DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-209699 DATE: May 19, 1983

MATTER OF: Department of Energy use of consent orders to distribute petroleum overcharge settlement funds

DIGEST: 1. In distributing funds under consent orders with alleged violators of petroleum price and allocation regulations, Department of Energy must attempt to return funds to those actually injured by overcharges. Where this is not possible, Energy must use mandatory procedure established by 10 C.F.R. § 205.280 et seq., which creates mechanisms for injured parties to claim refunds. Distribution of consent order funds by oil companies is not permissible without restitutionary nexus because Energy lacks authority to do indirectly what it cannot do directly. In-kind deposit of oil in Strategic Petroleum Reserve by oil companies is not permissible because it lacks restitutionary nexus and is not otherwise authorized.

2. Distribution of consent order funds to states by oil companies or Department of Energy is permissible only if states are required to use funds exclusively for energy-related purposes with restitutionary nexus to nature of overcharges, for benefit of class of consumers overcharged, and according to plans approved by Energy. Any funds not able to be distributed by oil companies in appropriate restitutionary manner must revert to Energy for disposition under procedure in 10 C.F.R § 205.280 et seq. If no consumers or classes of consumers can be identified by administrative procedure, and no restitutionary nexus for payments to states can be found, only remaining authorized distribution is deposit of funds in miscellaneous receipts account of Treasury.

This decision to the Secretary of Energy results from a request of the Chairman, Oversight and Investigations Subcommittee, House Committee on Energy and Commerce, that we examine the validity of and continued use by the Department of Energy (Energy) of various provisions in consent orders with producers of petroleum products, by which Energy has been making or permitting the producers to make direct distribution of overcharge settlement funds to parties who have no clear connection to the overcharges which gave rise to the settlements. The purpose of the consent orders is to settle alleged violations of Federal petroleum price and allocation regulations through payments by the producers, the amounts of which were arrived at by negotiation with Energy's Economic Regulatory Administration or Office of Special Counsel.

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We previously have issued to the Chairman two opinions on the question of appropriate distributions of overcharge refunds, 60 Comp. Gen. 15 (1980) and B-200170, April 1, 1981, and we now have been requested to issue this decision to inform Energy of our position regarding its current actions under consent orders.

We have examined the relevant legislation, case law, regulations and other related materials, including summaries of numerous consent orders published in the Federal Register, and we also obtained Energy's views on this matter. In our opinion, Energy has been using consent orders improperly in a number of cases by making or allowing the oil companies to make distribution of overcharge refunds without prior efforts to identify those overcharged and the amounts of overcharges. As a result, payments have been made by oil companies and by Energy to institutions that were not actually injured by the overcharges, and that lack an appropriate connection to the overcharges. Further, and more importantly, overcharged customers have been denied an opportunity to present claims through Energy's established procedures.

In large part, our conclusion is founded on our prior opinions, particularly on their analysis of Energy's restitutionary authority, and on the holding that Energy is legally bound to follow its own regulations which require that certain administrative procedures be followed in determining appropriate restitutionary distribution mechanisms for individual or classes of injured consumers not readily identifiable. Subsequent judicial decisions addressing Energy's restitutionary authority and the validity of certain consent order provisions it has negotiated do not address the specific issues with which we are concerned, but in our view they lend additional support to our conclusions, as will be discussed below.

Prior GAO Opinions on Energy's Restitutionary Authority

In our two previous opinions dealing with the authority of Energy to distribute the overcharge refunds it has received under consent orders with Getty Oil Company and other producers of petroleum products, we stated that Energy has limited, implied restitutionary authority to distribute the funds only to consumers injured by the overcharges, or to classes of consumers with a connection to the overcharges.

