Section 4. THE COASTAL ZONE MANAGEMENT ACT OF 1972

The federal Coastal Zone Management Act of 1972 was enacted during the same period as other major federal environmental legislation, but differed substantially from legislation like the Clean Air Act or the Clean Water Act. First, state participation in coastal zone management planning was completely voluntary, and federal standards or management would not be imposed if the state did not develop a plan. Second, although there was a recognized national interest in effective coastal management, Congress also recognized that the type of land use planning and management required was primarily within the traditional domain of state and local governments. The "Congressional Declaration of Policy" (as amended in 1980) sets out the purposes of the Act:

CONGRESSIONAL DECLARATION OF POLICY

SEC. 303. The Congress finds and declares that it is the national policy—

(1) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations;

(2) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development, which programs should at least provide for—

(A) the protection of natural resources, including wetlands, floodplains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife and their habitat, within the coastal zone,

(B) the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas and in areas of subsidence and saltwater intrusion, and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands.
(C) priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation, and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists,

(D) public access to the coasts for recreation purposes,

(E) assistance in the redevelopment of deteriorating urban waterfronts and ports, and restoration of historic, cultural, and esthetic coastal features,

(F) the coordination and simplification of procedures in order to ensure expedited governmental decisionmaking for the management of coastal resources,

(G) continued consultation and coordination with, and the giving of adequate consideration to the views of, affected Federal agencies,

(H) the giving of timely and effective notification of, and opportunities for public and local government participation in coastal management decisionmaking, and

(I) assistance to support comprehensive planning, conservation, and management for living marine resources, including planning for the siting of pollution control and aquaculture facilities within the coastal zone, and improved coordination between State and Federal coastal zone management agencies and State and wildlife agencies; and

(J) to encourage the preparation of special area management plans which provide for increased specificity in protecting significant natural resources, reasonable coastal-dependent economic growth, improved protection of life and property in hazardous areas, and improved predictability in governmental decisionmaking; and

(4) to encourage the participation and cooperation of the public, state and local governments, and interstate and other regional agencies, as well as of the Federal agencies having programs affecting the coastal zone, in carrying out the purposes of this title.

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The CZMA set out requirements for state management programs to be eligible for federal approval. Federal funding for development and administration of approved programs provided the primary motivation for states to participate initially. All eligible states participated at some time during the development stage of the program. The development stage turned out to be a long, arduous process in most states. In general, the states lacked statutory bases to implement coastal zone plans, and local governments often balked at what was perceived as state usurpation of local planning and zoning functions.

The section 305 and 306, 16 U.S.C. 1454-1455, program requirements are set out below. A.P.I. v. Knecht provides an overview of state program development and the federal approval process.

Section 305. Management program development grants

* * *

(b) Program requirements. The management program for each coastal state shall include each of the following requirements:

(1) An identification of the boundaries of the coastal zone subject to the management program.

(2) A definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters.

(3) An inventory and designation of areas of particular concern within the coastal zone.

(4) An identification of the means by which the state proposes to exert control over the land uses referred to in paragraph (2), including a listing of relevant constitutional provisions, laws, regulations, and judicial decisions.

(5) Broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.

(6) A description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, areawide, state, regional, and interstate agencies in the management process.
(7) A definition of the term "beach" and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value.

(8) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for anticipating and managing the impacts from such facilities.

(9) A planning process for (A) assessing the effects of shoreline erosion (however caused), and (B) studying and evaluating ways to control, or lessen the impact of, such erosion, and to restore areas adversely affected by such erosion.

No management program is required to meet the requirements in paragraphs (7), (8), and (9) before October 1, 1978.

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Section 306. Administrative grants

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(c) Program requirements. Prior to granting approval of a management program submitted by a coastal state, the Secretary shall find that:

(1) The state has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary, after notice, and with the opportunity of full participation by relevant Federal agencies, local governments, regional organizations, port authorities, and other interested parties, public and private, which is adequate to carry out the purposes of this title and is consistent with the policy declared in section 303 of this title [16 USC 1452].

(2) The state has:
(A) coordinated its program with local, area-wide, and interstate plans applicable to areas within the coastal zone existing on January 1 of the year in which the state's management program is submitted to the Secretary, which plans have been developed by a local government, an area-wide agency designated pursuant to regulations established under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966 [42 USC 3334], a regional agency, or an interstate agency; and
(B) established an effective mechanism for continuing
consultation and coordination between the management agency designated pursuant to paragraph (5) of this subsection and with local governments, interstate agencies, regional, and areawide agencies within the coastal zone to assure the full participation of such local governments and agencies in carrying out the purposes of this title; except that the Secretary shall not find any mechanism to be "effective" for purposes of this subparagraph unless it includes each of the following requirements:

(1) Such management agency if required, before implementing any management program decision which would conflict with any local zoning ordinance, decision, or other action, to send a notice of such management program decision to any local government whose zoning authority is affected thereby.

(2) Any such notice shall provide that such local government may, within the 30-day period commencing on the date of receipt of such notice, submit to the management agency written comments on such management program decision, and any recommendation for alternatives thereto, if no action is taken during such period which would conflict or interfere with such management program decision, unless such local government waives its right to comment.

(3) Such management agency, if any such comments are submitted to it, with [within] such 30-day period, by any local government—
   (I) is required to consider any such comments,
   (II) is authorized, in its discretion, to hold a public hearing on such comments, and
   (III) may not take any action within such 30 day period to implement the management program decision, whether or not modified on the basis of such comments.

(3) The state has held public hearings in the development of the management program.

(4) The management program and any changes thereto have been reviewed and approved by the Governor.

(5) The Governor of the state has designated a single agency to receive and administer the grants for implementing the management program required under paragraph (1) of this subsection.

(6) The state is organized to implement the management program required under paragraph (1) of this subsection.
(7) The state has the authorities necessary to implement the program, including the authority required under subsection (d) of this section.

(8) The management program provides for adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state’s coastal zone) which are necessary to meet requirements which are other than local in nature. In the case of such energy facilities, the Secretary shall find that the state has given such consideration to any applicable interstate energy plan or program.

(9) The management program makes provision for procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, or esthetic values.

(d) Required authority for management of coastal zone. Prior to granting approval of the management program, the Secretary shall find that the state, acting through its chosen agency or agencies, including local governments, areawide agencies designated under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966 (42 USC 3334), regional agencies, or interstate agencies, has authority for the management of the coastal zone in accordance with the management program. Such authority shall include power

(1) to administer land and water use regulations, control development in order to ensure compliance with the management program, and to resolve conflicts among competing uses; and

(2) to acquire fee simple and less than fee simple interest in lands, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.

(e) Required findings. Prior to granting approval, the Secretary shall also find that the program provides:

(1) for any one or a combination of the following general techniques for control of land and water uses with the coastal zone:

(A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement of compliance;

(B) Direct state land and water use planning and regulation; or
(c) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.

(2) for a method of assuring that local land and water use regulations within the coastal zone do not unreasonably restrict or exclude land and water uses of regional benefit.

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Section 307. Coordination and cooperation

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(b) Adequate consideration of views of Federal agencies. The Secretary shall not approve the management program submitted by a state pursuant to section 306 [16 USC 1455] unless the views of Federal agencies principally affected by such program have been adequately considered.

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NOTES

1. The legislative history of the CZMA, court decisions, and the fact that the act was part of the "environmental decade" indicate that the CZMA was "primarily an environmental statute." But the act clearly did not have a single objective. Is it possible to "preserve, protect, and develop" coastal resources? Which purpose has priority? How does one gauge the success of the program?

