COASTAL ZONE MANAGEMENT—Part 2

HEARING

BEFORE THE

SUBCOMMITTEE ON OCEANOGRAPHY

OF THE

COMMITTEE ON MERCHANT MARINE AND FISHERIES

HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

Oversight on Regulations Being Proposed by the Office of Coastal Zone Management for Implementation of the Coastal Zone Management Act Amendments

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DECEMBER 10, 1976

Serial No. 94–48

Printed for the use of the Committee on Merchant Marine and Fisheries

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1976

80-545

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CONTENTS

Communications submitted by—Continued

COASTAL ZONE MANAGEMENT

FRIDAY, DECEMBER 10, 1976

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OCEANOGRAPHY,
COMMITTEE ON MERCHANT MARINE AND FISHERIES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:12 a.m. in room 1334, Longworth House Office Building, Hon. John B. Breaux (chairman of the subcommittee) presiding.

Mr. BREAUX. The committee will please come to order.

Today, the House Subcommittee on Oceanography of the House Merchant Marine and Fisheries Committee initiates oversight hearings on regulations which are being proposed by the Office of Coastal Zone Management for implementation of the Coastal Zone Management Act amendments which were signed into law last July.

Due to the expressions of concern from Members of Congress, officials from State and local governments, and numerous affected organizations and individuals who have followed the legislative activity on this measure, it was felt that oversight by the Oceanography Subcommittee into the process conducted to draft the regulations and the question of whether the final product represents the intent of Congress was necessary.

The Office of Coastal Zone Management was given 270 days by statute to prepare regulations for implementation. We find, without understandable reason, that a speedy process of regulation writing has occurred, leaving many interested parties puzzled with the maze of complex guidelines proposed by the drafters of the regulations.

We also find serious questions as to whether the intent of Congress has been carried out regarding many aspects of the coastal energy impact program.

Section 308 of the Coastal Zone Management Act amendments outlined a complicated program to authorize and assist coastal States and local communities to plan for, manage and control the impact of coastal-related energy activities.

This $1.2 billion program consists of basically three components.

First, section 308(c) provides planning grants to prepare for the socioeconomic and environmental consequences of future coastal energy activity.

Second, loans and guarantees under section 308(d) are available for financing new or improved public facilities and public services required as the result of specific coastal energy activity.

Lastly, grants are provided under section 308(b) for the prevention of amelioration of unavoidable damage to environmental or recreational resources, and for other purposes.

On August 9, OCZM issued a first draft of the proposed regulations for section 308, known as the coastal energy impact program, (CEIP). On August 30, six members of this committee, including myself, sent a letter to the Associate Administrator for OCZM, Robert Knecht, indicating our dismay over the procedure by which 308(b) moneys, called formula grants, would be administered according to the regulations.

I will submit this letter for the record.

[The document referred to follows:]

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON MERCHANT MARINE AND FISHERIES,
Washington, D.C., August 30, 1976.

Mr. ROBERT W. KNECHT,
Assistant Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration, Department of Commerce, Washington, D.C.

DEAR MR. KNECHT: Thank you for furnishing us with your August 9 draft describing the Coastal Energy Impact Program.

We must object, however, to the "applications" process for Section 308(b) grants which the draft envisages, as well as the references to "disbursing" these funds for repayment of guaranteed bonds long after the other alternatives are exhausted. The House clearly expeced the Secretary to review the state's use of 308(b) funds after and not before making disbursement of grant funds to the states. Representative Pierre S. du Pont, senior Republican Conference, took the House Floor during consideration of the conference report to state: "There is no discretion in the Secretary to withhold approval or retain any proceeds in the State's account . . . the Secretary does not have the right to impose additional conditions prior to the approval of automatically granted funds, except for the condition that the state must certify that they are going to be used for proper purposes. As soon as that certification is made, that is the end of it as far as the Secretary is concerned."

Later in the debate the Floor Manager of the conference report, Representative John Murphy, responded to Representative John Breaux's question about a statement made the day previously by Senator Hollings. Mr. Hollings had stated that proceeds would not be disbursed until the state demonstrates to the Secretary that they will be used for the purposes described in the bill. Mr. Murphy stated: "As far as the states are concerned, after the calculations are made, based on the four OCS criteria, the grants are to be disbursed to the states which are affected by OCS activity . . ."

Section 308(b)(1) is not discretionary. It states that the Secretary *shall* make grants annually to coastal states. Section 308(b)(4) does not authorize the Secretary to make funds available for the listed purposes. Instead it authorizes the states which have already "received" grants to use them for enumerated purposes. There is no reference in either section to Secretarial review of applications, except to note in (b)(4)(B)(ii) that the Secretary may approve *types* of projects and programs eligible under (b)(4)(B).

We do not believe that you have satisfied the mandate of Congress by shifting funds from one hand of the Secretary to another hand. Public Law 94-370 calls for grants to the eligible states, not to accounts established for each of the states.

The Secretary's reviewing role is described in 308(b)(5). He "shall determine that each coastal state has expanded or committed, and may determine that such state will expend or commit, grants which such state has received under this subsection in accordance with the purposes set forth in paragraph (4)". The past tense of "receive" in this sentence must be read in conjunction with "received" in the succeeding sentence, which describes the mechanism that the Secretary is to employ in enforcing the provisions of 308(b)(4).

That Congress intended this interpretation of "received" is clear since it was the focus of specific proposals made by Senate conference staff to House conference staff and a June 16 proposal of Commerce Department spokesman Frank Hodsoll. We don't believe Mr. Hodsoll would have felt it important to substitute "funds, to which it is entitled" for the phrase "grant which such state has received" unless entitlement and receipt mean different things.

Why did Congress state that the Secretary "may determine that such state will expend of commit funds" already received by the state? It did so to permit

those states which wish to insure they will not be required to repay the Secretary to obtain a determination that a contemplated use is wihin 308(b)(4) before the state actually expends or commits the funds. This prior determination language was included for the sole purpose of allowing states to request a review of expenditure purposes before entering into a contractual arrangement with a contractor or the like. It was clearly the intention of Senate and House Conferees that this predetermination be made at the request of the state only!

The concept of 308(b) funds being available for "disbursal"—still in the Secretary's hands—after the Secretary has exhausted all of the 308(d)(3) alternatives to "repayment grants", is contrary to Congress' intention to make all of the funds available to the states in each of the years for which 308(b) funds are authorized to be appropriated.

The extent of federal review of individual projects *before* disbursal bears greatly on the question of whether an Environmental Impact Statement is required for each and every state use of the formula grants. That many environmental impact statements would even further aggravate the delays and the administrative costs in giving the states the prompt assistance in mitigating environmental consequences of energy development which Congress intended.

We trust that your draft regulations will provide a procedure for the state to receive 308(b) funds, to be expended for purposes enumerated in (b)(4), upon their simple certification of ability to repay grants, not spent in accordance with (b)(4).

With best wishes, we are

Very truly yours,

LEONOR K. (Mrs. John B.) SULLIVAN,
Chairman of House-Senate Conferees.
JOHN B. BREAUX.
PIERRE S. DU PONT.
DAVID C. TREEN.
THOMAS N. DOWNING.
PAUL G. ROGERS.

Mr. BREAUX. I feel it is the intent of Congress—and I refer to the debate on the floor of the House on June 30, 1976—that the formula grant moneys should be disbursed to the States, with the role of the Associate Administrator limited to postfacto review.

Since that time, I have met with representatives from OCZM on several occasions. During one such meeting held prior to the November 29 version of the proposed regulations, I expressed my concern over several provisions in the regulations which, in my opinion, were not in compliance with the intent of Congress.

Finally, on December 1, I sent a letter to the Associate Administrator of OCZM listing five provisions which had remained in the regulations and were not consistent with what Congress had intended. I will submit this letter for the record.

[The document referred to follows:]

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C. December 1, 1976.

Mr. ROBERT W. KNECHT,
Assistant Administrator for Coastal Zone Management, U.S. Department of Commerce, NOAA Washington, D.C.

DEAR BOB: I recognize that the 1976 amendments to the Coastal Zone Management Act is a complex piece of legislation. The development of rules and regulations to implement this law is a formidable task and you and your staff are to be commended for a strong and conscientious effort.

However, I must express my disappointment and concern about your interpretation of certain sections in the Act as those interpretations are reflected in the latest version (November 29) of the proposed regulations. In my judgement, these provisions go beyond the statutory language and the intent of Congress. While you may have some strong arguments for retaining these provisions, I am certain you understand that the constitutional authority to make law

rests with the Congress and not with the implementing agencies. If these provisions are truly necessary to insure the successful implementation of the Coastal Zone Management Act, then the Act should be amended to include them.

An issue of primary concern involves the procedures by which the formula grants are processed. It is the intent of Congress, and I refer you to the debate on the House floor of June 30, 1976, that the formula grant moneys should be disbursed to the states and administered by the states with the role of the Associate Administrator limited to post facto review. While the November 29 version of the regulations has somewhat modified the previous position of OCZM, the Associate Administrator still retains the power to process 308(b) grant applications on a case by case basis. This most recent version still does not respect the intent of Congress.

The following provisions in the November 29 draft violate the principle of the separation of power and do not reflect either statutory language or Congressional intent as indicated in the committee reports or floor debate:

(1) 931.38(c). Limitations on planning grants.

(d) A coastal state may use for the purposes set forth in 931.33(b), an amount of the assistance provided to it under section 308(b) that is up to ten percent of the total amount of the assistance allotted it under section 308(e)(1). (There is no language in the statute nor is there any mention in the legislative history that any limitation be placed on the use of section 308(b) grants for the planning of public facilities and services required as a direct result of new or expanded OCS energy activity.)

(2) 931.38(d). Planning.

To the maximum extent practicable, the ratio of the costs attributed to OCS energy activities to the costs attributable to non-OCS energy activities must be equal to the ratio of the total employment equivalencies associated with the above activities respectively.

(There is no language in the statute nor is there any mention in the legislative history that a constraint be placed in the distribution of planning grants between the consequences of new or expanded OCS energy activity and other eligible energy activities.)

(3) 931.52.

Total moneys available to all the states pursuant to this subpart for public facilities and public services cannot exceed four times the amount of total moneys available to all states pursuant to subpart G of this part for the prevention, reduction or amelioration of any unavoidable loss of valuable environmental or recreational resources.

(There is no language in the statute nor is there any mention in legislative history that such a ratio be maintained between financial assistance from CEIP which will go for public facilities and public services and that which will be used for environmental or recreational needs.)

(4) 931.77. Grants for unavoidable losses. Allotment from the Fund. (section 308(d)(4)).

(a) The list drawn up as described in subpart E of this part will be modified by removing those energy facilities directly related to the exploration or development of or production from the OCS. (There is no language in the statute nor is there any mention in the legislative history justifying any such provision.)

(5) 931.79.

(f) To pay more than 80 percent of the cost of a project to prevent, reduce, or ameliorate any loss resulting or expected to result, from new or expanded coastal energy activities; however, this limitation does not apply to those costs incurred for purposes set forth in Sec. 931.74(b) and (c).

(There is no language in the statute nor is there any mention in the legislative history that only 80 percent of the cost of a project will be paid to prevent, reduce or ameliorate any future environmental loss resulting from new or expanded coastal energy activities. In essence, this provision is attempting to establish policy.)

The law gave 270 days for the promulgation of regulations. The timeframe established by the Office of Coastal Zone Management does not afford the Congress adequate time for comment and review of the regulations. This is especially true given the fact that the comment period occurred concurrently with the Congressional recess.

As you know, a number of coastal states have expressed concern about the stringency and complexity of the proposed regulations. It is my feeling that the coastal zone program is in a precarious position now with respect to state efforts and acceptance.

States need more time to analyze the draft regulations, the Congress should be allowed time to determine whether its intent has been satisfied and conduct oversight hearings, your office should reexamine the sections noted above, and representatives of the new Administration should be given the opportunity to review the new programs.

Because of the above considerations and the additional fact that I have scheduled oversight hearings on the proposed regulations on December 10, 1976 for the benefit of my colleagues, it is imperative that the comment period for the regulations be extended for 30 days. Your attention to this matter is appreciated.

Sincerely,

JOHN BREAUX, MC.

Mr. BREAUX. In addition, this letter reiterated the concern of the August 30 letter that regulations continue to have the formula grant moneys administered out of the Office of Coastal Zone Management, and not at the State level. Also in the letter, a 30-day extension on the comment period, which was set to expire on December 3, was requested.

OCZM then granted all 11-day extension to the comment period, which now ends on December 14. The most recent version of the proposed regulations was issued to the Congress just 3 days ago.