In our first opinion, 60 Comp. Gen. 15 (1980), we reviewed the legality of plans by Energy to distribute $25 million in overcharge refunds it obtained under the terms of a consent order with Getty. We examined the distribution plan in light of the terms of the settlement, the pertinent legislation and regulations under which

Energy carried out enforcement of the price and allocation controls on petroleum products, and the nature and scope of restitutionary authority available to Energy. On the basis of this analysis, we concluded that Energy could not lawfully implement its proposed distribution of the funds to defray the heating oil costs of low-income persons without regard to their status as former heating oil customers of Getty, both because the plan did not effect restitution to the entire class of purchasers injured, and because Energy failed to follow its own mandatory regulations which set forth procedures to allow persons allegedly injured by the overcharges to present their evidence and establish their claim.

The Getty Consent Order contained no provision controlling the distribution of the $25 million refund. Energy proposed to make "restitution" by distributing the bulk of the funds to states where Getty presently has heating oil customers, to be used to assist low-income users of heating oil, with the balance of the funds to be distributed to lower grade members of the armed services currently residing in those states.

Energy asserted that its restitutionary authority included the power to take any action necessary to eliminate or compensate for the effects of a violation of its petroleum price and allocation regulations. However, in analyzing Energy's implied power to order restitution as a remedy for violation of the regulations, we determined that "Energy's remedial authority is limited to ordering a violator to make refunds to overcharged customers." 60 Comp. Gen. supra at 20.

We examined the distribution plan for the Getty funds in light of our view of Energy's restitutionary authority. We concluded:

> "In order for any distribution of the Getty funds to satisfy the statutory and regulatory requirements for restitution, it must be made in approximate proportion to the injury actually sustained to Getty customers and to ultimate consumers of Getty products who were the victims of the overcharges." 60 Comp. Gen., at 22.

On the other hand, we recognized

> "* * * that it is frequently not possible to identify each individual customer or consumer who has been overcharged nor is it always possible to make a precise determination of the amounts each individual has been overcharged. So long as a good faith effort was made to

> identify overcharged individuals, we would not view a distribution scheme which lacked dollar for dollar precision as unauthorized. However, the Energy distribution scheme in the Getty case does not sufficiently relate distributees to those injured to support a finding of restitution." 60 Comp. Gen., at 24.

We believed at the time this opinion was issued that within these guidelines, Energy had ample flexibility to develop appropriate, innovative distribution plans for the funds. We still believe so.

In our opinion of April 1, 1981, B-200170, reviewing the legality of subsequent distribution proposals by Energy's Office of Hearing and Appeals (OHA), where it appeared to be difficult or impossible to identify injured purchasers, we again emphasized the necessity in any appropriate restitutionary distribution plan of a sufficient relationship between the recipients of disbursements and the persons actually overcharged.

> "No authority is expressly granted to Energy—or to the administrative components of Energy responsible for the price and allocation programs—to promote the interests of consumers in general through direct payments to them or through grants made on their behalf to states or other entities." April opinion, p. 9.

We also reiterated that adequate flexibility is built into Energy's restitutionary authority.

The statutory framework under which Energy operates was set out in 60 Comp. Gen., _supra_, at 18-21, and need not be described in detail here. We pointed out that the only specific grant of restitutionary power in that legislation is found in section 209 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note, and is limited to actions which can be taken by the United States District Courts. 60 Comp. Gen., _supra_, at 18-19. We also stated that _Bonray Oil Co. v. Department of Energy_, 472 F. Supp. 9 (W.D. Okla. 1978), _aff'd per curiam_, 601 F. 2d 1191 (TECA 1979), "only confirms Energy's authority, as part of a remedial order which determines that violations have occurred, to order the violator to return overcharges directly to its customers."

DISCUSSION

In a copy of a memorandum delineating its view of its legal authority to structure remedies, provided to us by the Administrator of Energy's Economic Regulatory Administration, Energy relies on Bonray, supra, on Sauder v. Department of Energy, 648 F. 2d 1341 (TECA, 1981), and on Citronelle-Mobile Gathering, Inc. v. Edwards, 669 F. 2d 717 (TECA, 1982), as authorizing the broad grant of restitutionary power that it has been exercising in recent consent order settlements. As noted above, we believe that Bonray, supra, indicates that Energy's authority is limited to making refunds to overcharged customers.