2. In the early 1970s, President Nixon's Administration supported general land use regulation rather than special legislation for the coastal zone. Congress rejected such legislation. Coastal zone regulation, however, had the support of both developers and environmentalists. Many states were independently beginning to develop independently programs and legislation to protect the coast. Developers hoped that programs following national guidelines would provide consistency and certainty for coastal development, environmentalists sought to protect areas they viewed as the most sensitive in the country.
Plaintiffs American Petroleum Institute, Western Oil and Gas Association, and certain oil company members of the aforesaid Institute and Association brought this action against three federal officials ("the federal defendants") in their official capacities as Secretary of Commerce, Administrator of the National Oceanic and Atmospheric Administration ("NOAA"), and Acting Associate Administrator of the Office of Coastal Zone Management ("OCZM"), seeking declaratory and injunctive relief against defendants' imminent grant of "final approval" of the California Coastal Zone Management Program ("CZMP") pursuant to section 306 of the Coastal Zone Management Act of 1972, as amended ("CZMA") and seeking further relief in the nature of mandamus directing the federal defendants to grant "preliminary approval" to the CZMP pursuant to Section 305(d) of the Act.

In brief, plaintiffs contend that the California Program cannot lawfully be approved by the federal defendants under Section 306 of the CZMA, principally for two reasons. First, the CZMP is not a "management program" within the meaning of Section 304(11) of the Act in that (a) it fails to satisfy the requirements of Sections 305(b) and 306(c), (d), and (e), and regulations promulgated thereunder, as regards content specificity; and (b) it has not been "adopted by the state" within the meaning of Section 306(c)(1). Second, the procedures by which the CZMP has reached the present state of development violate the CZMA, the National Environmental Policy Act ("NEPA") (42 U.S.C. Section 4321 et seq.), and California statutes in that the final environmental impact statement, which differs substantially from both the draft and revised draft environmental impact statements, was not subject to formal notice and hearings, yet purports to contain one of five "elements" of the CZMP.

* * *

For reasons set forth below, the Court affirms the federal defendants' Section 306 approval of the CZMP and grants judgment for defendants and against plaintiffs.

FACTS

The following facts appear to be before the Court without dispute:

1. Plaintiff American Petroleum Institute ("API"), a corporation organized under the District of Columbia nonprofit corporation laws, is a national trade association of approximately 350 companies and 7,000 individuals engaged in the
petroleum industry. Its members include companies and individuals actively engaged in exploration, production, refining and marketing of petroleum products in the United States, including the State of California and the Outer Continental Shelf off the coast of California.

2. Plaintiff Western Oil and Gas Association ("WOCA"), a corporation organized under the California nonprofit corporation laws, is a regional trade association of over 75 member companies and individuals engaged in the petroleum industry. Its members include companies and individuals responsible for in excess of 65 percent of the production of petroleum, in excess of 90 percent of the refining of petroleum, and in excess of 90 percent of the marketing of petroleum in the southern western states of the United States, including California and the Outer Continental Shelf off the coast of California.

3. Plaintiffs Champlin Petroleum Company; Chevron U.S.A., Inc.; Continental Oil Company; Exxon Corporation; Getty Oil Company; Gulf Oil Corporation; Mobil Oil Corporation; Reserve Oil & Gas Company; Shell Oil Company; Texasco, Inc.; and Union Oil Company of California ("the oil company plaintiffs") are each corporations organized under the laws of the various states and are members of API or WOCA. The oil company plaintiffs, among other activities, are engaged in the business of exploration for and production of oil and natural gas both within the state of California and the Outer Continental Shelf ("OCS") off the California coast. Some of the oil company plaintiffs own interests in OCS leases purchased in federal lease sales under the provisions of the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.). The remaining plaintiffs have interests in the coastal zone of California and/or are oil and gas consumers engaged in business in California.

4. Defendant Juanita Kreps, sued herein in her official capacity, is Secretary of the United States Department of Commerce ("Secretary") and is charged with administering the CZMA, which includes approval or disapproval of coastal zone management programs submitted by the coastal states, of which California is one. NOAA exists within the Department of Commerce. By administrative directive dated October 13, 1976, the Secretary delegated, inter alia, the CZMA approval function to the Administrator of NOAA and expressly reserved other powers under the Act. Defendant Richard Frank is the Administrator of NOAA and is sued herein in his official capacity. Within NOAA there exists the Office of Coastal Zone Management ("OCZM"). Defendant Robert W. Knecht is the Acting Associate Administrator ("Acting Administrator") for coastal zone management and is sued herein in his official capacity. By Administrative directive dated October 20, 1976, the Administrator of NOAA delegated to the Associate Administrator for Coastal Zone Management the authority to exercise all functions under the CZMA not expressly reserved to either the Secretary or the Administrator of NOAA.

5. The defendant-in-intervention, California Coastal Commission, is an agency of the State of California created pursuant to the California Coastal Act of 1976 (Cal.Pub.Res.Code sec. 30000, et seq.). The Coastal Commission is the successor in interest to the California Coastal Zone Conservation Commission.

6. Defendants-in-intervention, Natural Resources Defense Council, In., and the Sierra Club ("NRDC") are associations whose members claim an interest in coastal zone management.

7. On March 31, 1976, the California Coastal Zone Conservation Commission submitted to the federal defendants a coastal zone management program for approval under the provisions of CZMA section 306.

8. In September of 1976 the federal defendants issued a Draft Environmental Impact Statement ("DEIS") wherein they announced their tentative decision to approve the California Coastal Zone Management Program submitted in March. Thereafter, the State of California enacted the Coastal Act of 1976, which declared itself to be "California's coastal zone management program within the coastal zone for purposes of the Federal Coastal Zone Management Act of 1972 . . . ." (Cal.Pub.Res.Code sec. 30008.)

9. On October 20, 1976, the DEIS was withdrawn and the public hearings to be held thereon were cancelled. On April 12, 1977, the federal defendants issued a Revised Draft Environmental Impact Statement ("RDEIS") and announced their tentative decision to approve the revised coastal zone management program submitted by the Coastal Commission. At this time the CZMP was described as consisting of the California Coastal Act of 1976, the Coastal Conservancy Act (Cal.Pub.Res.Code sec. 31000 et seq.), and the Urban and Coastal Park Bond Act (Cal.Pub.Res.Code sec. 5096.111 et seq.). Public hearings were held on the RDEIS and the CZMP as therein described on May 19, 1977, in Los Angeles, California. Plaintiffs appeared and (by oral testimony and written comments submitted before the hearing and additional comments submitted thereafter) recommended that the CZMP not be approved and that a new environmental impact statement be prepared.

10. On August 16, 1977, the federal defendants issued their Final Environmental Impact Statement ("FEIS"), together with Attachment K, containing written statements from parties commenting on the CZMP. In the FEIS, the CZMP was described as consisting of five elements: the Coastal Act of 1976, the Coastal Conservancy Act, the Urban and Coastal Park Bond Act, the Coastal Commission's final regulations (Cal.Admin.Code,Title 14, sec. 13000 to 14000), and Part IT (Introduction and Chapters 1-14) ("the Program Description") of the FEIS. On September 1, 1977, plaintiffs submitted to the federal defendants written comments objecting to approval of the CZMP as defendants proposed in the FEIS. Defendants replied by letter dated September 8, 1977, from Acting Administrator Knecht to plaintiffs' counsel, by which letter defendants indicated that they intended to proceed with approval of the CZMP. As noted previously, final approval, accompanied by a recital of findings, occurred on November 7.