In those regulations, four of the five provisions to which I had objected have now been eliminated. Main objections which remain are:

First. The limitation on 308(b) moneys spent on planning for the consequences of public services and public facilities provided under CEIP.

Section 931.38(c) of the proposed regulation require that no more than ten percent of the assistance allotted a state for financing new or improved public facilities—the formula is specific in section 308 (e)(1) of the act)—will be available from section 308(b) moneys. No such constraint was ever mentioned in the statute or in the legislative history.

Second. The procedure by which formula grants are administered which remains at the Federal level.

In addition to these, a number of other points need to be addressed today.

First, the law provided for 270 days to promulgate regulations; 141 days, just over half the time allowed, will have elapsed since the signing of this law when the comment period expires on December 14.

In that time, six different versions of the regulations have been issued. The last two versions were issued in a matter of a week and a half.

The regulations are complex. It takes time to read them and understand them, much less receive them through the mail.

I am afraid that the events which transpired at a meeting of the Coastal States Organization this past Monday may be representative of far too many participants in this program.

One person had prepared extensive questions on one version of the regulations, only to find that unknown to him, a more recent version had since been issued.

Another person was under the impression that the October 22 version, the version published in the Federal Register, was the most recent. He was two versions behind.

The latest version of the regulations was issued to the Congress on December 8. With the currently established comment period ending on December 14, that leaves six days to receive the regulations, read them, write comments, and send the comments to OCZM.

It seems to me, especially with the Christmas postal congestion, that this situation precludes people in many States, Alaska, for example, which will be significantly affected by this program, from commenting on the December regulations.

Is this rush justified? I would like to hear some reasons for it.

In addition, wouldn't it be proper to allow the new incoming administration, which will have the obligation of running this program, the opportunity to review these regulations?

Finally, I am disturbed to learn that OMB is intending to recommend a severely reduced appropriation for CIEP. It was my understanding during the conference meetings last summer that if the conferees conceded to certain provisions, the administration would budget an amount close to what was authorized in the law. I feel we've been let down by OMB.

This morning I would like to welcome our first witness, Mr. Robert Knecht, Associate Administrator for the Office of Coastal Zone Management.

I think the best procedure will be for Bob Knecht to come up to the witness table and, in turn, we will take the other various representatives.

The committee will try to be as accommodating as we possibly can for witnesses who have traveled a great distance and have a tight schedule.

Are there any comments from the committee members?

If not, Bob, please come up to the witness table with those who are accompanying you.

We have all received copies of your statement, and you may proceed.

STATEMENT OF ROBERT W. KNECHT, ASSISTANT ADMINISTRATOR FOR COASTAL ZONE MANAGEMENT OF THE DEPARTMENT OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, ACCOMPANIED BY MS. JOELLYN K. MURPHY, ACTING ASSOCIATE DIRECTOR FOR NATIONAL PROGRAMS, OCZM, AND WILLIAM BREWER, GENERAL COUNSEL, NOAA

Mr. KNECHT. I thank you, Mr. Chairman.

I notice that we don't have a microphone here at this table, which may present a problem for the people in the room. I will do my best to speak up, but it seems to be a difficult situation.

I have with me this morning——

Thank you for the microphone——

I have with me at the table this morning, on my left, Ms. Joellyn K. Murphy, who is Acting Associate Director for National Programs, OCZM, and who has been responsible for drafting the regulations and, on my right, Mr. William Brewer, who is the General Counsel of NOAA.

Let me state before I start that we appreciate very much your personal interest and the interest of the subcommittee in the work that we are undertaking. I have a feeling that the degree of interaction between the executive branch and the Congress has been at a higher level with these regulations than with any others with which I am familiar.

Mr. Chairman, I would like to read my statement in its entirety, even though I would ordinarily prefer to paraphrase it, because it reflects our working positions; and I would like to add a few comments with regard to the complexity of the proposed regulations.

Let me begin by noting that the proposed manner in which the formula grants under section 308(b) of the Coastal Zone Management Act, as amended, (act) are to be distributed by OCZM has been the subject of comment by several members of this committee.

As you know, the act does not specify a precise method for the making and disbursing of formula grants under Section 308(b). I would like to take a few minutes to talk about our interpretation of the act with respect to the formula grant program. I think that is the principal area of contention.

Our proposed coastal energy impact program (CEIP) regulations provide a method for the making of formula grants and the disbursement of their proceeds. OCZM would apply the four part formula set forth in section 308(b) of the act to make, or allot, the formula grants to each State.

The coastal states must then come in and "requisition" the proceeds of these grants. While we are still in the process of attempting to simplify the requirements of the requisition process, the requisition must contain certain information so that we will be able to verify that the proposed uses of grant proceeds will meet the requirements of the act.

It is also at this time that OCZM will conduct an environmental impact assessment, and where necessary, prepare an environmental impact statement—(EIS)—on a proposed project. Upon completion of the verification process and any procedures required under the National Environmental Policy Act—(NEPA)—the proceeds of a State's formula grants will be disbursed.

Some background on the formula grants first.

During the consideration of both the House bill, H. R. 3981, and the Senate bill, S. 586, two similar grant provisions were described as "automatic grant" programs. In the House bill, passed on March 11, 1976, the Secretary of Commerce was required to "make a payment for each fiscal year to each coastal state," according to a prescribed formula. In the Senate bill, the Secretary was required to "distribute grants annually" to coastal states, again according to a set formula. In the conference bill, S. 586, enacted in July of this year as the Coastal Zone Management Act Amendments of 1976, the language describing the grant program was changed significantly.

The language of section 308(b) of the act, as amended, requires that the Secretary "shall make grants annually" to coastal states, again according to a set formula. However, the act also refers to the Secretary "disbursing the proceeds" of these grants. Under the language of section 308(b)(4), the States are directed to "use the proceeds of grants received."

During their consideration of the conference bill, S. 586, Members of both the House and the Senate referred to what had been the automatic grant program of both the House and Senate bills, as a formula grant program. This change in terminology also reflected a number of key changes that appeared during the conference negotiations. Both the House and Senate bills contained provisions for the recovery of grant funds if these were spent by the States for unauthorized purposes. In neither bill, however, was there an express provision for a determination by the Secretary, before making a payment under H. R. 3981, or before distributing a grant under S. 586.

In the case of the Senate bill, S. 685, however, we do believe that some advance review of proposals to use the grants by the Secretary or his designee was intended, and I will discuss this in more detail when I talk about the applicability of the NEPA to the formula grant program.

Returning again to the provisions for the recovery of funds in the House and Senate bills, however, it is significant to note that section 308(b)(5) of the act, as amended, not only provides for the recovery of funds spent for unauthorized purposes or not spent in a timely manner, but it also authorizes the Secretary to conduct a review, in advance of disbursing the proceeds of a State's formula grant, of a State's proposal to use the proceeds of its grant.

As section 308(b)(5) states:

> the Secretary . . . may determine that such state will expend or commit, grants which such State has received under this subsection in accordance with the purposes set forth in [section 308(b)(4)].

It has been suggested to us that the inclusion of authority to make an advance determination on a State's proposal to use its formula grant proceeds was intended only as an option for a State to obtain assurances that it would not later be required to return funds spent for unauthorized purposes.

No basis for this interpretation appears in the legislative history, nor is there any mention of a State request for such an advance determination in the language of section 308(b)(5). The decision to make such an advance determination is that of the Secretary, or his designee, and his alone.

Section 308(b) also contains a number of other provisions which have led us to conclude that a procedure, by which grants are first made, or allotted, to the States, and their proceeds subsequently disbursed to the States, should be followed in administering the formula grant. Both the House and Senate bills described a given set of purposes for which the "automatic" grants could be used by the States.

The conference bill, S. 586, contains elements of both sets of purposes, but it also contains several significant additional limitations on the uses of what are now the "formula grants." Perhaps most important was the requirement in section 308(b)(4)(B) that adequate financing under any other subsection of section 308 of the act must be unavailable to provide new or improved public facilities and public services which are required as a direct result of new or expanded Outer Continental Shelf (OCS) energy activity.

In our view, this key restriction on the use of the formula grant proceeds requires that a determination must be made by the Secretary or

his designee that such adequate financing is not available before he disburses the proceeds of a grant. The primary source of financing for these public facilities and public services are the loan and guarantee provisions of section 308(d).

Other limitations on the purposes for which the proceeds of formula grants may be used by the States also suggest the need for an advance determination by the Secretary. However, for the sake of brevity, I will merely list some of them at this time: (1) The definition of "retirement" in section 308, with reference to the use of section 308 formula grant proceeds to retire State and local bonds; (2) the requirement that public facilities must be required as a direct result of new or expanded OCS energy activity; and (3) the definition of "unavoidable" as it applies to the use of formula grant proceeds to prevent, reduce, or ameliorate unavoidable losses of valuable environmental or recreational resources, and the requirement that such losses result from coastal energy activity, as that activity is defined in the act.

In addition to the express authority provided in the act for the Secretary to make an advance determination that a State will use its grant proceeds for authorized purposes, there are other important reasons for conducting an advance review.

Sound fiscal management principles require that a certain amount of information on the project, its purposes, and its relation to the purposes of the act, must be obtained before the grant proceeds are disbursed. It would be almost impossible for the Department of Commerce or the Comptroller General to audit the program at a later date without this vital information.

It makes good commonsense to also verify that the proposed project or program to use the grant proceeds meets the requirements of the act when this information is received. This procedure provides the states with a clear indication of whether or not their projects or programs will meet the requirements, and also insures that tax dollars are not misspent.

As the Assistant Administrator, I have a statutory responsibility to administer the act as a whole in a uniform and consistent manner. The CEIP was included in the Coastal Zone Management Act Amendments of 1976 because Congress believed that efforts to address the impacts of energy activity should be conducted in a manner which is consistent with the State coastal planning and implementation. As stated in the report of the committee of the conference:

> A strengthened coastal zone management program with full participation by the States, is vital to the protection and proper management of irreplaceable coastal resources and is the best means of dealing with impacts from new or expanded coastal energy activity. H. Rept. No. 94-1298, 94th Cong., 2d sess. 25 (1976).

To achieve this objective, and to insure that the projects and programs which receive financial assistance under the CEIP are planned and carried out in a manner which is consistent with State coastal zone management programs, we have required in our proposed regulations that the State agency which has been designated by the Governor to receive program development or administration grants under section 305 or section 306 of the act must review each proposed project under the CEIP, and certify that it will be compatible with a developing pro-

gram, or consistent with a program which has received Department of Commerce approval.

This is the only way in which we can insure that energy impact assistance under section 308 will not undermine State coastal management efforts. Once a requisition for formula grant proceeds arrives at OCZM, we also feel it incumbent upon ourselves to verify this certification, prior to disbursing formula grant proceeds.

My colleague from the Council on Environmental Quality will speak in detail to the subject of NEPA's applicability to the CEIP's formula grants. However, I would like to state for the record that we believe that the NEPA also requires advance review of a proposal to use formula grant proceeds.

As you know, the Senate bill contained a provision which exempted grants or loans provided under section 308 from the requirements of NEPA. Senator Jackson introduced an amendment on the Senate floor, which was agreed to, which deleted the NEPA exemption.

The formula grants were specifically mentioned by Senators Stevens, Jackson, and Johnston on the Senate floor in their discussion of Senator Jackson's amendment.

Senator Jackson maintained throughout the discussion that each action under the CIEP, including the disbursement of formula grant proceeds, would require an assessment by the Secretary as to whether the action was "a major Federal action significantly affecting the quality of the human environment." It was clear to all three Senators that not every action would actually require an EIS; however, it was Senator Jackson's strong belief, as one of the original cosponsors of NEPA and as sponsor of the amendment to the Senate bill, that an individual assessment must be made on every CEIP action.

The Jackson amendment was agreed to, and the exemption was deleted from the Senate bill. This portion of the legislative history not only indicates that NEPA applies to the formula grant program which is, as I indicated previously, a more discretionary program than the "automatic grant" program then contained in the Senate bill, but it also establishes a further basis for our interpretation that a prior review of State proposals to use formula grant proceeds is to be conducted.

I would also like to indicate how we envision that the EIS requirements of NEPA will be applied under this program.

The States will submit the initial information necessary for OCZM to conduct an environmental assessment on a proposed project, at the time that they requisition the proceeds of their formula grants.

The Department will prepare and circulate the draft and final EIS's on the proposed projects for which such statements are determined to be required. Where feasible, we will make an effort to include several related or similar actions in a programmatic or regional EIS, so as to minimize the delays and costs involved in complying with NEPA.