In Sauder, supra, the court stated that section 209 does not limit the courts or the agency to "restitution or to a particularly strict interpretation of restitution," but went on to state, that "[w]e do not grant the agency 'carte blanche,' * * * but merely enforce its effort sanctioned by the statute and its purposes, 'to set things right.'" Sauder, supra at 1348-49. In Sauder, the Court held only that Energy had sufficient restitutionary authority to order one of several joint oil well owner-operators to make refunds of all the owner-operators' overcharges even though that owner operator had not received all of the overcharged amounts. Sauder did not, however, provide for distribution of overcharged amounts to other than overcharged customers, using the term "refund" to denote the amount to be disgorged by the plaintiff. Sauder, supra at 1349. (It should be noted that both of these cases involved litigation arising from actions taken under Energy's administrative procedures for the enforcement of remedial orders, 10 C.F.R. Subparts 0 and H, §§ 205.190 et seq., 205.100 et seq., and not from consent orders agreed to by the parties.)

In our April opinion we discussed the decision of the district court in Citronelle-Mobile Gathering, Inc. v. O'Leary, 499 F. Supp. 871 (S.D. Ala. 1980), in which the court ordered that restitution be made to the United States Treasury since the court could not envision a formula which could meaningfully distribute available funds to the millions of consumers injured by the various defendants' acts. See, Citronelle, supra, 499 F. Supp. at 866; April GAO opinion at 11. In the subsequent appellate decision in that case, Citronelle-Mobile Gathering, Inc. v. Edwards, 669 F. 2d 717 (TECA, 1982), the court emphasized that enforcement actions under section 209 are taken "to enforce public, not private rights," and that "the central purpose of restitution is to determine the amount by which the wrongdoer has been unjustly enriched, and then to make him disgorge that amount." Citronelle v. Edwards, supra, 669 F. 2d at 722. On the question of distribution of the amounts placed in the Treasury, the appellate court stated—

"Suffice it to note that the Government has a duty to try to ascertain those overcharged, and refund them, with interest, from the restitution funds." Id., at 723.

We fully agree with the statement of Energy's duty to attempt to identify overcharged customers so that overcharge funds deposited in escrow accounts may ultimately be distributed. We also agree that where it is possible to determine the purchasers of overpriced oil, and through these to attempt to locate consumers ultimately overcharged as a result, "[i]t follows that payment to the United States Treasury is not restitution, in the true sense of the word, or in the objectives of the statutes here involved." Id., at 722. In our view, however, Citronelle v. Edwards does not preclude payments to the general funds of the Treasury when other restitutionary mechanisms are not appropriate, or have been tried without success, since these situations were not addressed by the court.

SUBSEQUENT DEVELOPMENTS

Section 155 of Pub. L. No. 97-377, 96 Stat. 1830, December 21, 1982, providing further continuing appropriations for fiscal year 1983, permitted a one-time distribution to the states of up to $200 million from the over $500 million in settlement funds deposited in Department of the Treasury escrow accounts as of December 17, 1982. The purpose of section 155 was:

"* * * to provide the Secretary of Energy the exclusive authority for the disbursement of the designated petroleum violation escrow funds for limited restitutional purposes (1) which are reasonably expected to benefit the class of persons injured by such violations, and (2) which * * * are likely not to be, through procedures established by regulation, otherwise refunded to injured persons because the purchasers of the refined petroleum products cannot be reasonably identified or paid or because the amount of each purchaser's overcharge is too small to be capable of reasonable determination." Pub. L. No. 97-377, § 155(a).

The funds are to be distributed to the governor of each state with each state's payment based on its share of nationwide consumption of refined petroleum products from 1973 to 1981. Id., § 155 (c)(d). The escrow funds to be disbursed may not include those designated for OHA proceedings under Subpart V of Energy's regulations and must be consistent with the remedial or consent order covering the funds. Id. § 155(e)(i). The states must use the funds under one or more of 5 energy conservation programs set forth in subsection (e)(2), and none of the funds may be used to defray administrative expenses of Energy or of any state. Id. 155(f).