The Court has before it for determination both preliminarily and for ultimate disposition questions of the highest importance, greatest complexity, and highest urgency. They arise as the result of high legislative purpose, low bureaucratic bungling, and present inherent difficulty in judicial determination. In
other words, for the high purpose of improving and maintaining felicitous conditions in the coastal areas of the United States, the Congress has undertaken a legislative solution, the application of which is so complex as to make it almost wholly unmanageable. In the course of the legislative process, there obviously came into conflict many competing interests which, in typical fashion, the Congress sought to accommodate, only to create thereby a morass of problems between the private sector, the public sector, the federal bureaucracy, the state legislature, the state bureaucracy, and all of the administrative agencies appurtenant thereto. Because the action taken gives rise to claims public and private which must be adjudicated, this matter is now involved in the judicial process.

In whatever technical form the questions and issues are here presented, they resolve themselves into the familiar situation in which a court must sit in some form of judicial review of administrative action—and it isn’t easy.

We deal here with a hybrid kind of record and consequent hybrid form of review. As will appear from the extensive discussion below, the several approaches to and differing views of the proper scope and kind of judicial review are here brought under consideration.

We have questions of whether review is proper or timely and, if so, of what proper scope and result. We treat each seriatim.

STANDING

This issue need not detain us long. While defendants originally urged that plaintiffs in this case lack standing to litigate speculative harms, during oral argument counsel for the NRDC, to whom the task of pressing defendants’ standing and ripeness contentions was apparently assigned, conceded that what had previously been designated an issue of standing was more properly characterized as a ripeness problem. The Court nevertheless briefly examines the standing of plaintiffs to maintain the present action before addressing the ripeness issue.


Abstract injury is not enough. It must be alleged that the plaintiff “has sustained or is immediately in danger of sustaining some direct injury” as a result of the challenged statute or official conduct.

In the present case plaintiffs, whose activities will be regulated by the CZMP to the extent that their activities in exploring for and developing oil and gas resources on the OCS must be consistent therewith, have alleged and shown injury in fact. For upon approval by the federal defendants of the CZMP under section 306 of the CZMA, the consistency provisions of section 307 are triggered. Thereafter, before federal agencies may approve certain activities of plaintiffs relating to exploration and development of OCS resources, plaintiffs must certify that the proposed activity is consistent with the CZMP. Although the state is afforded six months to certify to the federal agency whether or not a proposed activity is consistent, the initial burden of determining consistency falls to the applicant. The gravamen of the complaint is that the submitted CZMP as approved by the federal defendants lacks the requisite specificity under CZMA and consequently may not be approved under section 306. If approved, plaintiffs claim immediate and substantial harm by compulsion to expend large sums of money to determine if their proposed activities are consistent. Moreover, plaintiffs allege that this lack of specificity increases their burden and makes it impossible to discharge, since they cannot with any reasonable assuredness certify that any activity subject to section 307 is in fact consistent with the CZMP. The undeniable interest of plaintiffs in the area subject to the CZMP, the fact that once section 306 approval is given, their activities are subject to regulation under it, and the fact that an immediate consequence is to compel plaintiffs to expend financial resources in an effort to satisfy the requirements of section 307, combined with their claim that this burden is substantially increased by virtue of the very defects which they assert make approval improper, provide the necessary injury in fact to give plaintiffs standing to challenge the federal defendants' action in approving the CZMP under section 306.

Accordingly, the Court finds that the plaintiffs have standing to litigate the issues presented.

* * *

LEGISLATIVE HISTORY OF THE CZMA

A seemingly unbridgeable gulf between the parties concerning the proper construction of the CZMA establishes the cutting edge of this action. First, noted at the outset of this memorandum of decision, plaintiffs complain that the California Program fails to qualify for final approval under section 306 because it lacks the requisite specificity Congress intended management programs to embody, especially with respect to the substantive requirements of sections 305(b) and 306(c), (d), and (e), so as to enable private users in the coastal zone subject to an approval program to be able to predict with reasonable certainty whether or not their proposed activities will be found to be "consistent" with the program under section 307(c). Second, plaintiffs contend that a proper understanding of section 306(c)(8), particularly in light of the 1976 Amendments, compels the conclusion that in requiring "adequate consideration"
Congress intended that an approvable program affirmatively accommodate the national interest in planning for an siting energy facilities and that the CZMP fails so to do. The Court here addresses each of these contentions.

A. The Definition of "Management Program."

Any attempt to resolve this underlying dispute, out of which most of the issues in this lawsuit arise, must begin with Congress' definition of a "management program" in section 304(11) of the Act:

The term "management program" includes, but is not limited to, a comprehensive statement in words, maps, illustrations, and other media of communication, prepared and adopted by the state in accordance with the provisions of this title, setting forth objectives, policies and standards to guide public and private uses of lands and waters in the coastal zone.

(Emphasis supplied.) This definition is exactly as originally contained in the Senate version of the CZMA (S.3507). In its report on S.3507, the Committee on Commerce stated:

"Management program" is the term to refer to the process by which a coastal State . . . proposes . . . to manage land and water uses in the coastal zone so as to reduce or minimize a direct, significant, and adverse effect upon those waters, including the development of criteria and of the governmental structure capable of implementing such a program. In adopting the term "Management program" the Committee seeks to convey the importance of a dynamic quality to the planning undertaken in this Act that permits adjustments as more knowledge is gained, as new technology develops, and as social aspirations are more clearly defined. The Committee does not intend to provide for management programs that are static but rather to create a mechanism for continuing review of coastal zone programs on a regular basis and to provide a framework for the allocation of resources that are available to carry out these programs.


The Court agrees with defendants that Congress never intended that to be approvable under section 306 a management program must provide a "zoning map" which would inflexibly commit the state in advance of receiving specific proposals to permitting particular activities in specific areas. Nor did
Congress intend by using the language of "objectives, policies, and standards" to require that such programs establish such detailed criteria that private users be able to rely on them as predictive devices for determining the fate of projects without interaction between the relevant state agencies and the user. To satisfy the definition in the Act, a program need only contain standards of sufficient specificity "to guide public and private users."

The CZMA was enacted primarily with a view to encouraging the coastal states to plan for the management, development, preservation, and restoration of their coastal zones by establishing rational processes by which to regulate uses therein. Although sensitive to balancing competing interests, it was first and foremost a statute directed to and solicitous of environmental concerns. "The key to more effective use of the coastal zone in the future is introduction of management systems permitting conscious and informed choices among the various alternatives. The aim of this legislation is to assist in this very critical goal." S.Rep.No.92-753, U.S. Code Cong. & Admin.News 1972, p. 4781 (Legislative History at 198). See H.Rep.No.92-1049, 92d Cong., 2d Sess. (1972) (Legislative History at 313 and 315).

The Amendments of 1976 made clear the national interest in the planning for, and siting of, energy facilities (to be discussed infra). Apparently neither the Act nor the Amendments thereto altered the primary focus of the legislation: the need for a rational planning process to enable the state, not private users of the coastal zone, to be able to make "hard choices."

"If those choices are to be rational and devised in such a way as to preserve future options, the program must be established to provide guidelines which will enable the selection of those choices." H.Rep. No. 92-1049 (Legislative History at 315). The 1976 Amendments do not require increased specificity with regard to the standards and objectives contained in a management program. (Specificity as it relates to section 306(c)(8) will be discussed infra.)

In conclusion, to the extent plaintiffs' more specific challenges to the Acting Administrator's section 306 approval are premised on an interpretation of congressional intent to require that such programs include detailed criteria establishing a sufficiently high degree of predictability to enable a private user of the coastal zone to say with certainty that a given project must be deemed "consistent" therewith, the Court rejects plaintiffs' contention.