In addition, we will look to collaborate with other Federal agencies where EIS may be required for a CEIP-assisted project under another Federal program as for example may occur where a project is jointly funded, or where a Federal permit is required. All of this is to say that we take our NEPA responsibilities seriously as a means of insuring an environmentally responsible program, but that we want to use our limited resources wisely in complying with NEPA.

Furthermore, we view the NEPA process as an important means of insuring that the CEIP is carried out in a manner which is consistent with the State coastal zone management efforts, because it offers an opportunity to review a project and its environmental impacts on the context of broad coastal zone management policies.

Now let me turn to three other areas of concern: First, the process which OCZM has used to develop the rules and regulations for section 308, the CEIP; second, the five specific issues Congressman Breaux raised in his December 1 letter and, third, the complexity of the regulations.

With regard to the development of the section 308 rules and regulations, we are firmly committed to an open process. During the 4½ months since the Coastal Zone Management Act Amendments of 1976 were signed into law by the President, we have widely circulated for comment six working drafts. In addition, we have conducted at least 16 meetings with representatives from State and local governments; 9 meetings with Members of Congress and their staffs; 7 meetings with representatives from environmental communities, industry, and public interest groups; 10 meetings with Federal agencies and interagency committees.

This totals 52 meetings and does not include either numerous individual meetings and telephone calls with representatives from these various groups or meetings led by other members of the OCZM staff. At least 16 of these meetings have been in regional locations outside of Washington; and among these were three in Louisiana, three in Alaska, three in California, two in Chicago, and five in the Atlantic region, including Georgia, Virginia, and Massachusetts.

We also circulated working drafts of our proposed section 308 regulations to interested parties on August 9, September 13, October 7, October 22, November 29, and December 7. Our proposed regulations were published in the Federal Register on October 22 (41 Fed. Reg. 46723).

We have received a very large number of informative and very useful comments from interested parties, all of which have been carefully evaluated and incorporated as of December 6, as appropriate, into the regulations. We twice granted an extension of the comment period specified in the Federal Register—the first an 11-day extension from November 22 to December 3 and the second, another 11-day extension from December 3 to December 14, making a total of 52 days for formal public comment on the proposed rules and regulations.

We also chose to prepare an EIS for the section 308 regulations. This was available for public comment for 45 days. Although some advised us that an EIS was not required, we felt it would be advisable to prepare one for the following reasons:

First, the CEIP is itself a controversial program with different interests wanting to see the program developed and administered in different ways.

Second, the CEIP incorporates several concepts which have never before been included in Federal programs. A good example of this is the concept of "unavoidable environmental loss"—that is, the limitation of Federal funding to only programs and projects which prevent environmental losses, or which reduce or ameliorate those losses,

which cannot be avoided because they cannot either be attributed to or charged against the person causing the loss.

This is a particularly difficult provision of the act to implement. If the regulations are too narrow in the development of the definition of "unavoidable," there may be environmental damage from coastal energy activity which goes uncorrected. If, on the other hand, the regulations are too broad, then clearly the CEIP could be used to subsidize pollution. Clearly, neither of these two outcomes is the intent of Congress. The question that we have tried to resolve revolves around how do we define the middle ground, and how do we get there from the statutory language.

Third, we felt it desirable to prepare an EIS to be sure that we fully considered and evaluated the environmental consequences of our decisions in developing the regulations.

Fourth, we felt it was desirable to lay out clearly for comment all the reasoning behind the specific provisions we developed in the regulations which we felt would help to implement the intent of Congress.

With regard to the five points raised by you, Mr. Chairman, in your December 1 letter, I would like to address them one by one in order.

First, the limitations on planning grants.

The regulations specify that the amount of section 308(b) formula grants to be used for planning for public facilities and services is limited to 10 percent of the credit allotments for public facilities and services under section 308(d) (1) and (2), the CEIP fund.

Although there is not explicit statutory language specifying such a limitation, we feel that this specification is consistent with the intent of Congress and within our rulemaking authority.

The statute allows section 309(b) formula grants to be used for planning for only those public facilities and services which are required as a direct result of now or expanded OCS energy activity.

Because we are very well aware of the fact that planning can be an unending process, we feel it is reasonable to correlate the amount of planning money available for public facilities and services to the amount of money spent for the construction or provision of those public facilities or services. This correlation can be achieved best, we feel, through the 10-percent rule.

Second, the ratio limitation on planning under section 309(c).

This limitation has been dropped on the basis of comments we have received which indicate that maximum discretion should be retained by the states in how they spend their planning allotment, whether it be for OCS or non-OCS related needs.

Third, the 4-to-1-ratio limitation on public facilities expenditures and environmental expenditures.

This limitation was developed in order to assure that some money would be available for environmental and recreational purposes. However, because of a technical problem and because of comments we have received, this limitation has also been deleted.

Fourth, the allotment of environmental grants under section 308 (d) (4) limited to non-OCS.

Although there is no statutory language on this point, it is our understanding from discussions with congressional staff that the intent of Congress was to provide some money for environmental purposes to States which will not be allotted section 308(b) formula grants because they have no OCS activities. Based upon Congressman Breaux's comment, however, we have also deleted this limitation.

Fifth, the 80-percent limitation on future environmental/recreational projects.

Again, there is no explicit statutory language on this point, although we felt this limitation was a sound way to implement the intent of Congress to insure that only those environmental and recreational costs paid for with CEIP funds were truly "unavoidable." However, based upon numerous comments, we have also deleted this limitation so that 100 percent of the costs of both past and future unavoidable losses will be covered by CEIP funds.

The final area of particular concern I would like to address today is the complexity of the regulations.

There have been a number of complaints that our proposed regulations as published in the Federal Register were excessively complex. We have made significant modifications since then, and I think you will find that the regulations, as reflected in our December 6 draft version, have been greatly simplified—simplified both in terms of the readability of the regulations themselves and in terms of the processes and requirements contained in the regulations. Of course, as I am sure you realize, the act itself is complex; and some complexity in the regulations is therefore inevitable. But we have tried to avoid writing regulations that contribute to this complexity.

If you have any questions, Mr. Chairman, Mrs. Murphy and I will be happy to answer them.

Mr. Brewer is, of course, also available.

Mr. Breaux. We have a few questions, as you can imagine.

I thank you for your statement.

You have raised a number of points that the committee has also raised.

I am particularly pleased that of the five points addressed, you agreed with four of those points.

We have a problem—the states and individuals and Congress—in preparing intelligent comments on the proposed draft regulations because of the time factor.

The last draft published would give everybody only 8 days to make comments. It is impossible for a State to get those comments and do the necessary research and get them back up here with any kind of a reasonable understanding of what we are trying to do.

Why not allow 30 days each time we propose a new set of draft regulations on such a complex issue as this for people to comment on?

Mr. Knecht. It seems to me that that penalizes the open process. The only requirement was to share it once, on October 22, in the draft publication. Because we have chosen to make five other versions available, to require 30 days notice after each one would be to discourage those involved in writing regulations to make them available in draft form.

We feel the December 6th version does not represent by any means the introduction of any new concepts. In substance, the only changes are removals of points, elimination of contested items and a simplification in expression to reduce some of the apparent complexities. On December 6th, the only way the draft has changed is to simplify, reorganize, and to drop controversial issues. So it seems to me the dropping of items that have been much discussed should not require another long comment period.

Mr. BREAUX. I get the gist of what you are saying. The problem is to give everyone an opportunity to see whether the intent of Congress which, after all, I know you are trying to carry out in the drafting regulations is, in fact, carried out. This is almost an impossibility if you are sending out new regulations and saying in a matter of 11 days, we need your comments on that.

We have had people who were knowledgeable commenting on the wrong set of the regulations. They haven't yet seen the latest version.

Maybe this oversight hearing is good in that sense, that we are giving everybody a chance to see the last and latest draft.

Mr. KNECHT. Let me comment on that. I think the oversight hearing is important and comes at a good time. We appreciate the opportunity to have this discussion. This is an important program. You consider that it is, and a lot of people behind us apparently do.

Let me share with you our plans as of today.

We have not heard what other witnesses have to say. We will be interested in the view of the State of Alaska with regard to the urgency of their needs. This is a program not to satisfy our office or even the Congress, but to satisfy the users, the communities that will be affected and have the needs now.

It is our understanding that those needs exist now, in Alaska especially, and that Alaska is not going to call for additional delays. I don't know that for certain. We will see what the testimony is like.

We will listen today with interest and, assuming that there are no surprises and major new points raised, proceed with the publication of interim regulations shortly after the close of the comment period. That would be about the end of December. At the same time, we would issue a final environmental impact statement.

Now, those interim regulations would not have the force and effect of law for 30 days while the final EIS "steeps." The purpose of the NEPA process is to give the people who still disagree another chance to send in additional comments during the 30-day period. We would receive comment on the basis of the final EIS through a 30-day period which would terminate at the end of January. At that time, we would review the comments on the FEIS and then move toward issuance of final regulations, probably in late January or early February.

We accomplish three purposes:

The first is to continue development of the program in a timely fashion. The second is to give the States time to begin to prepare applications and data and to put themselves in the position to respond, by knowing what the ground rules are as expressed in the interim regulations published in late December. States could be doing their side of it.

Third, it would allow additional time for comments, but through comment on the final EIS rather than on the regulations themselves.

Mr. BREAUX. That sets out your time frame.

I have no problem with the time frame. My concern is that the States need assistance and whether everybody can agree. The problem is in the rush. We do not want to have something put in effect that is contrary to the intent of Congress.

It is equally important that what we intended when we passed this law is being carried out. Let us leave that.

Let us get to some points that I have.

We are very concerned about the interpretation of language as to whether the funds for the CEIP program or the grant program is to be retained in the Federal Treasury as you are saying now, or whether they are to be allocated to the States in a bloc type of an approach. The latter happens to be my opinion and the opinion of a number of the members on the House side, and spelled out in a recent letter.

You have come up with a different interpretation. Congressman du Pont will get into this as to questions he posed to the chairman of the committee, Mr. Murphy, from New York. There are also questions I asked of Chairman Murphy and his response, which clearly indicates that the opposite interpretation was intended.

My question was that under the formula grant section the States would be allocated a certain amount of money based on a set formula and that money would be referred back to the general treasury if the States do not use it.

After the fiscal year was over, only then would the money revert back to the treasury.

Chairman Murphy, who was chairman of the subcommittee while law was being drafted in the House says, among other things:

> After the calculations are made, the grants are to be disbursed to the States which are affected by the Outer Continental Shelf activities. These grants are to be used for said coordination of the statute. If the Secretary determines the grants are not used for these purposes, such grants will revert back to the treasury.

The language is clear in the House debate that these funds are allocated and if they were not used in the way we set out in the program, then and only then will they revert to the Treasury.

The regulations do not follow that concept. It takes the exact opposite.

How do you justify it?

Mr. KNECHT. We tried to lay out our logic in the statement I read. I cannot disagree with your comment that the grants are made directly to the States. It is a question of disbursing the proceeds from those grants. The allotments are set out mechanically and the grants are made according to those allotments. It is the question of disbursing proceeds that is at issue, and we find in our interpretation of the language, that the Secretary may make—that is the word used, "may" make the kind of advance verification or determination that we are calling for in the regulations. Given the fact that we see the word "may," and we find very adequate justification for accepting that discretion, we have taken the position we have.

Mr. BREAUX. I will yield after I follow up on a point.

What is your answer if we have a question of what the interpretation is? What is your response and how do you justify ignoring a letter which was signed by the conferees on the House side and clearly comes to an opposite conclusion?

We spent 2 days on the House floor debating this particular point. Everybody on the House side said this is not the intent. If there is a question, don't you think that our clear and forceful letter would indicate just the opposite was intended?

Mr. KNECHT. The difficulty is that we have Members of the Senate who expressed another point of view.

Mr. BREAUX. A Member of the Senate.

Mr. KNECHT. But the Member of the Senate that carried the bill. We have a letter from Senator Hollings to Secretary Richardson stating clearly the other interpretation, and we don't find a unanimous opinion on the House side.

One could argue on balance the interpretation we have taken. We have taken it, though, for the reason stated in the testimony. It is an authorized and sound way to run the program. We think underneath that it is a required way to run the program.

Mr. BREAUX. Let me yield to Mr. du Pont.

Mr. DU PONT. I would like to focus on a statement you made a moment ago. If you weigh Senator Hollings against the entire House of Representatives, it seems to me that there is one way you ought to come out.

Mr. BREAUX. You better tell him which way.