The history of section 155, and its location in a temporary continuing resolution, clearly indicate that it was not intended to authorize Energy to follow a similar distribution formula in disbursing escrow funds in subsequent fiscal years even though it may be unable to identify overcharged customers readily. The provision, then designated amendment 110, was defined as "a one-time distribution" in the explanatory statement to the conference report, H.R. Rep. No. 97-980. Further, in floor debate on the provision, Rep. Dingell stated as follows:

> "The provision is a one-time provision. It should not be viewed as a precedent. It does not confer on DOE any new restitutional or remedial authority or imply that the DOE has such authority. It is a very limited provision aimed at helping people. It is, I stress, an exclusive, one-time disbursement authority." 128 Cong. Rec. H. 10435 (daily ed. December 20, 1982).

The fact that section 155 was considered necessary by the Congress in order to authorize distribution of escrow funds when it was not possible to determine who was actually overcharged provides further support for our position that Energy cannot make such distributions in the absence of similar statutory authority.

In the most recent judicial decision on the issue of disbursement of escrow settlement funds, the district court used section 155 as a model for the equitable remedy it provided. United States v. Exxon Corporation, Civil Action No. 78-1035, (D.D.C., filed March 23, 1983). In its opinion, the court found Exxon liable for substantial overcharges under the crude oil entitlements program, and held that under that program the cost effects of Exxon's wrongdoing were so widely dispersed throughout the country as to make it impossible to trace the overcharged persons and to calculate the extent of injury to each. Id., advance sheets at 77.

This court also pointed out that the court in Citronelle v. Edwards, supra, did not preclude restitutional payments into the Treasury, but based on the facts in that case, where identification of the overcharged persons was possible, ordered further action to identify them and to distribute the funds initially placed in the Treasury. When, as in the Exxon case, overcharges are diffused nationwide, and individualized losses could never be determined accurately, the court held that it was "not precluded on the facts before it from ordering Exxon to make restitution to the Treasury." Exxon, supra, advance sheets at 81-82. In this case, however, the court ordered Exxon to make restitution of the overcharges, plus interest, to the Treasury for deposit in an escrow account, and additionally exercised its equitable powers and restitutionary authority under section 209 of the Economic Stabilization Act, supra, to order Energy to make disbursements from this fund in accordance with the distribution plan set forth in section 155. Id., at 83-85.

Subpart V Regulations for Distribution of Refunds Made to Energy

In our two previous opinions dealing with the distribution of overcharge refunds, we set forth our analysis of the regulations promulgated by Energy which establish procedures for the distribution of these funds by Energy when the recipients or amounts of refunds cannot be readily identified. In our first opinion, we pointed out that Energy's Subpart V regulations, 10 C.F.R. §§ 205.280-205.288, are statutory regulations designed for the protection of the rights of overcharged consumers, that they are binding upon Energy, and that as a result, the procedures established in the regulations are mandatory. 60 Comp. Gen., supra at 26. These procedures provide, among other things, for publication in the Federal Register of notice of Subpart V proceedings, the solicitation of public comments, and the solicitation of claims.

The scope of Subpart V is set forth in the regulations:

> "This subpart establishes special procedures pursuant to which refunds may be made to injured persons in order to remedy the effects of a violation of the regulations of the Department of Energy. This subpart shall be applicable to those situations in which the Department of Energy is unable to readily identify persons who are entitled to refunds specified in a Remedial Order, a Remedial Order for Immediate Compliance, an Order of Disallowance or a Consent Order, or to readily ascertain the amounts that such persons are entitled to receive."
> (10 C.F.R. § 205 280. Emphasis added.)

In our April opinion we determined that the mandatory language of this provision, underlined above, was clearly intended by Energy, since it prevailed over a more flexible provision originally proposed. April opinion, at 4.

We continue to believe that these procedures are mandatory and that Energy therefore is required to present to OHA for disposition every case where the appropriate recipients or amounts of overcharge refunds cannot be determined readily by Energy or the oil companies. The importance of this procedure is that it assures that customers actually overcharged will have an opportunity to have their claims considered before other methods of distribution are used.