Section 306(a)(1) requires the Secretary, prior to approval of a management program under section 306, find that it contains that which section 305(b) specifies. Plaintiffs have focused their attack in large measure on what they charge is the CZMP's failure to include those items which section 305(b) mandates, especially those required by paragraphs (2), (3), and (5) thereof. The attack is premised not on any alleged invalidity of or ambiguity in NOAA's regulations (15 C.F.R. Parts 920 and 923) -- although plaintiffs insist the proposed (now interim final) program approval regulations (Part 923), rather than the then-existing regulations, should have been utilized in evaluating the
California Program -- but rather on the alleged failure of the Acting Administrator properly to apply the regulations to the CZMP.

The Court has reviewed the Acting Administrator's findings, the CZMA, and the regulations (both then-existing, proposed, and now interim final), and concludes that the Acting Administrator's finding that the Program satisfies the requirements of section 305(b) (as required by section 306(a)(1)) was not arbitrary or capricious, and further, that his application of the then-existing regulations (published January 9, 1975) was not an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. 706(2)(A).

The Court has reviewed in great detail Attachment J to the FEIS, wherein the CZM summarizes and responds to comments received from other governmental agencies (state and federal) and from private interests addressed to the draft management program and EIS. Attachment J includes CZM's responses to similar concerns voiced by a number of reviewers (FEIS at J-1 through J-12) and its responses to comments received from individual reviewers (FEIS at J-13 through J-48), including plaintiffs FEIS at J-29 through J-41) and various federal agencies (such as the Federal Energy Administration, and the Department of the Interior) whom plaintiffs have characterized as opposing section 306 approval (FEIS at J-17 through J-22).

In their comments the various parties have raised most of the issues which plaintiffs have raised in this action. The Court finds additional support for the Acting Administrator's decision in the thoughtfulness and reasonableness with which CZM has addressed the views of the various reviewers. The Acting Administrator had these comments and responses before him at the time of his approval of the CZMP and they lend further support to the nonarbitrary character of his decision.

The Court notes that while the interaction between the state (Coastal Commission) and various interested and affected federal agencies during the review process was substantially less than ideal in this instance, a situation of which the Acting Administrator was painfully aware, nevertheless the requirement of section 307(b) that "the views of federal agencies principally affected by such program have been adequately considered" before section 306 approval may be granted has been satisfied.

Without belaboring the point or embarking on a needless point-by-point analysis and refutation of plaintiffs' assertions regarding the Acting Administrator's findings under section 305(b), the Court, consistent with the previously-expressed view of the specificity which the Act requires, finds the "performance standards" approach embodied in the California Program to be permissible. The CZMA, as noted earlier, does not speak to this issue beyond defining "management program" in section 304(11).

The requirements of sections 305(b) and 306(c), (d), and (e) do not constrain the state in the manner in which it meets them; nor does it constrain the Secretary or NOAA in establishing through regulations that which it will require of a management program in this regard. Congress has granted the Secretary and Acting Administrator considerable discretion. They have exercised it in promulgating approval regulations. The Court's
review of these indicates that rulemaking itself has been an open process and has involved ongoing interaction between NOAA and interested parties.

As noted previously, the Court, cognizant of Congress' expression of approval for the manner in which NOAA and OCZM (and particularly Mr. Knuech) have carried out its mandate (see S.Rep.No.94-277, 94th Cong., 1st Sess. 30 (1975) U.S.Code Cong. & Admin.News 1976, p. 1768 (Legislative History at 756), and further cognizant of Congress' resolving its original uncertainty over whether the CZMA should be administered by the Department of the Interior or the Department of Commerce in favor of the latter largely because of the "requisite oceanic, coastal ecosystem, and coastal land use expertise" found in NOAA (see S.Rep.No.94-277 at 7 n.5 (Legislative History at 733)), concludes that considerable deference is due NOAA's interpretation of its own regulations. In short, the Acting Administrator's findings and Attachment J of the FEIS, when viewed in the context of the legislative history of the Act and of the statutory language itself, satisfy the Court that approval of the California Program has not been arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

B. Adequate Consideration of the National Interest.

Plaintiffs' fundamental grievance with the California Program stems from its assertion that the Program fails to satisfy the mandate of section 306(c)(8) -- that before the Secretary grant approval to management program under section 306 she find that it provides for adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature.

Plaintiffs urge that the CZMA, particularly in light of the 1976 Amendments, requires an "affirmative commitment" on the part of the state before section 306 approval is proper. The California Program allegedly fails adequately to make that commitment in that its general lack of specificity, coupled with what plaintiffs characterize as California's overall antipathy to energy development (as embodied in the policies and practices of its Coastal Commission), combine to give the Coastal Commission a "blank check" effectively to veto any or all exploration and development activities subject to section 307(c)(3) simply by finding such activity not to be "consistent" with the CZMP.

Defendants, beyond taking issue with plaintiffs' characterization of California's energy posture, assert first, that plaintiffs' premise that the Act requires an affirmative commitment is incorrect as a matter of law and second, that the Program contains adequate consideration of national energy interests. Defendants contend that the CZMP contains "performance standards and criteria" more than adequate to satisfy the requirements of the CZMA and serve as a guide to plaintiffs in planning their activities in the coastal zone.
Implicit in the various provisions of the Coastal Act (and in particular those in sections 30001.2 and 30260-64) and in Chapter II of the Program Description is a wholly adequate consideration of the national energy interest.

Plaintiffs apparently focus on language in H.Rep.No.92-1049 (which accompanied H.R. 14146) to the effect that, "if the program as developed is to be approved and thereby enable the State to receive funding assistance under the title, the State must take into account and must accommodate its program to the specific requirements of various Federal laws which are applicable to its coastal zone." Legislative History at 321. The report continues:

To the extent that a State program does not recognize these overall national interests, as well as the specific national interest in the generation and distribution of electric energy . . . or is construed as conflicting with any applicable statute, the Secretary may not approve the State program until it is amended to recognize those Federal rights, powers, and interests.

Id. at 322.

It is to be noted that the reference in the House Report to the state's need to "accommodate" its program is to "the specific requirements of various [applicable] Federal laws." It is not a requirement that the state program expressly "accommodate" energy interests. In the program approval regulations published on January 9, 1975 (40 Fed.Reg. 1683), NOAA stated that:

A management program which integrates . . . the siting of facilities meeting requirements which are of greater than local concern into the determination of uses and areas of Statewide concern will meet the requirements of Section 306(c)(8).

15 C.F.R. 923.15(a). In subsection (b) NOAA amplified on the above requirement.

. . . The requirement should not be construed as compelling the States to propose a program which accommodates certain types of facilities, but to assure that such national concerns are included at an early stage in the State's planning activities and that such facilities not be arbitrarily excluded or unreasonably restricted in the management program without good and sufficient reasons. . . . No separate national interest "test" need be applied and submitted other than evidence that the listed national interest facilities have been considered in a manner similar to all other uses, and that appropriate consultation with the Federal agencies listed has been conducted.

The Coastal Zone Management Act Amendments of 1976, Pub.L. 94-370 ("1976 Amendments"), while largely prompted by the 1973 Arab oil embargo and while expressly recognizing the national interest in the planning for and siting of energy facilities,
nevertheless did not alter the requirement of "adequate consideration" in section 306(c)(8) or make any changes in the degree of specificity required under the Act. Rather, recognizing that coastal states like California were currently burdened by the onshore impacts of Federal offshore (OCS) activities and likely to be burdened further by the plans for increased leases on the OCS, Congress sought to encourage or induce the affected states to step up their plans vis-a-vis such facilities.