[Laughter.]

Mr. DU PONT. In any case, you put a great deal of emphasis on the word "may," and yet even in your total testimony you left out, of course, the operative part of that language, perhaps by oversight; but what the language says, of course, is that the Secretary shall determine that each coastal State has its option. That is what was written in the bill which Senator Hollings got through his body for us.

We made it clear with the conferees this was the proper intention.

How do you account for that?

Mr. KNECHT. Because our discretion was based on the wording that I did read.

Mr. DU PONT. Same sentence?

Mr. KNECHT. Yes. We do both. I think our position is not inconsistent with the full reading. I have in my possession a letter of June 30 to Secretary Richardson, signed by John M. Murphy, chairman, who was the House leader and floor manager, and the paragraph in question says:

> The conference substitute provides for grants to be made annually to coastal States in accordance with the formula set out in subsection 308(b)(2). Such grants are to be credited to the accounts of each State by the Department of Commerce.

That is the key sentence.

Mr. BREAUX. Of course, I think my interpretation and many of the members is one of looking at legislative history, and the first thing we should consider is the floor debate.

It is my opinion that the intent of the committee is clear to have the funds allocated to the States. Can you suggest how we could write

the law any clearer to indicate to you that was our intent? We might look at this again in the next Congress.

Mr. KNECHT. The omission of the wording which I read which includes "may" and indicates discretion for the Secretary would be one clear suggestion if Congress intended to make that kind of change.

Mr. BREAUX. How much is an interpretation the result of dictates from OMB as to what Congress intended?

Mr. KNECHT. I am not aware of dictates from the Office of Management and Budget.

Mr. BREAUX. Suggestions?

Mr. KNECHT. I find nothing in the record that those had disproportionate weight. Various parts of the administration, as they reviewed the result of congressional deliberations and the contents of the compromise bill that was finally passed had to decide whether to recommend Presidential signature or not; and the administration in that review put heavy weight on the construction that I have developed in my testimony and believing that that discretion was allowed, the signature was recommended and the President signed the bill. It was an important part of the final deliberations on the measure.

Mr. BREAUX. All right.

Mr. Oberstar, please?

Mr. OBERSTAR. No questions.

Mr. BREAUX. Mr. Forsythe?

Mr. FORSYTHE. Thank you, Mr. Chairman.

I do not believe I have any questions, but I ask unanimous consent that a letter to you, Bob, from Congressman Bauman be made a part of the record and supplied.

Mr. KNECHT. Do we have that letter? Has it been received by us?

Mr. BREAUX. We will have it for the record and for your purposes.

[The document referred to follows:]

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., December 2, 1976.

Mr. ROBERT W. KNECHT,
Assistant Administrator, Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, Rockville, Md.

DEAR BOB: Thank you for this opportunity to comment on the proposed regulations to implement section 308 of the Coastal Zone Management amendments of 1976, and for the attentiveness of your staff in dealing with my office's questions concerning your promulgation of these regulations. As a member of the House Merchant Marine and Fisheries Committee and having contributed to the composition of the Coastal Zone Management Amendments of 1976, I have a particular interest in how section 308(b) affects my state of Maryland.

The efficient and effective management of Maryland's fragile coastal zone by coordinated state and local authorities is necessary in order to prevent the loss of these resources due to increasing public demands on their use. I recognize the necessary role of the federal government in the environmental protection of our coasts and shorelines, and section 308(b) of the enacted House version of the Coastal Zone Amendments makes the orderly disbursement of federal funds for this purpose possible. As you know, the House intended during the bill's consideration and in fact included in the final version of the bill a review authority by the Secretary of Commerce after the disbursement of grant funds to the states are made.

I am extremely concerned, however, with the manner in which the applications procedure 308(b) apparently is being interpreted in the proposed regulations. To reiterate, Congress intent clearly expects the Secretary to review the State's

use of 308(b) funds after and not before they have been granted. I second the comments of my friend and colleague, Rep. Pete du Pont, in his letters to you concerning this matter on October 12 and 15. During the consideration of this legislation on the Floor and in conference, the authors of section 308(b) made it clear that we provided no discretionary authority of the Secretary to withhold approval or retain any proceeds in a respective state's account. Moreover, the Secretary is not in a position to dictate additional conditions concerning these granted funds, but in fact their granting is automatic to those states which qualify as prescribed by law.

The mandate of Congress is unmistakable in this case, and it respectfully holds that you promulgate regulations which guarantee the nondiscriminatory application of this program to states with prior activity, as described in the legislation now enacted into Public Law 94–370. The states are given the opportunity in this procedure to consult with the Secretary in order to obtain a determination that a contemplated use by the state of 308(b) funds is proper before actually committing these funds for some additional purpose. The procedure does not, however, put the Secretary in the position of deciding whether these funds shall or shall not be granted to the qualifying states.

As the comments of my colleagues who have also written to you expressing dissatisfaction with the proposed regulations make plain, we prefer draft regulations which are clearly and unambiguously in accordance with the intent of Congress when the Coastal Zone Management Amendments of 1976 were passed earlier this year. We feel the congressional intent best reflects the will of the citizens strongly supportive of a sound and cooperative coastal zone management program to be administered on the state and local level. This will best guarantee that our state governments will have maximum flexibility in the use of C.E.I.P. fund resources.

I thank you, again, for this opportunity to comment on the proposed regulations, and I stand ready to assist you wherever possible in the proper support of this very important program.

Faithfully yours,

ROBERT E. BAUMAN,
Member of Congress.

Mr. BREAUX. Mr. Treen of Louisiana.

Mr. du Pont first.

Mr. DU PONT. Thank you, Mr. Chairman.

I do not find myself anywhere in agreement. They have misconstrued the intent of Congress. I think they have deliberately been writing regulations that do not reflect the intent of Congress.

I would like to begin with a constitutional question, not statutory.

Can you point out to me any authority that you have to write regulations in conflict with congressional intent, the statutory authority given to you in the specific statutes you are writing regulations for?

Mr. KNECHT. I don't know of any, Mr. du Pont.

Mr. DU PONT. If you don't know of any, how could you have put together the four or five limitations in the regulations that the chairman referred to, where you admit in each case there was no statutory language, but you went ahead and wrote the regulations anyhow?

Mr. KNECHT. It seems to me the whole essence of the regulation-writing job is to set up a policy framework to run the program, once the major guidance and general policy has been set by the Congress. There will always be gray areas.

Occasionally you can go either way and where certain directions are not foreclosed expressly and where we feel it would be good public policy to suggest a regulation, we have done it.

Mr. DU PONT. For example, on page 18 of your testimony you talk about the 80-percent limitation on environmental/recreational projects; and you say there is no explicit statutory language, though you felt it was a sound way to implement the law written by Congress.

You said a minute ago that you had no authority to write beyond the intent of Congress. I do not know how you think you have any authority to come up with a new limitation that the Congress never put in the bill.

Where do you draw that authority from, Mr. Knecht?

Mr. KNECHT. You directed us to write rules and regulations and, to the best of our ability, we were attempting to write draft rules and regulations consistent with the intent of Congress.

Mr. DU PONT. Do you think that gives authority to add new sections?

Mr. KNECHT. We didn't believe we were developing policies inconsistent with the intent of Congress or inconsistent with the specific provisions of the statute.

Mr. DU PONT. Yet you quote on page 17 in the testimony about other limitations that you say in your language were developed in order to assure that some money would be available for environmental and recreational purposes.

You have not got any authority to develop limitations. You exist as a creature of the Congress, solely and only for the purpose of interpreting what we have passed. I don't see that you have come anywhere close to it.

Mr. KNECHT. I certainly agree with you as to our purpose, but would you not admit that there is a gray area between the policy that is contained in legislation and policy that, perforce, has to be set in regulations to operate a program?

Not all of the decisions and the entire framework is cast, you know, in the legislation. There are a great number of decisions that have to be made as we implement it. That is the purpose of submitting drafts to the public and to the people who are interested, to get comments.

Mr. DU PONT. I do not think there is any gray area that permits you to add, administratively, what the Congress has not passed legislatively; and I do think that you have exceeded your authority.

But going back to the question of prereviews by the Secretary of projects that are to be undertaken by the States, we have a very strong disagreement. I think the intent of Congress, stating in the subcommittee, where I offered the original automatic grant, going through the full committee and through the full House of Representatives and, indeed, going through the conference process, clearly indicate that we intended it to be automatic and that there would be no prereview.

I believe everybody on the House side agreed with that. I am sorry Mr. Murphy is not here. He agreed with it, too. So we have a strong disagreement.

But the most interesting point of the disagreement—I would like to address my question to Ms. Murphy. She was the one present.

At 4 o'clock on June 17, Mr. Hodsall, Ms. Murphy and I met in my office. One of the arguments made by Ms. Murphy was that we had to change the statutory language because it did not give, did not give the Secretary the right of prereview and she thought it extremely important that he have that right.

We discussed it. We did not agree on it and the language was never changed.

How do you square the fact that the language did not have it and now you argue that the language does have it?

Ms. MURPHY. That was after the word "may" was inserted?

Mr. DU PONT. The language we discussed that afternoon is exactly the language that is in the law now.

Ms. MURPHY. Perhaps one of the reasons is that I did not have the benefit of the Department of Commerce's legal counsel who interpreted the statute and legislative history afterward.

Mr. DU PONT. I see.

So the legal—that is as good an answer as any. I am not going to press you because the fact of the matter is that there was no intention of prereview. You thought it then and I think you see it now.

No more questions.

Mr. BREAUX. Mr. Treen?

Mr. TREEN. I want to associate myself with the substance if not the tone of the remarks of the Governor. It was not the intent as far as this Congress is concerned to have a predisbursement review or any procedure whereby the funds would be allocated to an account, then disbursed, subject to requisition by the States.

Let me ask you this: Are there any other Federal programs in which this is done, Mr. Knecht, in which the money to be granted to a State, is put into an account and the State cannot use it?

Mr. KNECHT. Yes; I think, Mr. Treen, the LEAA and HUD grants are similar; there is an allocation and allotment made for each State and the State draws down against that after it submits a plan for specific projects.

Mr. TREEN. I know we have many acts, Mr. Knecht, containing formulas which set forth what the States will get. Then usually they have some discretionary fund. I refer to this procedure of transfering funds to an account. I believe one of the arguments for putting it into an account for the States is so that the money would not lapse?

Mr. KNECHT. That is one advantage to the States. The funds remain available during the life of the program rather than ceasing to be available at the end of 2 years.

There are several Federal programs where this is done and it is rather customary. This review is not the review of the efficacy or wisdom of the State proposal, but because of the law, we are required to verify certain information.

Mr. TREEN. Will interest be paid to the States on the funds put in these various accounts?

Mr. KNECHT. No.

Mr. TREEN. It will not?

Mr. KNECHT. No.

Mr. TREEN. If it is our money, why would we not get interest? If it belongs to the State, just subject to requisition?

Are you going to use the money?

Mr. KNECHT. This is the policy of the Federal Government. Interest is not paid in these kinds of situations. It is not authorized in the statute.

Mr. TREEN. Well, I am having trouble trying to appreciate that the money is ours and it is not ours.

Mr. KNECHT. Well, it is no one else's and no other State can draw down on it and the Treasury cannot recover it until the life of the program is ended.

Mr. TREEN. Let me ask you this: Is there any possible basis for making a distinction with regard to procedure as between the grants that

will be used for the reduction of environmental losses and the grants for other purposes?

I direct your attention to page 6 of your statement in which you state that one of the principal reasons for the procedure that we now have in the regulations is because a determination must be made by the Secretary or his designee that adequate financing under other sections of the act is not available before he disburses the proceeds of the grant.

Now, that determination is not required in the case of funds used for the reduction and amelioration of environmental losses. That cannot possibly be one of your reasons for handling those funds in that fashion.

Mr. KNECHT. That is right, Mr. Treen, but there are other verifications.

Mr. TREEN. I know you have other reasons as stated, but that does not apply.

Mr. KNECHT. That is right. It only applies in the case you mentioned.

Mr. TREEN. I want to say that I appreciate the changes that have been made in the regulation which make more possible the use of formula grant funds in the construction of facilities to pay the differential between the cost of that facility based upon its lowest possible cost and the cost of building that facility in an environmentally sound way.

I made these comments in New Orleans.

You have made several changes in the regulations which I think are helpful in that regard, but I want to get into that a little bit with you.

Will you refer to page 59 of the draft regulation? I have several questions.