For these reasons, we hold that whenever settlement funds cannot be distributed readily to identifiable overcharged consumers or classes of consumers, Energy lacks authority to agree to a consent order provision that distributes overcharge settlement funds directly, or in which distribution is to be made by the oil company, without first attempting to find claimants through OHA proceedings.

Energy's Authorized Remedial Actions

Energy has available to it a range of remedial actions it may take to enforce compliance with its programs. The scope of these actions is set forth in Energy's regulations as follows:

> "(a) A Remedial Order. a Remedial Order for Immediate Compliance, an Order of Disallowance, or a Consent Order may require the person to whom it is directed to roll back prices, to make refunds equal to the amount (plus interest) charged in excess of those amounts permitted under DOE Regulations, to make appropriate compensation to third persons for administrative expenses of effectuating appropriate remedies, and to take such other action as the DOE determines is necessary to eliminate or to compenste for the effect of a violation * * *. Such action may include a direction to the person to whom the Order is issued to establish an escrow account or take other measures to make refunds directly to purchasers of the products involved notwithstanding the fact that those purchasers obtained such products from an intermediate distributor of such person's products, and may require as part of the remedy that the person to whom the Order is issued maintain his prices at certain designated levels notwithstanding the presence or absence of other regulatory controls on such person's prices. In cases where

> purchasers cannot be reasonably identified or paid or where the amount of each purchaser's overcharge is incapable of reasonable determination, the DOE may refund the amounts received in such cases directly to the Treasury of the United States on behalf of such purchasers." 10 C.F.R. § 205.199I

This provision makes it clear that the intended result of these remedial actions is to ensure compliance with Energy's regulations by requiring some form of restitution to overcharged consumers by violators. As an alternative to paying the amounts of the overcharges to Energy, leaving Energy to make restitution from the funds so received, parties who are alleged to have overcharged may be ordered to roll back prices, make refunds themselves, or take other, similar actions. See 60 Comp. Gen. at 21.

As indicated, a consent order is one tool available to Energy to effect restitution. Energy's regulations governing the contents of consent orders provide:

> "(a) Notwithstanding any other provision of this subpart, the DOE may at any time resolve an outstanding compliance investigation or proceeding * * * with a Consent Order. A Consent Order must be signed by the person to whom it is issued, or a duly authorized representative, and must indicate agreement to the terms contained therein. A Consent Order need not constitute an admission by any person that DOE regulations have been violated, nor need it constitute a finding by the DOE that such person has violated DOE regulations. A Consent Order shall, however, set forth the relevant facts which form the basis for the Order." 10 C.F.R. § 205.199J.

The lack of specific requirements for the contents of consent orders is consistent with the nature of consent orders, which are individualized "product[s] of negotiation and compromise in which each party gives up something they might have won in litigation." Consumer Energy Council of America v. Duncan, 4 Energy Mgmt (CCH) ¶ 26,314, at 28,417. Energy's decision to settle a case or close an investigation with a consent order is within the discretion of agency officials, and is not judicially reviewable. U.S. Oil Co., Inc. v. Department of Energy, 510 F. Supp. 910, 914-915 (E.D. Wisc., 1981); Consumer Energy Council of America, supra.

Similarly, the terms of consent orders generally are not reviewable, although there is a limited statutory exception under section 211 of the Economic Stabilization Act, 12 U.S.C. § 1902 note, which permits judicial review of Energy's final orders. The scope of review under this section is very narrow, allowing only the determination of whether the terms of the consent order exceed the agency's authority. State of Minnesota v. Standard Oil Co. (Indiana), 516 F. Supp. 682, 689-90 (D. Minn., 1981. The wisdom or fairness of particular provisions may not be questioned, but it is appropriate to examine these provisions to determine whether Energy has the authority to agree to them at all. Id. at 691, f. 7. To determine whether Energy has, in fact, included unauthorized distribution mechanisms in consent order provisions, we examined a randomly selected group of notices of proposed and final consent orders that were published primarily during 1982 in the Federal Register, the place and form in which most of the consuming public would be made aware of the settlements. The Federal Register documents also contain statements summarizing comments received about proposed consent orders, as well as Energy's responses to these comments. In most cases, these responses outline the legal or policy basis for various actions taken by Energy and are useful in analyzing the distribution mechanisms selected in each instance.