The primary means chosen to accomplish this result was the Coastal Energy Impact Program ("CEIP") contained in new section 308. As the Conference explained, the purpose of the 1976 Amendments was to coordinate and further the objectives of national energy policy by directing the Secretary of Commerce to administer and coordinate, as part of the [CZMA], a coastal energy impact program.

... The conference substitute follows both the Senate bill and the House amendment in amending the 1972 Act to encourage new or expanded oil and natural gas production in an orderly manner from the Nation's outer Continental Shelf (OCS) by providing for financial assistance to meet state and local needs resulting from specified new or expanded energy activity in or affecting the coastal zone.

H.Rep.No.94-1298, 94th Cong., 2d Sess. 23 (1976), U.S.Code & Admin.News 1976, pp. 1820, 1921 (Legislative History at 1073). The formula Congress provided for calculating a state's share of the Coastal Energy Impact Fund ("the Fund") established to carry out the CEIP's purposes is itself further evidence of the congressional intention to provide "built-in incentives for coastal states to assist in achieving the underlying national objective of increased domestic oil and gas production."


The formula, as so constructed, provides incentives to coastal states (if they are interested in increasing their share of the funds appropriated for this purpose) to encourage and facilitate achievement of the basic national objective of increasing domestic energy production. This provision would be in harmony with sound coastal zone management principles because Federal aid would be available only for states acting in accord with such principles. For example, since the grant is based on new leaseings, production, first landings, and new employment, it is to the state's interest to apply the "consistency" provisions and related process to the issuance of oil exploration, development and production plans, licenses, and permits as quickly as possible rather than to postpone decision-making for the statutory 6-month period.

Id. The Congress was particularly careful to circumscribe the role of the federal government in particular siting decisions.
Thus, section 308(1) provides:

The Secretary shall not intercede in any land use or water use decision of any coastal state with respect to the siting of any energy facility or public facility by making siting in a particular location a prerequisite to, or a condition of, financial assistance under this section.

This provision is consistent with the approach of the CZMA as a whole to leave the development of, and decisions under, a management program to the state, subject to the Act's more specific concern that the development and decision-making process occur in a context of cooperative interaction, coordination, and sharing of information among affected agencies, both local, state, regional, and federal. This last, especially as regards energy facility planning, is the policy behind the Energy Facility Planning Process ("EFPP") of section 305(b)(8) and the Interstate Grants provision of new section 309 (which encourages the coastal states to give high priority to coordinating coastal zone planning utilizing "interstate agreements or compacts"). It should be noted that the only amendment to the national interest requirement of section 306(c)(8) effectuated by the 1976 Amendments is the additional requirement that in fulfilling its obligation to provide "adequate consideration of the national interest" in the case of energy facilities, the state also give such consideration "to any applicable interstate energy plan or program" established under section 309.

The Court rejects plaintiff's argument that affirmative accommodation of energy facilities was made quid pro quo for approval under section 306 by the 1976 Amendments. In addition to the above, the Court notes that Congress itself did not assume that such siting was automatically to be deemed necessary in all instances. For instance, in its report on H.R. 3981, the Committee on Merchant Marine and Fisheries stated that the addition of the EFPP in section 305(b)(8)

reflects the Committee's finding that increasing involvement of coastal areas in providing energy for the nation is likely, as can be seen in the need to expand the Outer Continental Shelf petroleum development. State coastal zone programs should, therefore, specifically address how major energy facilities are to be located in the coastal zone if such siting is necessary. Second, the program shall include methods of handling the anticipated impacts of such facilities. The Committee in no way wishes to accelerate the location of energy facilities in the coasts; on the contrary, it feels a disproportionate share are there now.

There is no intent here whatever to involve the Secretary of Commerce in specific siting decisions.

H.Rep.No.94-878 at 45-46 (Legislative History at 931-32) (emphasis supplied). The siting in the coastal zone of energy facilities which could be located elsewhere is embodied in section 308. See H.Rep.No.94-878 at 15 and 26 (Legislative History at 900 and 912).
The Senate Committee on Commerce, in reporting S. 586 to the full Senate, stated:

The Secretary of Commerce (through NOAA) should provide guidance and assistance to States under this section 305(b)(8), and under section 306, to enable them to know what constitutes "adequate consideration of the national interest" in the siting of facilities necessary to meet requirements other than local in nature. The Committee wishes to emphasize, consistent with the overall intent of the Act, that this new paragraph (8) requires a State to develop, and maintain a planning process, but does imply intercession in specific siting decision. The Secretary of Commerce (through NOAA), in determining whether a coastal State has met the requirements, is restricted to evaluating the adequacy of that process.


Consistent with this mandate, NOAA has promulgated revised program approval regulations (43 Fed.Reg. 8378, March 1, 1978). These interim final rules follow the submission of comments on the proposed rules published on August 29, 1977 (42 Fed.Reg. 43552). The Court looks to the revised regulations because they reflect NOAA's interpretation of any changes wrought by the 1976 Amendments, the former regulations against which the California Program was tested having been promulgated after the Arab oil embargo but before the 1976 Amendments.

In its response to several reviewers' suggestion that section 306(c)(8) be interpreted to require that facilities be accommodated in a State's coastal zone, the agency reiterated the position it has maintained since the inception of the CZMA that the purpose of "adequate consideration" is to achieve the act's "spirit of equitable balance between State and national interests." As such, consideration of facilities in which there may be a national interest must be undertaken within the context of the act's broader finding of a "national interest in the . . . beneficial use, protection, and development of the coastal zone" (Section 302(a)).

Subsection 302(g) of the Act gives "high priority" to the protection of natural systems. Accordingly, while the primary focus of subsection 306(c)(8) is on the planning for and siting of facilities, adequate consideration of the national interest in these facilities must be based on a balancing of these interests relative to the wise use, protection and other development of the coastal zone. As the Department of Energy noted in its comments on the proposed regulations:

The Act presumes a balancing of the national interest in energy self-sufficiency with State and local concerns involving adverse economic, social, or environmental impacts.


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Section 306(c)(8) is treated at length in 15 C.F.R. 923.52. After generally noting that one "need not conclude . . . that any and all such facilities proposed for the coastal zone need be sited therein," the regulation proceeds to set forth requirements which must be met by the management program in order to satisfy section 306(c)(8). While these are considerably more detailed than those contained in its predecessor (15 C.F.R. 923.15, January 9, 1975), they do not change the basic tenor of the rule as interpreted by NOAA. Having previously determined that the Acting Administrator's utilization of the then-existing regulations was proper—indeed, to have applied proposed regulations arguably would have been improper—and having determined that it was not abuse of discretion to proceed with approval of the California Program rather than await promulgation of final revised approval regulations, given the fact that the proposed regulations effected no fundamental change of philosophy but merely a "shift in emphasis" (42 Fed.Reg.43552), the Court concludes that the Acting Administrator's finding that the CZMP satisfied section 306(c)(8) is neither arbitrary nor capricious.

The Court notes further in this regard that the standards established by the Coastal Act (and in particular sections 30260-64 and 30413) for making energy facilities siting decisions, in the words of the Coastal Commission staff, "establish the general findings that must be made to authorize coastal dependent industrial facilities, liquefied natural gas terminals, oil and gas developments, refineries, petrochemical facilities and electric power plants." FEIS, Part II (Chapter 9) at 66. The key to the California approach, and one which the Acting Administrator and this Court find acceptable under the CZMA, is that the standards require that "findings" be made upon which specific siting decisions ensue. For instance, in dealing with the siting of oil tanker facilities, section 30261(a) requires that

... [t]anker facilities shall be designed to (1) minimize the total volume of oil spilled, (2) minimize the risk of collision from movement of other vessels, (3) have ready access to the most effective feasible containment and recovery equipment for oil spills, and (4) have onshore deballasting facilities to receive any fouled ballast water from tankers where operationally or legally required.