You specifically set forth there that the funds may be spent to pay—

> * * * the differential in the least cost method of providing a public facility eligible for funding under subpart E of this part and a higher cost method that reduces the environmental loss of the least cost method.

We have in southern Louisiana two highway proposals, among others, but two that I think of now; one to reconstruct U.S. Highway 90 across wetlands areas in the parish of Terrebonne and the other for the Lafitte-Larose Highway in Jefferson and Lafourche Parishes.

There are many who feel Highway 90 should be built not as ground level causeway, but in an elevated fashion so that the tidal flow would not be obstructed by the highway.

Now, this is a much more costly way to build this highway. If these funds could be used to pay that differential, then I think we would have a very substantial use of these funds.

There is also another highway, known as the Lafitte-LaRose Highway, which is to cut through wetlands and, again, the cost of building that, with enough openings to the tidal low will not be retarded is much more expensive.

If we could eliminate the environmental objection with the funds, we would have a substantial use for those funds. It would be of great benefit to the State of Louisiana and this could apply to other States as well.

Do you believe your regulations as now written would permit the use of those funds under 308(b)(4)(c), for that purpose?

Mr. KNECHT. Mr. Treen, under certain conditions. I think the answer is "Yes." I would like to ask Mrs. Murphy to explain what conditions would have to prevail for that to be the case.

Mr. TREEN. Also would you address the question of the unavoidable loss? That could be an obstacle because you could say the State doesn't have to build the highway at all.

I addressed the point in New Orleans whether that highway be precluded by limitation 931.79(d) as a "public facility," and also its necessary relation to Outer Continental Shelf activity.

Ms. MURPHY. The answer to your question is "Yes," it is a permissible use under the regulations. However, the specific use of those funds for the highway would depend on the intrastate allocation of the funds by the State. In other words, if the State decided to give so much money to a county to build a facility and they allocated some money to the State itself for the highway that would be allowable. The decision rests at the State level, not at the Federal level.

Mr. TREEN. I am not sure I understand that. All highways are paid for by State funds and Federal funds, not county funds.

Ms. MURPHY. The State agency designated by the Governor to manage 308 assistance has to develop an intrastate distribution process. If the utilization of that process determines that the highway will be built with so much money and a parish or city will get so much money, then that is the State's decision. It is an allowable use under these regulations.

The conditions that must be met are that the facility or that the environmental loss from that facility be the result of coastal energy activity; so if the highway serves primarily coastal-energy activity, that would be allowable.

Mr. TREEN. You have been down there, and you have looked at it. The highway serves many purposes but, of course, one of the driving forces of increased population and activity in that area is the Outer Continental Shelf activity.

Ms. MURPHY. The State has to certify that you followed the interest allocation process. It also has to certify it is consistent and compatible with the CZM program and that it is an unavoidable loss from energy activity. We verify the certifications to see if they were signed by the appropriate agency.

Mr. TREEN. Is that all you do, or are you going to question our judgment that it is an unavoidable loss?

Ms. MURPHY. In the case of a highway, I would assume an environmental impact assessment would be done and probably an environmental impact statement would be required. If there are already Federal funds in that highway and the Federal Highway Administration has done an environmental impact statement and said there are no adverse environmental effects and the cost of building it in a more environmentally sound manner would reduce the environmental costs, then that is perfectly allowable. We would not have to do another environmental statement.

Mr. TREEN. OK.

But getting to the principal point, in your verification process or approval process, are you going to question the judgment of the State in its verification that what we have is an unavoidable environmental loss?

Ms. MURPHY. We would question whether or not the information that you submitted met our definition of "unavoidable" under the regulations.

Mr. TREEN. You would question it?

Ms. MURPHY. To see that the information you supply is in conformance with the regulations that define "unavoidable."

Mr. TREEN. In that instance, would you feel that that was an unavoidable environmental loss, since the State has the option not to build the highway at all?

Mr. KNECHT. That is not the point. She is attempting to say we are not going to go to Louisiana in order to second-guess the State's situation. We will review what the State submits and verify that the regulations are met, not go to Louisiana—I am sorry, Mr. Chairman.

Mr. BREAUX. That was very interesting.

We do need to recognize Mr. Lent. Maybe we can come back to Mr. Treen.

Mr. LENT. Thank you very much, Mr. Chairman. I do not have any particular questions, but I would like to express my concern with these regulations and join my colleagues and say it appears that these regulations do contravene the intent of Congress in a number of ways, particularly insofar as they require prereview of expenditures; it would seem that this places an extremely onerous, time-consuming burden; and it would probably be an extremely expensive burden on the States and it would encumber a statute which was intended to operate with a greater degree of facility.

It would seem that where the OCZM is going to require the localities or the States to collect that data, such as developing accurate employment equivalencies and need factors, you are really placing a tremendous burden on the State and you are also going to duplicate that burden once again when the Federal Government has to review these employment equivalency and need factors, and other statistics which the States have to develop.

Mr. KNECHT. Mr. Lent, we were simply trying to give the opportunity to the States to argue with the data collected by my office and which will be the basis for the allotments or allocations. They do not have to respond.

Also, assistance is being provided now to those States that are being affected by the Outer Continental Shelf leasing program of the Federal Government to do this kind of work.

Mr. LENT. If the Federal Government develops the employment equivalencies and need factors, particularly as to need factors, are you not substituting your judgment for that of the State?

Mr. KNECHT. It is difficult to have it both ways. We felt the best way was to do that initially and then allow the State time to review and comment and reach a meeting of the minds before we determine the factors used for the allotment. We are open to additional suggestions if you prefer us to consider a different way of doing it.

Mr. LENT. No further questions.

Mr. BREAUX. Thank you.

I have two short points.

We raised six specific issues where, at least, the Chair felt the regulations did not conform with the intent of Congress.

On four of these we apparently cleared up the problems we have and you now agree with our original position as outlined in my letter.

On the sixth and last one, whether it goes to Treasury or State, we have problems. On the fifth, the limitation of 10 percent on the planning grant.

Bob, in your statement on page 16, you say that the regulations specify that the amount of section 309(b) formula grants to be used for planning for public facilities and services is limited to 10 percent of the credit allotments for public facilities and services under section 308(d)(1) and (2), the CEIP fund.

You say that although there is not explicit statutory language specifying such a limitation, you feel that this specification is consistent with the intent of Congress. It is something that added to the regulation. I do not think we ever intended that.

As one who was on the conference committee, I say that is not the intent of Congress. We talked about grants, but we did not talk about 80- or 90-percent grants. We talked about grants that covered planning purposes, whatever that might be, 100-percent grants.

I strongly do not feel—it may be the best idea that anybody can come up with, but if it is not in the statute, I do not see that you can add it as something which is merely carrying on the intent of the statute.

Mr. KNECHT. These are 100-percent grants, not 90. We are trying to work out mechanically what we believe Congress was intending. You can only use 308(b) for planning when you are planning for public facilities directly required by new or expanded OCS and, therefore, we felt there ought to be a tie-in between the amount of planning you do for public facilities and the amount of money you have available for those public facilities. There is no other way we can see to try to achieve the congressional intent that this planning be restricted or related to public facilities.

Mr. BREAUX. The point is if the grant is 100 percent, you can only use 10 percent for planning purposes. You are in effect saying the planning grant is only 10 percent.

Mr. KNECHT. No; 10 percent of the credit allotment for public facilities under (d)(1) and (2) of the fund, so if the credit allotment for a given State was $10 million, that would allow up to $1 million to be requisitioned——

Mr. BREAUX. Nowhere in the statute is that specified as spelled out or in my opinion even hinted at.

Mr. KNECHT. It is a suggestion we make in the draft to try to achieve the intent of Congress as we read it in the statute. Without this limitation, all of the money, in theory, all of the money in the formula grant could be for planning and we do not see planning as a principal objective.

Mr. BREAUX. I do not think that is the intent of Congress.

At what point did you say the final regulations would be ready? What is your ballpark date?

Mr. KNECHT. In the scenario I outlined, the final regulations would be prepared and submitted to the Federal Register in late January or early February.

Mr. BREAUX. Would that give the new administration which is going to carry out the program an opportunity to be involved in the funding regulation?

Mr. KNECHT. If they so choose. We have met with the transition team and have discussed the key points of the controversy with them. Accept my word that we are not trying to pull a fast one.

You said "final regulations." I said it was our intent to publish interim regulations as early as late December which would have standing as final until replaced by the final regulations. But they would not become effective for 30 days, until the EIS final time period had elapsed, that is until late January or early February.

Mr. BREAUX. Mr. du Pont, do you have any questions?

Mr. DU PONT. Yes. I would like to follow up the question you were asking about the planning grant limitation.

Under the legislation that finally came out, how much money is held under 308(b)?

My recollection is $50 million.

Mr. KNECHT. $50 million annually for 8 years. That is 308(b).

Under (d) and (e), it is $800 million.

Mr. DU PONT. Yes.

But in your limitation of the 10 percent, the problem becomes, if you are distributing $50 million to approximately 30 coastal States—you are going to find that the amount of money that actually gets through may be very small and it might well be that the State would need to use all of it for planning and, as a matter of fact, we discussed that.

Mr. KNECHT. It is 10 percent of the $800 million, not 10 percent of the $50 million. It is 10 percent of credit allotments. This 10 percent over the life of the program is $80 million, which was allowed for planning. I think the $80 million is generous.

Mr. DU PONT. I am sorry; I misread your sentence.

Mr. KNECHT. No; it is related back to the credit assistance, 10 percent of that. Because that is the kind of planning allowed under 308 (b), it is a crossover to the other fund. It is a bit confusing, but that is the way the law was written.

[Laughter.]

Mr. DU PONT. It is a bit confusing and the sad thing is that the sections that were made clear have been made further confusing by the regulations.

[Laughter.]

Mr. DU PONT. But I want to address myself further, before we move on, to this:

The fact is that the gentleman from Louisiana was uneasy about associating himself with my tone rather than substance.

He is right. I intend to get a little excited. For 2 years I worked on it and watched what gained my consent and the committee's consent slowly being bent beyond recognition by the bureaucracy. This is my last shot; this is my last chance.

Mr. KNECHT. You are going to run a bureaucracy, Mr. du Pont.

Mr. DU PONT. I would say that somebody in a school of government somewhere ought to take this as an example of really what is wrong. Congress does not have control. I think we have demonstrated in this process what Congress set out to do has not come to pass. It has not come to pass through the efforts of that fourth branch of Government,

the bureaucracy, over which it seems that we have no effective control. I think that is too bad.

We have seen that happen here.

Thank you.

Mr. KNECHT. May I respond, Mr. Chairman? In fairness, would you agree or not agree that the situation was left somewhat tangled and confused when Congress finished its work on this legislation?

Mr. DU PONT. I would not agree as far as the prior control at all. The source of confusion is one misstatement in the record by a gentleman from South Carolina and everybody is in unanimous agreement.

Mr. KNECHT. I quoted from a letter from Chairman Murphy which supported this position. We was the leader of the House in this deliberation.

Mr. BREAUX. Bob, we have to get to something else because we have so many witnesses.

The point that the gentleman from Delaware makes is that it is frustrating when we have a statute that we wrote and spent years on is not being formulated in a manner that we intended it to be.

We are in an additionally unique position of being out of session. We cannot come back with amendments until the next Congress. That is frustrating and it points out the serious problems we have.

I would like to recognize Mr. Kitsos.

Mr. KITSOS. Mr. Knecht, will the public comment period on the EIS also involve comments on the interim regulations themselves?

Mr. KNECHT. Mr. Kitsos, in effect, I believe the FEIS, if adequate, will contain all of the relevant material; and I imagine it will have attached the interim regulations; so I think the entire contents will be there and all points would be subject to comment. There could be comment directly, as well, on the interim regulations in response to the FEIS. We would not interpret that as a limitation.

Mr. KITSOS. It would be possible, then, to comment on nonenvironmental aspects of the regulations?

Mr. KNECHT. Oh, yes, any comment will be considered until they are published in final form, which we would anticipate in late January or early February.

Mr. KITSOS. Thank you.

Mr. BREAUX. Minority counsel?

Mr. SMITH. No further questions, Mr. Chairman.

Bob, we appreciate your appearing here. You will be excused, but we would like you to sit with the representatives of our next witnesses who represent the coastal States organization.

Mr. KNECHT. Thank you very much.

(The following letter was received in response to questions raised during testimony of Mr. Knecht:)

U.S. DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
Rockville, Md., December 17, 1976.

Hon. JOHN B. BREAUX,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN BREAUX: I am submitting this letter, on behalf of Ms. Joellyn Murphy and myself, to be incorporated in the record of testimony for the December 10, 1976, Oversight Hearing of your House Oceanography Subcommittee.