As can be seen in the attached Appendix, we examined proposed or final consent orders with 16 companies engaged in various aspects of the petroleum industry, involving over $86 million in settlement payments. As will be discussed below, in many instances the orders establish refund mechanisms which we think Energy is not authorized to agree to. Some involve payments to be made directly to states by oil companies, with no requirement that the money be used only for restitutionary purposes.1/ Others require payments to Energy to place the funds in the U.S. Treasury miscellaneous receipts account without prior use of its Subpart V procedures.2/ A third form of disposition calls for the companies to deposit oil in the Strategic Petroleum Reserve.3/ In each such case the funds or the oil are to be distributed with no prior effort to identify and make refunds to purchasers who might be able to prove they were harmed by the questioned activities of the companies.

1/ Standard Oil Co. (Ohio), 47 F.R. 49705, Nov. 2, 1982, and Imperial Refineries Corp., 47 F.R. 53094, November 24, 1982.

2/ John L. Cox, 47 F.R. 36887, August 24, 1982, Carter Foundation Production Co., 47 F.R. 36886, August 24, 1982, ($700,000); Amerada Hess Corp., 47 F.R. 55265, December 8, 1982, and Santa Fe Energy Co., 47 F.R. 42434, September 27, 1982.

3/ Conoco, Inc., 47 F.R. 49700, November 2, 1982, Quaker State Oil Refining Corp., 47 F.R. 38968, September 3, 1982, and Champlin Petroleum Co., 47 F.R. 49703, September 2, 1982.

Energy's Use of Consent Orders to Permit Oil Companies to Distribute Overcharge Settlement Funds Themselves

In our view, Energy does not have authority to agree to consent order provisions which permit oil companies to distribute agreed upon amounts of funds or to agree to other procedures in a manner which exceeds Energy's own authority to distribute the refunds itself. In other words, if there is no restitutionary nexus, the fact that no funds come into the Government's possession is not sufficient to legitimize a distribution scheme. In such situation, Energy's only recource is to provide for payments to a Treausry escrow account, pending OHA consideration under Subpart V. We do not mean to suggest that Subpart V applies to oil companies, or, as discussed below, that oil company distributions are inappropriate in all circumstances. However, if overcharged purchasers cannot be identified with reasonable accuracy, oil companies should not be authorized to distribute refund amounts.

An example of the failure to attempt to identify overcharged purchasers is seen in explanatory documents rationalizing consent order provisions mandating in-kind payments of oil to the SPR where Energy refers particularly to the Entitlements Program, which dispersed the effects of crude oil pricing violations nationwide, and states that payment to the SPR is the equivalent of depositing the funds in the U.S. Treasury as miscellaneous receipts, Champlin, Petroleum Co., supra, 47 F.R. 49704; Conoco, Inc., supra, 47 F.R. 497020.) The Conoco documents also contain Energy's stated purpose in adopting the SPR remedy:

> "[T]his remedy is intended to benefit, albeit indirectly, consumers of petroleum products nationwide by adding to the Reserve to protect against future disruptions in foreign crude oil supplies." Conoco, supra, 49702.

This admittedly lacks any connection with overcharged customers of Champlin and Conoco products, and cannot be considered a restitutionary distribution. Even if this intended indirect benefit to consumers in general were somehow acceptable as restitution, we believe Energy lacks any authority to order such payments into the SPR absent specific legislative authority to do so.

Similarly, unrestricted distribution of consent order funds by companies to states on the basis of the percentage of use by states of petroleum products, with no attempt to provide restitution to specific overcharged customers also exceeds Energy's restitutionary authority. The payments of escrow funds to states for energy related projects which admittedly do not have a restitutionary nexus were held to be unauthorized by our October 10, 1980 opinion. As stated earlier, the fact that legislation was required to provide for non-restitutionary distribution to states in Public Law No. 97-377 reflects congressional recognition of this lack of authority absent legislative authority.