As can readily be seen from these provisions, whether a particular tanker facility siting proposal will be deemed "consistent" with these requirements of the California Program will turn on specific findings of a factual nature. The California Program sensibly does not attempt to map out in advance precisely what type or size tanker facilities will be found to meet these requirements in particular areas of its almost 1,000-mile coastline. Rather, by its very nature, the Coastal Act encourages plaintiffs with a particular facility in mind to address themselves to the standards set forth in the Coastal Act and to plan such a facility in cooperation and communication with the Coastal Commission from the inception. This approach seems consonant with the overall approach of the
CZMA itself. In this regard it is noteworthy that the Senate Committee on Commerce, in summarizing the "key findings" of a number of reports made under the aegis of the committee-created National Ocean Policy Study, stated that "coastal States often have been criticized unfairly for delaying the siting of energy facilities when such action often is the result of lack of information and planning." S.Rep.No.94-277 at 3, U.S.Code Cong. & Admin.News 1976, p. 1770 (Legislative History at 729). The CZMP takes an approach which has received the congressional blessing. To the extent plaintiffs seek not guidance with respect to the way in which coastal resources will be managed but instead a "zoning map" which would implicitly avoid the need to consult with the state regarding planned activities in or affecting its coastal zone, the Court rejects their position. While wholly sympathetic to the legitimate concerns of corporate officers and planners who must conform their activities to the standards of the CZMP, the Court nevertheless concludes that the Acting Administrator's finding that the Program satisfies section 306(c)(8) is supportable and hence not arbitrary or capricious. It proceeds from a correct interpretation of the CZMA.

Finally, the Court notes that both the California Program and the CZMA contain safeguards to protect plaintiffs from arbitrary exercise by the Coastal Commission of its section 307 consistency powers. First, plaintiffs under the Coastal Act may seek judicial review of a decision of the Coastal Commission finding a specific proposed activity of plaintiffs to be inconsistent with the CZMP. Such review certainly may encompass a challenge to the Commission's interpretation of the California Program as well as a challenge to specific findings upon which the determination presumably would be based. Second, with respect to an adverse consistency determination regarding any proposed activity for which a federal license or permit is required or which involves an OCS plan, the party against whose activity such a determination has been made may seek review by the Secretary of Commerce (who could also undertake review on her own initiative) on the grounds that "the activity is consistent with the objectives of this title or is otherwise necessary in the interest of national security." Sections 307(c)(3)(A) and (B). Third, under section 312(a) the Secretary is obliged to conduct "a continuing review of (1) the management programs of the coastal states and the performance of such states with respect to coastal zone management; and (2) the coastal energy impact program provided for under section 308." Subsection (b) provides:

The Secretary shall have the authority to terminate any financial assistance extended under section 306 . . . if (1) [s]he determines that the state is failing to adhere to and is not justified in deviating from the program approved by the Secretary . . .

In short, both as regards specific determinations of inconsistency and as regards general trends in and manner of issuance of such determinations, plaintiffs are amply protected
by and have various forms of recourse under the California Program itself and sections 307 and 312 of the CZMA.

APPROVAL BY THE FEDERAL DEFENDANTS

Plaintiffs have charged that the procedures followed by the state in developing and adopting, and by the federal defendants in approving, the California Program violated both the CZMA and NEPA.

Section 306(c)(1) requires the Secretary to find that the state has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary, after notice, and with the opportunity of full participation by relevant Federal agencies, state agencies, local governments, regional organizations, port authorities, and other interested parties, public and private, which is adequate to carry out the purposes of this title and is consistent with the policy declared in section 303 of this title.

(Emphasis supplied.) The Acting Administrator has so found. Findings at 13-14 (and references to the PEIS contained therein). Section 306(c)(3) amplifies the requirement of section 306(c)(1) by demanding a finding be made that "[t]he state has held public hearings in the development of the management program." This too has been found. Findings at 16 (and references to the PEIS contained therein).

Plaintiffs' claims of invalid adoption by the state having been discussed previously, the Court merely adds that the process of developing a coastal zone management program for the state of California has been ongoing since the enactment of Proposition 20 (the California Coastal Zone Conservation Act of 1972) and that the Acting Administrator's finding that the process has been open within the meaning of section 306(c)(1) and (3) is supported by the record. Under the arbitrary and capricious standard applicable to such findings, they must be sustained.

Plaintiffs mount an assault on the review process undertaken by the federal defendants in approving the CZMP under section 306, focusing on the purported inadequacies of the environmental review process culminating in the PEIS. As noted earlier, a challenge under NEPA invites broader-ranging evidentiary review (not limited to the administrative record) and requires application of the observance of prodecure standard of review. Having done so, the Court concludes that the environmental review process here followed and the PEIS produced thereby are adequate under section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)).

Section 102(2)(C) mandates that an EIS address:

(i) the environmental impact of the proposed action;

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.
(iii) alternatives to the proposal action;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Plaintiffs contend first, that the federal defendants utilized the environmental review process not to conduct a bona fide environmental review but to advocate a prior decision to grant final approval to the CZMP; second, that the FEIS is deficient because the Program discussed therein differs substantially from that disclosed in the RDEIS; third, that it fails to adequately discuss possible alternatives to section 306 approval; fourth, that it fails to consider all available relevant information; and fifth, that it fails to discuss potential and unavoidable adverse impacts of approving and implementing the CZMP.

The Court discusses these claims in order.

First, the Court finds nothing improper in the federal defendants' informing the public and other organs of government of its tentative conclusion that the California Program meets the requirements of section 306 so as to qualify for final approval. The nature of the cooperative interaction between the state and federal governments envisioned by the CZMA in the development of a management program makes it wholly unrealistic to assume that the federal agency charged with reviewing that program will entertain no preliminary conclusions as to its adequacy under the Act.

With respect to plaintiffs' second claim—that the RDEIS and FEIS differ substantially in their description of the elements of the California Program—the Court concludes that such claim lacks merit. First, the two statutory elements of the Program other than the Coastal Act both were noted in the RDEIS (at 8, 12, and 77). Neither establishes standards in the sense that the Coastal Act does; rather, these companion statutes provide a portion of the implementation authority required by section 306(c)(6), (7), and (d) of the CZMA. Second, the RDEIS contains the original version of the Program Description found in the FEIS. As discussed at length in another section of this memorandum, Chapter 11 of the Program Description has been formally adopted by the Coastal Commission; and the remaining chapters, being of an essentially descriptive nature, were not required to be. The procedures followed may have been sloppy, but the Court cannot say that the failure expressly to designate Part II of the RDEIS an "element" of the CZMP was fatal—particularly in light of the Court's conclusions regarding the legal status of the Program Description. Finally, the Court notes that the revisions made in the Program Description were largely prompted by comments received on the original Program Description, including those received from plaintiffs.
Plaintiffs' third argument—that the FEIS fails adequately to discuss alternatives to section 306 approval—is premised on plaintiffs' insistence that the federal defendants should have denied final approval and instead granted the CZMP preliminary approval under section 305(d), particularly in light of the fact that the local coastal programs required by the Coastal Act (not due until 1980) will add the requisite degree of specificity to enable the Program to qualify for section 306 approval. While there is support for plaintiff's position in the legislative history surrounding the addition of "preliminary approval" to section 305 effected by the 1976 Amendments (H.Rep.No.94-878, 94th Cong., 2d Sess. 48 (1976) (Legislative History at 934)), nevertheless the FEIS discusses this alternative to section 306 approval and rejects it on the basis of a reasonable construction of sections 306(e)(1) (dealing with permissible implementation techniques for control of land and water uses) and 305(d), the NOAA regulations relevant thereto (15 C.F.R. 923.26), the pertinent legislative history, and the application of the above to the provisions of the CZMP. FEIS at 184-85. The federal defendants' conclusion—that "if a state has the necessary authorities in place and will employ acceptable implementation techniques, the "preliminary approval" option is inappropriate" (FEIS at 184)—is reasonable in order to give harmonious and full effect to sections 305(d) and 306(e)(1). Again, while the Court, if faced with the choice, might have opted for preliminary approval, we may not substitute our judgment for that of the Acting Administrator. It is sufficient for present purposes to note that, contrary to plaintiffs' contention, the FEIS does adequately discuss this alternative.