This letter responds to several comments presented in and testimony by witnesses at that hearing as well as by members of the Subcommittee.

I would first like to address the question raised by Mr. Kai Midboe of the Sea Grant Legal Program concerning our interpretation that public facilities and public services eligible for funding under section 308(d)(1) and (2) of the Act must be required as a result of "new or expanded coastal energy activity." Although the term "coastal energy activity" appears in section 308(d)(1) and (2) unqualified by the term "new or expanded," our interpretation is based upon an inconsistency between the language in section 308(d) and that in section 308(e), which requires the promulgation of regulations to implement section 308(d), as well as on the legislative history to the CEIP.

Section 308(d)(1) and (2) of the Act provides for credit assistance in the form of loans and guarantees to coastal states and units of general purpose local government for the purpose of providing new or improved public facilities or public services which are "required as a result of coastal energy activity." Section 308(e) mandates the promulgation of regulations to allot credit assistance under section 308(d), and to establish criteria and procedures to evaluate the ability of states and local governments to repay. In each case, the regulations are to be based upon factors which include "new or expanded coastal energy activity," new employment, and new population. Because it makes little sense to base implementing regulations upon a more narrow range of factors than those upon which financial assistance is to be provided, we found it necessary to look to the basic policies and structure of the credit assistance program as these are described in the legislative history to the CEIP.

As you know, the loan and guarantee provisions of section 308(d) were intended to help states and units of general purpose local government by providing *front-end* financing to address the impacts of coastal energy activity. There are numerous references to this intent in the legislative history accompanying section 308(d)(1) and (2). The term "front-end financing" necessarily implies financing to address problems associated with the *early* stages of energy activity. Credit assistance under section 308(d) is coupled with repayment assistance in section 308(d)(3), so that the Federal Government will assume some of the risks associated with planning for and carrying out projects to address the energy impacts.

Thus, the structure of the credit and repayment assistance provisions of section 308(d) is based on providing loans and guarantees during the early stages of coastal energy activity, when revenues from that activity are often not sufficient to pay for necessary public facilities and services. Since revenues generally do materialize at a later date from the energy activity, state and local recipients of credit assistance are obligated to repay the Federal Government. If the projected revenues from the energy activity do not materialize, however, the Federal Government will provide repayment assistance.

Given the apparent inconsistency of language in sections 308(d) and (e) of the Act, and the basic policies and structure of the credit assistance and repayment provisions as described in the legislative history, we have required in the proposed regulations that public facilities and public services eligible for funding under section 308(d) must be "required as a result of new or expanded coastal energy activity." However, the term is defined so that many new functions associated with coastal energy activity which began prior to July 26, 1976 are included. Section 931.15 of the proposed regulations (there has been no change in later staff working drafts) defines "new or expanded coastal energy activity" as: "any coastal energy activity, as defined in § 931.13, if the siting, construction, expansion, initial operation, or replacement, in whole or in part, of any equipment or facility required by the conduct, support, or facilitation of such activity takes place after July 26, 1976."

A comment in the December 6 staff working draft explains that: The term "expansion" is intended to include both the physical expansion of a facility itself and the expansion of the output of the facility. The term "initial operation" is intended to include the case in which a previously operating but then idle energy facility is reactivated after July 26, 1976.

We believe that our interpretation of the requirements of sections 308(d) and (e) is entirely consistent with the legislative history, including a statement by Senator Hollings during the consideration of the Conference bill, S. 586, that: "It is the intention of this provision that loan funds be available to provide facilities required as a result of ongoing activities, including OCS activities. This would include, for example, schools, hospitals, and renovations of same as necessary due to ongoing coastal energy activity." Cong. Rec. S. 10933 (daily ed. June 29, 1976).

Some examples of activities associated with coastal energy activity which began prior to July 26, 1976 should clarify the situation:

(1) If a company has been drilling for several years on a tract that was leased in the 1950s, and the company decides after July 26, 1976 to start drilling a different well on the same tract, the resulting activities from this decision will be covered

(2) If a company has received approval by the Department of the Interior to drill a well on a plan that was approved in the 1950s, and the company decides to start drilling after July 26, 1976, the resulting activities from such decision will be covered if a notice to drill is issued after July 26, 1976.

(3) If a company finds more oil than was initially expected and the company decides after July 26, 1976 to install a storage tank on the platform in order to temporarily store the oil, the activities resulting from this decision will be covered.

It should also be noted that most of the facilities required to build a deepwater port offshore Louisiana will be built after July 26, 1976, and will therefore qualify for CEIP credit assistance. In addition, the facilities required to support the transportation of oil onshore from the deepwater port will be constructed after July 26, 1976 and will qualify for assistance under the credit assistance program.

The foregoing examples indicate clearly that many aspects of coastal energy activity which began prior to July 26, 1976 will be covered under the definition of "new or expanded coastal energy activity." We are, however, attempting to make sure that credit assistance is provided for front-end financing problems associated with coastal energy activity, as dictated by the legislative history.

I would also like to point out that the definition of the term "new or expanded outer Continental Shelf energy activity," a term which appears in the formula grant provisions of section 308(b), is structured to include a similar range of new functions associated with ongoing OCS energy activity. In this case, we have exercised our discretionary authority to define a term left undefined in the Act in an inclusive manner. "New or expanded outer Continental Shelf energy activity" is defined in § 931.18 of the December 6, 1976 staff working draft regulations as: "any outer Continental Shelf energy activity, as defined in § 931.17, which supports exploration, development, or production according to plans, amendments to plans, or notices to drill approved or issued by the U.S. Department of the Interior after July 26, 1976."

Thus, the following activities would be among those covered under the definition:

(1) Activities resulting from the exploration, development, or production on a tract belonging to a lease sale that took place before July 26, 1976, if such plan was approved by the Department of the Interior after July 26, 1976.

(2) Activities resulting from an amendment to a plan that was approved before July 26, 1976, if such amendment is approved by the Department of the Interior after July 26, 1976.

(3) Activities resulting from a notice to drill issued on a plan that was approved before July 26, 1976, if such notice to drill is issued by the Department after July 26, 1976.

I point out this definition in the regulations to indicate a situation in which we have chosen to provide a non-exclusive definition when the alternative existed to provide assistance for only a more narrow range of energy activity.

I would like to address another question raised by Mr. Midboe. This question concerns our interpretation of the term "energy facilities directly required by OCS energy activities" that appears in the definition of OCS energy activity in section 304(c)(12) of the Act.

The Act defines the term "outer Continental Shelf energy activity" as any exploration for, or any development or production of, oil or natural gas from the outer Continental Shelf, or the siting, construction, expansion, or operation of any new or expanded energy facilities *directly required* by such exploration, development, or production (emphasis added). This definition follows the House report.

The key words in the above definition are "directly required." Congress delegated to the Secretary of Commerce the authority to determine which energy facilities are directly required by such exploration, development, or production. The definition in the House report used the words "made necessary" instead of "directly required." On page 40, the House report states: "The criteria for determining whether a particular facility is made necessary by OCS exploration or development should be specified by the Secretary of Commerce when he pro-

mulgates regulations for the administration of the amendments of the Coastal Zone Management Act."

The Act also follows the House amendment in defining the term "coastal energy activity, to include only those facilities which have to be in the coastal zone because of technical requirements as eligible for assistance. The purpose of this limitation is to reduce the encouragement of unnecessary energy facility siting in the coastal zone.

To quote the House report: ". . . the activities and associated facilities enumerated in the definition were considered by the Committee to be those which by their very nature or technical requirements, mandate their location and operation in the coastal zone." (page 54)

The definition of coastal energy activity is broader than the definition of the OCS energy activity and contains the latter.

On page 43 the House report states: "The final new definition, subsection (c), defines, 'coastal energy activity'. Coastal energy activity is distinct from 'outer Continental Shelf energy activity' (defined in subsection 304(j) in that it is broader and contains most OCS-related activity within it."

Note that the term "OCS-related activity" is used in the above quote. This term includes the pre-exploration, exploration, development, production, transportation, treatment, and refining phases of OCS activity. The House report defines OCS energy activity to include only three of the above phases: exploration, development and production of OCS oil or natural gas. In the House definition of coastal energy activity, however, the transportation of oil and natural gas is added to this list. Thus, the word "most" in the above quote refers to those OCS-related activities—pre-exploration, treatment and refining phases—which are not included in the definition of coastal energy activity. ("Transportation" was deleted from the definition of OCS energy activity in the 1976 amendment.")

To sum it up, Congress intended that of the facilities that are sited in the coastal zone, only those that have technical requirements to be located in the coastal zone will be eligible for CEIP assistance. Congress stated this explicitly in the definition of coastal energy activity. It might be argued that Congress did not intend the "technical requirement" language to apply in the definition of OCS energy activity. However, the latter interpretation would produce conflicting and disruptive incentives in the implementation of the program. A state which allowed the location of OCS-related facilities in its coastal zone that did not meet the "technical requirements" criteria in the definition of coastal energy activity, for purposes of loans and guarantees under section 308(d), would be able to go directly to its formula grants under section 308(b). In other words, this would reward those communities that permitted unnecessary energy development in their coastal zones, while at the same time penalizing those communities that sought to protect their coastal zones from unnecessary energy development by requiring that they first use their credit assistance under section (d). Clearly, this was not the intent of Congress.

OCZM in its proposed rules and regulations has, therefore, defined energy facilities directly required by OCS energy activity to be any new or expanded energy facilities that have technical requirements, as described in § 931.13, which necessitate their location in the coastal zone and are:

(1) Publicly owned transportation systems to the extent that they serve outer Continental Shelf energy activities; or

(2) Owned or operated by OCS lessees or their contractors, subcontractors, or principal suppliers. Such facilities are limited to:

(i) Exploratory and development drilling rigs;

(ii) Platforms, subsea completions, and subsea production systems;

(iii) The following components of marine pipeline systems;

(A) Pressure source,

(B) Gathering lines,

(C) Pipelines,

(D) Intermediate pressure boosting facilities, and

(E) Landfall sites;

(iv) The following facilities to the extent that they serve outer Continental Shelf energy activities;

(A) Offshore storage and loading facilities of oil and gas,

(B) Marine terminals,

(C) Construction yards for platforms and exploration rigs,

(D) Pipe coating yards,

80-545—76——3

(E) Bases supporting platform and pipeline installation,
(F) Electric generating plants,
(G) Temporary service bases used in exploration phase,
(H) Permanent service bases used in development phase, and
(I) Transportation facilities limited to helicopters, heliports, tug boats, crew boats, supply boats, production utility boats, ocean and seismic vessels, barges, "spread" vessels, workover rigs, diving tenders, and drilling tenders; and

(3) Such other facilities which the Associate Administrator determines to be directly required by OCS exploration, development, or production.

Note that the above list is broader than the list proposed in the House report. The latter was also exclusive. It is clear from the legislative history that such list should be exclusive. To quote again from the House report: "It also provides a detailed list of the outer Continental Shelf support activities which would be covered, to avoid possible absurd links in the supply chain that might result in impact aid being provided for a plant making items which are used for OCS development even though most of the company's business involves manufacturing these items for other purposes."

It is on this basis, as well as others, that OCZM defines energy facilities directly required by OCS energy activities to be primarily those owned or operated by OCS lessees, contractors, subcontractors, or principal suppliers. However, the proposed rules and regulations also provide sufficient flexibility to the Associate Administrator to add any other facility to the list he determines to be directly required by OCS energy activity.

I would now like to turn to the question of repayment assistance.

One of the greatest concerns expressed in the National Governors Conference (NGC) and National Association of Counties (NACo) testimonies, as well as in the letter from Governor Hammond, was that the CEIP regulations do not provide that repayment assistance should flow "automatically" to a borrower whenever revenues are insufficient. There was a fear that the regulations afford the Associate Administrator too much discretion in deciding whether a borrower is entitled to such assistance.

This is simply not the case.

The most recent version of the regulations, dated December 6, 1976, makes it clear that the Associate Administrator shall award repayment assistance whenever revenues from the anticipated coastal energy activity and the related new population do not materialize as forecast in the fiscal management schedule.

