by

such other means as the officer promulgating such rule, regulation, or order determines will reasonably assure wide public notice.

[(3) For the purposes of this title, the exception from the requirements of section 553 of title 5, United States Code, provided by subsection (a)(2) of such section with respect to public property, loans, grants, or contracts shall not be available.]

(c) Substantial issue of fact or law or likelihood of substantial impact on Nation's economy, etc.; oral presentation.

(1) If the Secretary determines, on his own initiative or in response to any showing made pursuant to paragraph (2) (with respect to a proposed rule, regulation, or order described in subsection (a)) that no substantial issue of fact or law exists and that such rule, regulation, or order is unlikely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses, such proposed rule, regulation, or order may be promulgated in accordance with section 553 of title 5, United States Code. If the Secretary determines that a substantial issue of fact or law exists or that such rule, regulation, or order is likely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses, an opportunity for oral presentation of views, data, and arguments shall be provided.

(2) Any person, who would be adversely affected by the implementation of any proposed rule, regulation, or order who desires an opportunity for oral presentation of views, data, and arguments, may submit material supporting the existence of such substantial issues or such impact.

(3) A transcript shall be kept of any oral presentation with respect to a rule, regulation, or order described in subsection (a).

[(d) Promulgation of rule if accompanied by explanation. Following the notice and comment period, including any oral presentation required by this subsection, the Secretary may promulgate a rule if the rule is accompanied by an explanation responding to the major comments, criticisms, and alternatives offered during the comment period.]

(e) Waiver of requirements. The requirements of [subsections (b), (c) and (d)] *subsection (c)* of this section may be waived where strict compliance is found by the Secretary to be likely to cause serious harm or injury to the public health, safety, or welfare, and such finding is set out in detail in such rule, regulation, or order. In the event the requirements of this section are waived, the requirements shall be satisfied within a reasonable period of time subsequent to the promulgation of such rule, regulation, or order.

(f) Effects confined to single unit of local government, geographic area within State, or State; hearing or oral presentation.

(1) With respect to any rule, regulation, or order described in subsection (a), the effects of which, except for indirect effects of an inconsequential nature, are confined to—

(A) a single unit of local government or the residents thereof;

(B) a single geographic area within a State or the residents thereof; or

(C) a single State or the residents thereof; the Secretary shall, in any case where appropriate, afford an opportunity for a hearing or the oral presentation of views, and provide procedures for the holding of such hearing or oral presentation within the boundaries of the unit of local government, geographic area, or State described in paragraphs (A) through (C) of this paragraph as the case may be.

(2) For the purposes of this subsection—

(A) the term “unit of local government” means a county, municipality, town, township, village, or other unit of general government below the State level; and

(B) the term “geographic area within a State” means a special purpose district or other region recognized for governmental purposes within such State which is not a unit of local government.

(3) Nothing in this subsection shall be construed as requiring a hearing or an oral presentation of views where none is required by this section or other provision of law.

(g) Prescription of procedures for State and local government agencies. Where authorized by any law vested, transferred, or delegated pursuant to this Act, the Secretary may, by rule, prescribe procedures for State or local government agencies authorized by the Secretary to carry out such functions as may be permitted under applicable law. Such procedures shall apply to such agencies in lieu of this section, and shall require that prior to taking any action, such agencies shall take steps reasonably calculated to provide notice to persons who may be affected by the action, and shall afford an opportunity for presentation of views (including oral presentation of views where practicable) within a reasonable time before taking the action.

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Subchapter VI—Administrative Provisions

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§ 7234. Advisory committees

[(a)] The Secretary is authorized to established in accordance with the Federal Advisory Committee Act such advisory committees as he may deem appropriate to assist in the performance of his functions. Members of such advisory committees, other than full-time employees of the Federal Government, while attending meetings of such committees or while otherwise serving at the request of the Secretary while serving away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code for individuals in the Government serving without pay.

[(b)] Section 17 of the Federal Energy Administration Act of 1974 shall be applicable to advisory committees chartered by the Secretary, or transferred to the Secretary or the Department under

this Act, except that where an advisory committee advises the Secretary on matters pertaining to research and development, the Secretary may determine that such meeting shall be closed because it involves research and development matters and comes within the exemption of section 552b(c)(4) of title 5, United States Code.】