Plaintiffs' final two claims are premised on the alleged failure of the FEIS to discuss the adverse impact nationwide should California utilize its section 307 consistency powers to retard or preclude OCS and related energy development. Plaintiffs also assert that the FEIS fails adequately to discuss the impact of the CZMP on the "socio-economic" environment (e.g., impact on "urban sprawl"). The Court rejects this argument.

As this Circuit has stated:

... [A]n EIS is in compliance with NEPA when its form, content, and preparation substantially (1) provide decision-makers, with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in the light of its environmental consequences, and (2) make available to the public, information of the proposed projects' environmental impact and encourage public participation in the development of that information.

*Trout Unlimited v. Morton*, supra, 509 F.2d at 1283. "An EIS need not discuss remote or highly speculative consequences... [The] adequacy of the content of the EIS should be determined through use of a rule of reason." Id. In elaborating on this "rule of reason" the Second Circuit has observed that
an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives. [Citations omitted].

County of Suffolk v. Secretary of the Interior, supra, 562 F.2d at 1375.

In this instance, the inadequacies raised by plaintiffs rest on the highly speculative assumption that in implementing its management program California will abuse its section 307 consistency powers, the California courts will acquiesce therein, and, further, the Secretary of Commerce will fail to discharge her duties under sections 307(c)(3) and 312. As stated during our discussion of the ripeness issue, the Court declines to make such an assumption -- nor must the federal defendants in preparing the FEIS engage in such speculation.

The Court views the situation with which it is here presented as not unlike that presented in Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973). In that case an action was brought by environmental groups to enjoin construction of a new seaward runway at Honolulu International Airport. The defendants in preparing the EIS determined that it was unnecessary to undertake air pollution studies because of the very nature and location of the proposed project. In rejecting plaintiff-appellants' claim that such omission was fatal to the adequacy of the EIS, this Circuit remarked:

The Reef Runway will relocate aircraft takeoffs, the major source of aircraft air pollution, 6,700 feet seaward, and away from the populated areas of Honolulu. The essence of this project, therefore, involves moving the sources of the air pollution away from people. The federal and state officials concluded that detailed air pollution studies were unnecessary, on the premise that at the very least, the project was extremely unlikely to worsen the air quality in any relevant sense.

Id. at 470.

Similarly, the "essence" of the CZMP, in accordance with sections 302 and 303 of the CZMA, is sensitivity to environmental concerns in establishing standards for utilization of the coastal zone; consequently, fewer and less detailed environmental studies would be expected because the Program emphasizes environmental preservation.

Finally, the Court notes that the act of approving the California Program in itself does not result in the undertaking of any specific project by the state or federal governments or any private user(s) of the coastal zone. The concerns raised by plaintiffs -- in particular, the alleged omission in the FEIS of an adequate discussion of the significance of permitting OCS
development to go forward and the impact of precluding such development — will be addressed in connection with the preparation and dissemination of environmental impact statements for specific proposed activities. The environmental review here undertaken resembles that frequently utilized where a "multistage" project is involved; consequently, the failure of the FEIS to discuss such possibilities is justified on this alternative ground. The Second Circuit addressed this issue in County of Suffolk, supra. That case involved preparation of an EIS in connection with the proposed lease-sale by the Department of the Interior of federal lands on the OCS to petroleum companies. There, in reversing the district court's finding that that [the] EIS was inadequate in its failure to explore the possibility that state and local governments affected by such lease-sale might bar the landing of pipelines on their shores and thereby in necessitating the use of tankers increase the hazards of oil pollution, the Court reasoned:

... [T]he extent to which treatment of a subject in an EIS for a multistage project may be deferred, depends on two factors: (1) whether obtaining more detailed useful information on the topic of transportation is "meaningfully possible" at the time when the EIS for an earlier stage is prepared, see Natural Resources Defense Council v. Morton, [148 U.S.App.D.C. 5, at 15,] 458 F.2d [827] at 837, and (2) how important it is to have the additional information at an earlier stage in determining whether or not to proceed with the project, see National Resources Defense Council v. Callaway, 524 F.2d at 88.

If the additional information would at best amount to speculation as to future event or events, it obviously would not be of much use as input in deciding whether to proceed. As we said in Callaway, supra, referring to Morton, supra:

"NEPA does not require a 'crystal ball' inquiry ... An EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible, Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973). A government agency cannot be expected to wait until a perfect solution of environmental consequences of proposed action is devised before preparing and circulating an EIS." 524 F.2d at 88.

Where the major federal action under consideration, once authorized, cannot be modified or changed, it may be essential to obtain such information as is available, speculative or not, for whatever it may be worth in deciding whether to make the crystallized commitment (e.g., the construction of a bridge of a specified type between two precise points). But where a multistage project can be modified or changed in the future to minimize or eliminate
environmental hazards disclosed as the result of information that will not become available until the future, and the Government reserves the power to make such a modification or change after the information is available and incorporated in a further EIS, it cannot be said that deferment violates the "rule of reason." Indeed, in considering a project of such flexibility, it might be both unwise and unfair not to postpone the decision regarding the next stage until more accurate data is at hand.

562 F.2d at 1378 (emphasis supplied). The court concluded that "projection of specific pipeline routes was neither "meaningfully possible," nor "reasonably necessary under the circumstances." Id. at 1382. This factor of multistage projects whose various stages are "substantially independent" of one another similarly has been considered by this Circuit in assessing the adequacy of an EIS.

The Court concludes that this action presents an analogous situation to which this reasoning applies. Approval and implementation of the CZMP no more indicates which of potentially dozens of projects will be certified as consistent (and undertaken subject to what conditions) than the decision of the Department of the Interior to proceed with the lease-sale of a large tract of federal OCS lands indicated which of potentially dozens of exploration and development projects would be permitted (and under what conditions).

The Court concludes, as did the court in Cady v. Morton supra, that "although the EIS could be "improved by hindsight," it has satisfied the intent of the statute. National Forest Preservation Group v. Butz, 485 F.2d 408, 412 (9th Cir. 1973)."

527 F.2d at 797.

The length, complexity and convolutions of this memorandum and of the findings and conclusions set forth herein speak louder and much more eloquently than the words themselves. The message is as clear as it is repugnant: under our so-called federal system, the Congress is constitutionally empowered to launch programs the scope, impact, consequences and workability of which are largely unknown, at least to the Congress, at the time of enactment; the federal bureaucracy is legally permitted to execute the congressional mandate with a high degree of befuddlement as long as it acts no more befuddled than the Congress must reasonably have anticipated; if ultimate execution of the congressional mandate requires interaction between federal and state bureaucracy, the resultant maze is one of the prices required under the system.