Nevertheless, further clarification of OCZM's intentions seems in order, and we will incorporate the following language into § 931.67(b)(4)(i):

> In determining whether a repayment remedy, including a repayment grant, is warranted, OCZM will use as a criterion only the extent to which the actual increases in employment and the related population resulting from new or expanded coastal energy activity and the facilities associated with that activity do not provide adequate revenues. The Associate Administrator does not have discretion to withhold repayment assistance when that assistance is needed because the new or expanded coastal energy activity (and related population and facilities) does not provide the revenues anticipated in the fiscal management schedule as described in § 931.48(b)(2)(5). The Associate Administrator also does not have discretion to award any form of repayment assistance when the need for that assistance arises from causes unrelated to the new or expanded coastal energy activity. Each loan or guarantee contract signed by the borrower will set forth in detail the conditions under which repayment assistance will be available, and those conditions will be binding on the Associate Administrator.

I hope you now recognize that our handling of repayment assistance is, in fact, in harmony with the Act, and that it provides a complete guarantee against default resulting from coastal energy activity.

Another concern expressed in the NGC and NACo testimonies (and elsewhere) is that the regulations do not define credit assistance to be "unavailable" (in the meaning of section 308(b)(3)(B) of the Act) when a borrower cannot project sufficient revenues to amortize a loan or bond, and thus, that the regulations do not permit direct use of the State's formula grant proceeds under these circumstances.

The regulations do not include this case in the definition of "unavailable" because such inclusion would be inconsistent with the policies and structure of section 308. The Act clearly states that credit assistance is the primary source of assistance for the provision of public facilities and services—and the Act provides a form of guaranteed credit assistance that is designed to prevent any

fiscal losses to or increased fiscal burdens on a State or community accepting the assistance.

Indeed, to define "unavailable" in the manner suggested above would be to return to the concept of "net adverse impacts" contained in the original Senate version of S. 586 and so clearly rejected in the Act that ultimately became law. The Act recognizes that projections or forecasts are a poor substitute for reality. To base assistance on such projection entirely would be to encourage the "wipeouts" and "windfalls" referred to in the NGC testimony. The Act and the regulations provide a much more flexible approach tailored to need as that need develops.

The regulations (§ 931.50(b)(2)) makes it clear that a borrower shall not be discriminated against in the awarding of a loan or guarantee because the borrower cannot project revenues sufficient to amortize the loan. The Associate Administrator and the borrower will work out an appropriate repayment schedule—which may involve complete deferral of payment for a number of years until revenues do materialize or until a repayment grant is awarded. (As pointed out above, a repayment grant will always be awarded when revenues from the energy activity do not materialize as forecast.)

This scheme benefits the country as a whole, because it prevents windfalls to borrowers who initially project no revenues but later find they could, in fact, take in sufficient revenue using their usual rates and methods. Furthermore, this scheme benefits the borrowing community, because it prevents shortfalls to borrowers who initially project a small deficit, receive a grant, and then later discover their deficit to have been much larger than forecast.

There is also another reason why the concept of "unavailability," as currently embodied in the regulations, should be preferrable to states and local governments. Section 931.42(g)(2) sets forth clearly a rule by which the unavailability of credit assistance is to be determined; it is a rule that applies in the aggregate on a state-wide basis. This determination is made at the time of allotment (as described in § 931.46(e)), permitting the state complete certainty as to the extent of grants and loans/guarantees available to it. The state can thus set its own priorities and make its own decisions, packaging a combination of credit and grants as it desires, and targeting the available formula grants to those communities least likely to be able to amortize a loan or bond. To define "unavailable" as suggested above would be to involve the Federal Government in the individual allocations of grants and loans within the state—something both the states and the local governments have repeatedly told us they wish to avoid.

Regarding the issue of lateral seaward boundaries, we believe that it is technically impossible to define all lateral seaward boundaries within 270 days from July 26, 1976. Lateral seaward boundaries will be extended within that timeframe, however, for those states that have existing interstate compacts, agreements, or judicial decisions. This would be for eight out of the eighteen boundaries in question. For the remaining ten boundaries, we have drawn the regulations to allow the states six months in which to reach an agreement on a boundary through the territorial sea. If the six months elapse without an agreement being reached, the states have four months in which to submit written arguments to the Associate Administrator in support of their positions. The Associate Administrator will then have two months in which to establish a delimitation line beyond the territorial sea.

It should be noted, however, that the Associate Administrator can establish a line of delimitation at any time after the regulations take effect and before the six months (or the six months plus the four months) are up, provided that both states involved request him to do so.

Admittedly, this could be a twelve month process, but we feel it is the most reasonable, equitable, and expedituous manner in which these determinations can be made, given the extraordinarily complex technical aspects of the issue. We also feel that this procedure is a safeguard for all the states against any possible "arbitrary designations for the disbursing of funds" which Mr. Thomas mentioned in his testimony.

Thank you very much for the opportunity to submit these additional comments for the record.

Best personal regards.

Sincerely,

ROBERT W. KNECHT,
Assistant Administrator
for Coastal Zone Management.

Mr. BREAUX. Appearing as our next panel of witnesses are representatives of the coastal States organization.

The coastal States organization is represented by Mr. Jay Thomas, chairman, State of Mississippi; Mr. Joe Bodovitz, State of California, and Mr. Kai Midboe, State of Louisiana Sea Grant Legal Program.

I understand you gentlemen have some plane problems. Proceed in the way you feel best.

STATEMENT OF JAY THOMAS, CHAIRMAN, STATE OF MISSISSIPPI COASTAL STATES ORGANIZATION, ACCOMPANIED BY JOE BODOVITZ, COASTAL COMMISSION, STATE OF CALIFORNIA, AND KAI MIDBOE, STATE OF LOUISIANA SEA GRANT LEGAL PROGRAM

Mr. THOMAS. Thank you.

Mr. Chairman and members of the committee, I am Jay E. Thomas, director of the Mississippi Marine Regional Council and I am here today as chairman of the coastal States organization.

On behalf of the 30 coastal and Great Lakes States, we want to thank you and members of your committee for your interest and action in legislation that recognizes the importance of the coastal areas to the Nation.

We are particularly appreciative of this opportunity to comment on the draft rules and regulations and section 308 of the Coastal Zone Management Act amendments.

In making these comments, two elements of background information should be identified.

First, we would like to comment on the excellent relations which we have had with the Office of Coastal Zone Management from its inception. These pleasant relationships have continued through the development and comment period on this important and very complicated statute.

Second, our comments will be based in part on the draft of the rules and regulations which appeared in the Federal Register; and reference will also be made to the draft which was distributed on November 29 and to a lesser degree to the draft which was distributed on December 6.

In view of the release of several drafts in a short period of time, the coastal States organization will request an extension of the comment period beyond December 14.

In order to most nearly recognize and represent the breadth of opinions which exist among the various coastal and Great Lakes States, we have asked representatives of three coastal States to present their State's views of the draft rules and regulations.

We will have presentations from Mr. Kai Midboe, director of Maritime Law Studies, Law School, Louisiana State University, who will be speaking at the request of the office of the Governor of Louisiana.

We had expected to have Mr. Michael Bucciero to present a statement on behalf of the Governor of the State of Massachusetts, but Mr. Bucciero is not here.

Mr. Bodovitz will speak first and will be followed by Mr. Midboe.

Mr. BODOVITZ. Mr. Chairman, members of the committee, and Mr. Thomas, it is my understanding that your committee has received copies from the Governor's office, addressed by Governor Brown of California to Mr. Hollings on December 7.

There was a request to you also of that date to have that be made a part of the record.

In the interest of time, may I just read the two key paragraphs?

This is from Bill Press, director of the office of planning and research, office of the Governor of California.

> Representatives from the State of California Coastal Zone Conservation Commission, the Governor's Office of Planning and Research, and other State agencies have been working closely with Ms. Joellyn Murphy of the Office of Coastal Zone Management in the drafting and review of regulations to implement the Coastal Energy Impact program.
>
> Ms. Murphy has been most cooperative in addressing California's concerns and balancing those with the concerns of other coastal States, in her efforts to draft reasonable and workable regulations that fully accomplish the intent of the Coastal Zone Management Act Amendments of 1976. While this program has both some statutory and regulatory imperfections, the State of California believes that it is a workable program which will provide much needed assistance to the State and local government agencies for planning to meet the impacts of coastal energy development.
>
> California has immediate need for Coastal Energy Impact Program funds, due to the great number of energy facilities proposed to be located in the California Coastal Zone. We therefore urge the finalization of the Coastal Energy Impact Program Rules and Regulations at the earliest possible date and early appropriation by Congress of funds necessary to carry out this program.

I think, Mr. Chairman and members of the committee, what our position is, in short, is that we have tried to relate the coastal energy impact program to the overall coastal management program.

We see a careful effort has been made by the Office of the Coastal Zone Management to do this. We would like you to give us a blank check and ask us no questions before or after.

We recognize it is not likely to be done. Given the conflicting pressures that have been reflected both in the rules and regulations, we think a highly workable and responsible set of procedures have been worked out.

The sense of urgency we wish to communicate. Having listened to the debate, I very much understand the concerns you face. I want to underscore the concerns which we face.

While these matters are debated fully here, the Interior Department is not debating lease sales. It is moving with both feet to get those done as quickly as possible.

The people who wish to move gas from Alaska are moving with great speed. The Federal Power Commission is moving. It is our strong position that we urge these matters before you be worked out expeditiously and that the energy impact program be funded because the impact is upon us, and I think that is our position.

Mr. BREAUX. Thank you.

The letters you referred to will be put into the record at this point, without objection.

[The documents referred to follow:]

STATE OF CALIFORNIA,
GOVERNOR'S OFFICE,
OFFICE OF PLANNING AND RESEARCH,
Sacramento, December 7, 1976.

Hon. JOHN BREAUX,
Chairman, Subcommittee on Oceanography, House Merchant Marine and Fisheries Committee, House Office Building, Washington, D.C.

DEAR CONGRESSMAN BREAUX: I understand that you are holding hearings before your House Subcommittee on Oceanography to review the status of Coastal Energy Impact Program (CEIP) regulations. As the attached correspondence indicates, the State of California is interested in seeing the CEIP regulations finalized as expeditiously as possible.

I would appreciate having the attached communications read into the record of your December 10 proceedings.

Sincerely,

BILL PRESS, *Director.*

STATE OF CALIFORNIA,
GOVERNOR'S OFFICE,
OFFICE OF PLANNING AND RESEARCH,
Sacramento, December 7, 1976.

Hon. ERNEST HOLLINGS,
Chairman Senate National Ocean Policies Study, Senate Commerce Committee, Washington, D.C.

DEAR SENATOR HOLLINGS: On behalf of the State of California, I would like to express my concern over current activities to delay implementation of the Coastal Energy Impact Program established by the Coastal Zone Management Act Amendments of 1976.

Representatives from the State of California Coastal Zone Conservation Commission, the Governor's Office of Planning and Research, and other State agencies have been working closely with Ms. Joellyn Murphy, of the Office of Coastal Zone Management, in the drafting and review of regulations to implement the Coastal Energy Impact Program. Ms. Murphy has been most cooperative in addressing California's concerns and balancing those with the concerns of other coastal states, in her efforts to draft reasonable and workable regulations that fully accomplish the intent of the Coastal Zone Management Act Amendments of 1976. While this program has both some statutory and regulatory imperfections, the State of California believes that it is a workable program, which will provide much needed assistance to State and local government agencies for planning to meet the impacts of coastal energy development.

California has immediate need for Coastal Energy Impact Program funds, due to the great number of energy facilities proposed to be located in the California coastal zone. We therefore urge the finalization of the Coastal Energy Impact Program rules and regulations at the earliest possible date and early appropriation by Congress of funds necessary to carry out this program.

If you require any further information concerning California's views regarding this program, please do not hesitate to have a member of your staff contact Ms. Suzanne Reed (916) 322-4245, or Mr. Bill Travis, of the Coastal Commission, (415) 557-1001.

Sincerely,

BILL PRESS, *Director.*

[Mailgram]

DECEMBER 6, 1976.

RICHARD HAMMOND,
Governors Office of Planning and Research,
Sacramento, Calif.

This Mailgram is a confirmation copy of the following message:

J. E. THOMAS,
Chairman, Coastal States Organization
Long Beach, MS:

Due to short notice and inalterable schedule conflicts, California representatives will not attend the announced meeting of CSO in December. California agencies have been conducting intensive detailed review of the proposed regulations for

the Coastal Energy Impact Program (CEIP) to identify problems. We have met at length with OCZM representatives in Alaska, twice in California, and twice in Washington, D.C. OCZM has responded positively to suggested changes resolving many of California's problems. We anticipate further close communications with OCZM staff through the period for review of the proposed regulations.

BILL PRESS,
Director, Governor's Office of Planning and Research.
JOSEPH RODOVITZ,
Executive Director,
California Coastal Zone Conservation Commission.