While no funds come into the Government's possession under the terms of the consent orders here under consideration, this does not serve to overcome the lack of any restitutionary nexus to overcharged customers in such unrestricted payments. Energy cannot permit the companies to do indirectly what Energy can not do directly.

This is not to say that oil companies can never distribute overcharge refunds directly. In many instances, the oil companies are in the best position to identify the overcharged purchasers and to determine the amount of the overcharges. In these cases, where the companies and Energy are both satisfied that a clear restitutionary nexus has been established by means of fair and open procedures, we believe that a consent order can provide for direct payments to these identified consumers without the need for a formal administrative procedure. Energy should encourage the companies to undertake such efforts, and to develop payment mechanisms best suited for each these purchasers. For example, some of the consent orders we examined established constructive claims funds for ultimate distribution by the companies, supervised by Energy, to overcharged customers. We conclude that these are within Energy's restitutionary authority. We do not mean to imply that the companies have carte blanche in distributing funds. Consistent with its own authority Energy must ensure that consent orders require that the procedures to be used are reasonable, fair, and enforceable, and that the distribution plans adopted by the companies are in fact restitutionary. Thus, for example, states may be appropriate recipients of funds from companies, but only if they are required to use the funds exclusively for purposes clearly connected to the nature of the overcharges, for the benefit of the class of consumers overcharged, and according to plans approved by Energy. There must also be a provision that any funds not able to be distributed in this manner revert to Energy for appropriate disposition through OHA.

Concerning the establishment by oil companies of constructive claims funds or other restitutionary distribution mechanisms, in our April 1, 1981 opinion, we stated:

"Our decision is not intended to foreclose the options available to Energy in negotiating future consent orders. * * * Energy may still negotiate consent agreements that provide for the establishment by the oil company of a trust or other entity to carry out agreed-upon projects or activities, provided the project is one that may lawfully be agreed to by Energy, and will not be financed by appropriated funds or overcharge funds held in escrow." (Emphasis supplied.)

We believe the distribution mechanisms just discussed fall within the intent of this statement.

In summary, a consent order may authorize direct distribution of overcharge funds by an oil company to identifiable customers without the establishment of an escrow fund provided that Energy approves the distribution plan, and so long as any funds not able to be so distributed revert to Energy for appropriate distribution through OHA procedures.

If, however, the oil companies are unwilling or unable to make the restitutionary distributions discussed above, then Energy is only authorized to agree to consent order provisions requiring payments to Energy to be held in escrow pending of Subpart V disposition.

Energy's Direct Distribution of Funds Under Consent Orders

The consent orders we examined also contained numerous provisions for distributions to be made by Energy with no prior attempt to identify and make payments to overcharged consumers or appropriate classes of consumers. This is illustrated by the consent orders requiring Energy to deposit sums of money directly in the Treasury miscellaneous receipts account,4/ and in those requiring unrestricted payments to states.5/ Energy lacks authority to agree to these provisions, since, as stated previously, the Subpart V regulations are mandatory for Energy where overcharged purchasers have not been or cannot be identified.

4/ See footnote 2, supra.
5/ U.S.A. Petroleum Corp., 47 F.R. 50084, November 4, 1982, and Time Oil Company, 48 F.R. 325, January 4, 1983.

In other words, whenever there is any question as to the identity of the recipient or the amount of payment, then the case must be referred to OHA.

The court in Citronelle v. Edwards, supra, stated that even where "millions of customers along the east coast" have been overcharged, "the Government has a duty to try to ascertain those overcharged, and refund them with interest, from the restitution funds" (emphasis in original). Additionally, contrary to Energy's frequent assertions that identification of purchasers is impossible in cases where programs had national cost effects, recent OHA decisions in consent order cases have established refund procedures in cases where overcharges affected virtually all users of petroleum products and where petroleum products passed through many hands before reaching the ultimate consumer. See, e.g., Amoco Brand Committee, et al, case no. HEZ-0137 (March 2, 1983); Standard Oil Company (Indiana), case no. BFF-0007 (January 3, 1983).