The foregoing shall constitute the Court’s findings of fact and conclusions of law.

The administrative action is affirmed; the petition is denied, each side to bear its costs.
NOTES

1. The importance of energy development and improvement of the states' abilities to cope with the coastal impacts of energy development were themes of the 1976 amendments to the CZMA. See generally Hilldrehth, The Coast-Where Energy Meets the Environment, 13 San Diego L. Rev. 253 (1976). In order to facilitate coastal planning and mitigation of energy-related impacts, the Coastal Energy Impact Program was established.

Section 308. Coastal energy impact program

(a) Administration and coordination by Secretary; financial assistance; audit; rules and regulations. (1) The Secretary shall administer and coordinate, as part of the coastal zone management activities of the Federal Government provided for under this title, a coastal energy impact program. Such program shall consist of the provision of financial assistance to meet the needs of coastal states and local governments in such states resulting from specified activities involving energy development.

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(4) Each coastal state shall use the proceeds of grants received by it under this subsection for the following purposes (except that priority shall be given to the use of such proceeds for the purpose set forth in subparagraph (A)):

(A) The retirement of state and local bonds, if any, which are guaranteed under subsection (d)(2); except that, if the amount of such grants is insufficient to retire both state and local bonds, priority shall be given to retiring local bonds.

(B) The study of, planning for, development of, and the carrying out of projects and programs in such state which are:

(i) necessary, because of the unavailability of adequate financing under any other subsection, to provide new or improved public facilities and public services which are required as a direct result of new or expanded Outer Continental Shelf energy activity; and

(ii) of a type approved by the Secretary as eligible for grants under this paragraph, except that the Secretary may not disapprove any project or program for highways and secondary roads, docks, navigation aids, fire and police protection, water supply, waste collection and treatment (including drainage), schools and education, and hospitals and health care.

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(C) The prevention, reduction, or amelioration of any unavoidable loss in such state's coastal zone of any valuable environmental or recreational resource if such loss results from coastal energy activity.

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(g) Eligibility requirements; apportionment of assistance.
(1) No coastal state is eligible to receive any financial assistance under this section unless such state—
   (A) has a management program which has been approved under section 306 [16 USC § 1455];
   (B) is receiving a grant under section 305(c) or (d) [16 USC § 1454(c) or (d)]; or
   (C) is, in the judgment of the Secretary, making satisfactory progress toward the development of a management program which is consistent with the policies set forth in section 303 [16 USC § 1452].
(2) Each coastal state shall, to the maximum extent practicable, provide that financial assistance provided under this section be apportioned, allocated, and granted to units of local government within such state on a basis which is proportional to the extent to which such units need such assistance.

Can a state that does not have an approved coastal zone plan receive CEIP funds? The federal Office of Coastal Zone Management (now the Office of Ocean and Coastal Resource Management) took the position that a state without a federally-approved plan, or working toward one, could not be considered "making satisfactory progress toward... a program...consistent with the policies [of the CZMA]...." Note that the eligibility requirements for CEIP funds also apply to interstate grants.

2. The funds available through CEIP have been minimal in recent years, and although the allocation formula is related to continental shelf oil leasing and production, allocations are merely budgeted yearly and do not represent a vested "share" of the revenue from offshore leasing or oil production. Recently, legislation has been introduced to allow direct sharing of revenues from offshore leases by the coastal states. Why should coastal states receive a share of the revenues? When minerals are extracted from federal lands within a state, the state receives a share of the federal revenues. Is the coastal state/continental shelf situation a valid analogy to the situation of federal lands within a state?

The 1980 amendments to the CZMA introduced a number of new programs, but more significantly, provided an opportunity for members of Congress to express their view of the federal government's continuing role in coastal zone management; that is, that once the federal government has facilitated the development and initial administration of a state's coastal zone program, it
is the responsibility of the state to institutionalize and fund the program. The Reagan Administration has substantially cut funding and personnel. The continuation of the program at both the state and federal levels is in question. Most states claim that their programs cannot survive without federal funding. Can federal consistency be justified for state programs without adequate federal evaluation and oversight? Would Revenue Sharing solve the perceived problems?

3. In certain areas, for example, the Chesapeake Bay, planning by individual states is an insufficient basis for effective management. The CZMA provided for interstate coordination, but the major effort and funding during the early years was toward state program development. The 1980 amendments gave interstate planning and management a higher priority:

INTERSTATE COASTAL ZONE MANAGEMENT COORDINATION.

Section 309 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1456b) is amended to read as follows:

INTERSTATE GRANTS

Sec. 309. (a) The coastal States are encouraged to give high priority—

(1) to coordinating State coastal zone planning, policies, and programs with respect to contiguous areas of such States;

(2) to studying planning, and implementing unified coastal zone policies with respect to such areas; and

(3) to establishing an effective mechanism, and adopting a Federal-State consultation procedure, for the identification, examination, and cooperative resolution of mutual problems with respect to the marine and coastal areas which affect, directly or indirectly, the applicable coastal zone.

The coastal zone activities described in paragraphs (1), (2), and (3) of this subsection may be conducted pursuant to interstate agreements or compacts. The Secretary may make grants annually, in amounts not to exceed 90 percent of the cost activities, if the Secretary finds that the proceeds of such grants will be used for purposes consistent with sections 305 and 306.

(b) The consent of the Congress is hereby given to two or more coastal States to negotiate, and to enter into, agreements or compacts, which do not conflict with any law or treaty of the United States, for—

(1) developing and administering coordinated coastal zone planning, policies, and programs pursuant to sections 305 and 306; and

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(2) establishing executive instrumentalities or agencies which such States deem desirable for the effective implementation of such agreements or compacts. Such agreements or compacts shall be binding and obligatory upon any State or party thereto without further approval by the Congress.

(c) Each executive instrumentality or agency which is established by an interstate agreement or compact pursuant to this section is encouraged to give high priority to the coastal zone activities described in subsection (a). The Secretary of the Interior, the Chairman of the Council on Environmental Quality, the Administrator of the Environmental Protection Agency, the Secretary of the department in which the Coast Guard is operating, and the Secretary of Energy, or their designated representatives, shall participate ex officio on behalf of the Federal Government whenever any such Federal-State consultation is requested by such an instrumentality or agency.

(d) If no applicable interstate agreement or compact exists, the Secretary may coordinate coastal zone activities described in subsection (a) and may make grants to assist any group of two or more coastal States to create and maintain a temporary planning and coordinating entity to carry out such activities. The amount of such grants shall not exceed 90 percent of the cost of creating and maintaining such an entity. The Federal officials specified in subsection (c), or their designated representatives, shall participate on behalf of the Federal Government, upon the request of any such temporary planning and coordinating entity for a Federal-State consultation.

(e) A coastal State is eligible to receive financial assistance under the section if such State meets the criteria established under section 308(g)(1).

4. The CZMA also established the Estuarine Sanctions Program. The federal government will provide matching funds for the purpose of:

- acquiring, developing, or operating estuarine sanctuaries, to serve as natural field laboratories in which to study and gather data on the natural and human processes occurring within the estuaries of the coastal zone; and

- acquiring lands for the preservation of islands.

The goal is to preserve relatively pristine estuaries that are characteristic of regions of the country to be used as "living laboratories" and to be a source of baseline information for evaluating estuarine systems.

Fifteen estuarine sanctuaries have been established nationally. Apalachicola Bay and River Estuarine Sanctuary is located in northwest Florida. Some of the materials in Part One describe the initial stages of the project. Rookery Bay Estuarine Sanctuary is located in southwest Florida.