In the Amoco Brand Committee case, OHA acknowledged the difficulty of determining injury on the part of participants in the Entitlements Program. Nevertheless, claims were accepted from Entitlements Program participants, and the OHA, in fact, allowed refunds to a number of the claimants.

The Standard Oil Company (Indiana) case provided formulas for distributing some $100 million to various downstream users of petroleum products on a volume of historical use basis and solicited Applications for Refund from such users. Although the decision and order proposed a secondary distribution procedure which would provide funds remaining after resolution of claims to states in which petroleum products were sold, it clearly stated that any funds distributed to states could only be used in accordance with state plans, to benefit users of such products within the states. Thus, distribution to states in this case "would have a sound restitutionary basis," according to OHA.

After cases are referred to OHA, it is our view that payments to states as a result of Subpart V proceedings still should be made on a restitutionary basis according to approved state plans for programs clearly connected to the nature of the overcharges and the class of injured consumer. If, after Subpart V proceedings no consumers or classes of consumers can be identified, and no restitutionary nexus for payments to states can be found, then deposit of overcharge funds in miscellaneous receipts is the only remaining authorized disposition. This is appropriate only as a last resort disposition, because while these funds are theoretically available for later appropriation by the Congress for energy related grant programs, as was done by section 155 of Public Law No. 97-377, they are no longer available for refund to overcharged customers. While deposit in miscellaneous receipts after Subpart V proceedings have failed to find a more appropriate restitutionary remedy is authorized, the recent OHA decisions discussed above suggest that more direct restitutionary remedies can, in fact, be devised.

CONCLUSION

Our analysis of recent actions by Energy in settling cases with alleged violators of Federal petroleum price and allocation regulations leads us to conclude that Energy has been using consent orders improperly in a number of cases by allowing the distribution of overcharge refunds without prior efforts to identify those overcharged and the amounts of overcharges. As a result, payments have been made by oil companies and by Energy to institutions that were not actually injured by the overcharges, and that lack a clear connection to the nature of the overcharges or the class of persons injured. In our view, these actions exceed Energy's statutory authority to enforce compliance with its regulations.

Where oil companies or Energy are capable of identifying those injured by the overcharges, and of establishing a restitutionary nexus between the nature of the overcharges and the proposed recipients of the funds, a consent order can provide for direct payments to these parties (including states, with appropriate restrictions and safeguards) by the companies or by Energy, without the need for a formal administrative procedure. Energy must enusre, however, that the consent orders require identification and distribution procedures that are reasonable, fair, enforceable, and restitutionary in fact. There also must be a requirement, as one of the terms of the consent order, that any funds not able to be distributed in a restitutionary manner revert to Energy for appropriate disposition through OHA.

We reaffirm our prior opinion that in all cases where those overcharged cannot be identified or payments calculated, Energy is legally bound by its Subpart V regulations to provide administrative procedures to determine appropriate restitutionary distribution mechanisms, requiring in all cases that an attempt be made to identify overcharged customers and to calculate the payments to be made to them. In our view, Energy is entirely without authority to avoid its Subpart V procedures by agreeing to consent order provisions that distribute settlement funds directly, without prior efforts to locate injured parties, to states, to the miscellaneous receipts account of the U.S. Treasury, to the Strategic Petroleum Reserve, or to other entities not actually injured by the overcharges that gave rise to the companies' settlements.

Under the Subpart V procedures, if OHA can identify injured consumers or clauses of consumers, and thus establish the necessary restitutionary nexus, it can order payment to these parties, including states, provided that in the latter case appropriate restrictions and safeguards ensure that the funds returned to the consumers or classes of consumers will be used in accordance with the OHA determination.

We also reaffirm our previous opinion, now supported further by recent judicial decisions, that the only practical distribution plan available to OHA for funds remaining after all potential overcharged parties have been located and paid is to deposit them in the Treasury as miscellaneous receipts and leave further distribution to the Congress. If Energy feels that this is too restrictive a result, it should consider requesting statutory authority to broaden its restitutionary powers to permit a wider range of permissible payments.

for Milton J. Socolar
Comptroller General
of the United States