Mr. BREAUX. Mr. Midboe.

Mr. MIDBOE. Gentleman, my name is Kai David Midboe. I am the director of maritime law studies for the Louisiana sea grant legal program.

I have been asked by the office of the Governor of Louisiana, on invitation from the coastal States organization, to testify before this committee on section 308 of the Coastal Zone Management Act amendments of 1976.

The comments are my own, and should not be interpreted as the position of the Louisiana sea grant program.

Before beginning, I would like to express my sincere gratitude to the Federal Office of Coastal Zone Management for their assistance and kindness during the development of these regulations. Their openness and willingness to consult with the public and State and local government in the development of these regulations stand as a shining example to be followed by other Federal agencies in drafting regulations.

I would particularly like to thank Joellyn Murphy for her kindness. Joellyn has always remained completely accessible to answer our questions. Although we often disagreed, I sincerely feel that she gave all our comments the fullest consideration.

One problem I have had with regard to the procedural aspects of the development of these regulations has been remaining current with the rapid-fire series of drafts which we have been called upon to analyze.

I personally have reviewed at least five versions of the draft regulations. In fact, my comments today are based on the November 29 draft, since I did not receive the December 6 draft until last night.

This rapid-fire series of drafts has caused serious problems with commenting on them, since the changes in the different drafts are subtle and usually highly significant.

Because of the interrelationship of the different parts of the regulations, these changes require a careful analysis of each entire draft.

I have basically four major substantive objections to these regulations. However, they are so basic that they color the entire set of regulations.

The four are: (1) The definition of "Outer Continental Shelf energy activity"; (2) the insertion of "new or expanded" before the term "coastal energy activity" concerning section 308(d) loans and bond guarantees; (3) the two-step allocation process with regard to section 308(b) formula grants; and (4) the imposition of the National Environmental Policy Act, NEPA, on section 308(b) projects.

My argument on the Outer Continental Shelf is somewhat complicated, so I gave Wayne Smith some copies to pass out to you. You should have copies before you.

The act defines "Outer Continental Shelf energy activity" to mean "any exploration for, or development or production of, oil or natural gas from the Outer Continental Shelf * * *, or the siting, construction, expansion, or operation of any new or expanded energy facilities directly required by such exploration, development, or production."

Section 931.17(b) of the regulations defines the term "directly required" in the second part of the definition of Outer Continental Shelf energy activity to include expanded energy facilities "that are owned or operated by OCS lessees or their contractors, subcontractors, principal suppliers, and that have technical requirements * * * which necessitate their location in the coastal zone."

The statutory definition of Outer Continental Shelf energy activity refers to two things:

(1) The Outer Continental Shelf exploration, development or production itself; and (2) the siting, construction, expansion, or operation of any new or expanded energy facilities required by such. Energy facilities in turn are defined in the act to include any equipment or facility which is used: (1) in the exploration for, or the development, production, conversion, storage, transfer, processing, or transportation of the energy resources; or (2) for the manufacture, production, assembly of equipment, machinery, products, or devices which are involved in energy activity described in (1).

Thus, energy facilities means the energy facility itself and facilities used for the manufacture, production, or assembly of equipment which is involved in the energy activity.

Under the act, then, OCS energy activity means: (1) The OCS energy activity itself, (2) energy facilities necessary for OCS energy activity; and (3) equipment or facilities necessary for the manufacture of any energy activity.

The limitation in the regulations to energy facilities "that are owned or operated by OCS lessees or their contractors, subcontractors, or principal suppliers" has the effect of eliminating energy facilities and equipment for facilities used in the manufacture of energy facilities.

The statutory definition of Outer Continental Shelf energy activity is important with regard to both the formula grant allocation and the use that may be made of the formula grants.

One-third of the weighted formula for allocating the section 308(b) grants is based on the number of individuals residing in a State who obtain new employment as a result of new or expanded Outer Continental Shelf energy activities.

The statutory definition would include not only the OCS employees, as the regulations do, but employees of energy facilities directly required by the OCS energy activity and employees of facilities manufacturing, producing, or assembling equipment involved in the energy activity.

More important is the use which may be made by the States of the formula grant allocation.

Section 308(b)(94)(B) provides that formula grants may be used for providing new or improved public facilities and services which are required as a direct result of new or expanded OCS energy activity.

Since the statutory definition is broader, it would include not only the public facilities and service required for the OCS activity, but

also for the energy activities directly required by it and related to manufacturing facilities.

9A. The regulations also define new or expanded facilities that are "directly required" as those which have a technical requirement that they be located in the coastal zone. This technical requirement language comes from the definition of "coastal energy activity" and is not contained in the definition of "Outer Continental Shelf energy activity." There are three separate and distinct definitions contained in the act. There are: (1) Outer Continental Shelf energy activity, (2) coastal energy activity, and (3) energy facility. The three are not synonymous. The regulations should incorporate the definitions contained in the act.

The listed examples should not be exclusive but should read "include but are not limited." The listed examples contained in section 931.17 do not contain examples of non-OCS "energy facilities" as defined above.

The second problem concerns the insertion of "new or expanded" before the term "coastal energy activity" concerning section 308(d), loans and bond guarantees.

9B. The definition of "coastal energy activities" is very important, since the term is used in both sections 308 (b) and (d). The term "new or expanded coastal energy activity" appears in section 308(c) and in the allocation procedures contained in section 308(e)(1)(a). Thus the definition "new or expanded" in section 931.15 would be relevant to these sections.

However, the definition of coastal energy activity contained in section 304(4) is not limited to "new or expanded" coastal energy facility. Nor are the benefits contained in section 308(b)(4)(B), 308(d)(1), (2), (3), or (4).

These sections refer to "coastal energy activity" without the requirement that it be "new or expanded."

The insertion of "new or expanded" in the definition of coastal energy activity has the effect of eliminating all prior or existing coastal energy activity.

This would have serious consequences with regard to section 308(d) loans and bond guarantees. Section 308(d) loans and bond guarantees are for the purpose of providing new or improved public facilities or public services which are required as a result of coastal energy activity. The statutory language of section 308(d) would include the improvement of substandard public facilities and services which are required by prior or existing coastal energy activity.

The insertion in the regulations of "new or expanded" in the definition of coastal energy activity means that before a State can use section 308(d) funds for improving public facilities or services, it must first associate the need for these public facilities or services with new or expanded coastal energy activity.

The third objection to the regulations concerns the two-step allocation procedure concerning section 308(b).

We strongly support the statement made by Congressman du Pont during the June 30, 1976, debate on the 1976 amendments.

I quote:

> The formula grants would be allocated to the coastal States based on a carefully constructed set of criteria which are closely related to Outer Continental

Shelf energy activity. This means that the affected coastal States would in fact receive funds on an annual basis and the only Secretarial discretion would occur after the funds were committed or expended. At that point, the respective State must show that it had expended or committed the funds received for one of the purposes as set forth in the bill.

The Secretary only has discretion to require, under section 308 (B) (5):

Before disbursing the proceeds of any grant under this subsection to any coastal State, the Secretary shall require such State to provide adequate assurances of being able to return to the United States any amounts not expended for purposes listed in section 308(B) (4).

This should make it very clear that the States are entitled to their grants upon such assurances and that the Secretary has no discretion beyond requiring certification by the State. Indeed, in section 308 (B) (5) the language of the act is written in the past tense.

(5) the Secretary, in a timely manner, shall determine that each coastal State has expended or committed * * * grants which such States has received * * *

This issue of disbursement is critical. It is through this claim of discretion with regard to the disbursement of section 308(b) funds that the Office of Coastal Zone Management seeks to impose all forms of terms and conditions. Let me cite several examples:

(1) The limitation in section 931.38(c) that a coastal State may not use for section 308(b) (4) (B) planning an amount of assistance that exceeds 10 percent of the total amount of credit assistance allocated to it under section 308(e) (1), the loan section; (2) the limitation in section 931.42(a) that section 308(b) (4) (B) public facility and service grants may not be used to provide public facilities and services which primarily serve industrial facilities; and (3) the major limitations imposed on the use of section 309(b) (4) (C) unavoidable loss formula grants, contained in section 931.79.

This claimed discretion is the source of my fourth major objection.

In our view:

12A. An environmental impact statement is not required for each individual project receiving assistance under the coastal energy impact program. To involve NEPA in project-by-project review under the coastal energy impact program would be an invasion by the Federal Government into the area of decisionmaking that has traditionally been the sole province of State and local government.

Also, to impose NEPA on individual projects would violate the provisions of section 309(1) which provides:

The Secretary shall not intercede in any land 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.

Although a negative EIS may narrowly be construed as not making the siting of an energy facility in a particular location a prerequisite to assistance, it does clearly make the nonsiting of that facility in a particular location a prerequisite to receiving financial assistance under section 308.

The role of NEPA in the coastal energy impact program came up in the Senate debate on S. 586. It was generally agreed that—

* * * in instances which, but for a grant or loan provided under this bill [S. 586] there would be no requirement of NEPA for environmental impact statements for particular projects, then there would be none required as a result of such a grant or loan.

This is a proper interpretation of the role of NEPA. Where an EIS would be required by any provision of Federal law, it should be continued to be required. However, where a grant or loan is made under this act, and would not otherwise require an EIS, none will be required solely as a result of the grant or loan made.

The purpose of NEPA is to insure that environmental considerations are included in the Federal agency decisionmaking process.

Where a statute provides for no Federal agency discretion with regard to an action, NEPA is irrelevant.

This is the situation with regard to section 308(b) formula grants, since the Secretary has no discretion beyond requiring certification by the State that it will be able to return to the United States any amounts not expended for purposes listed in section 308(b)(4).

That ends my formal remarks. I have a section-by-section analysis prepared for Gov. Edwin Edwards concerning an earlier draft of the regulations; also an updating of that analysis to reflect the November 29, 1976, regulations.

I would like to submit them to the committee.

Mr. BREAUX. Without objection, it will be ordered; and I ask that it be made a part of the record, together with any other material you were reading. We do not have a copy of your prepared statement.

I do not know if it will be possible for you to prepare it and submit it to the record.

Mr. MIDBOE. I have some rough notes.

Mr. BREAUX. It would be very helpful to the committee.

[The comments and recommendations follow:]

COMMENTS ON PROPOSED REGULATIONS FOR COASTAL ENERGY IMPACT PROGRAM PREPARED BY KAI DAVID MIDBOE, LOUISIANA SEA GRANT LEGAL PROGRAM; ASSISTED BY VERNON BEHRHORST, LOUISIANA COASTAL COMMISSION; DAVID KIMMEL, LOUISIANA DEPARTMENT OF JUSTICE; AND JAMES RENNER, LOUISIANA STATE PLANNING OFFICE

Section 931.4

The objective to encourage "internalization of environmental and recreational social costs" is, generally speaking, a laudable objective. However, it was not mentioned as an objective of the Coastal Zone Management Act Amendments of 1976.

There are strong indications that the CEIP was not intended as an additional means of federal discretion over state environmental policy. Section 308(i) prohibits the secretary from interceding in "any land use or water use decision . . . with respect to the siting of any energy facility or public facility by making siting is a particular location a prerequisite to, or a condition of, financial assistance under this section." The intent of this provision is further indicated by the conference report which states "(5) that the coastal states and localities, which are closer to and more cognizant of the situation, should make the basic decisions as to the particular needs which result from such new or expanded energy activity; and (6) that the discretion of the Secretary of Commerce and other Federal officials should be correspondingly limited." Accordingly, the adoption of an environmental control program by a state, including an approved coastal zone program, should be considered evidence that the state has indeed internalized environmental effects to an optimum level. The disbursement of these funds is dependent on adoption of, or reasonable progress toward development of, an ap-

proved coastal zone plan. This should be the sole means by which the federal government determines eligibility for CEIP moneys. This approach is apparently acknowledged in 931.1(b)(2) by reference to "coastal zone management programs and objectives of the individual states."

The discussion of this in 931.71 and 931.72 is ambiguous. The statement made in 931.72(a)(2) is more closely allied with the objectives of the act, whereas 931.71(b) would seem to indicate unwarranted federal jurisdiction into environmental programs of states.

Section 931.13

Coastal energy activity should not be limited to direct use of oil, natural gas or coal, but should include all activities necessitated by exploration, production, transportation or processing of energy. There is no indication that Congress intended any such limitation. Evidence to the contrary is supplied by Section 308(a)(1) where reference is made to "consequences resulting from the energy activities", "consequences relating to new or expanded energy facilities . . ." "required as a result of coastal energy activity."

The technical requirements that necessitate the location of a facility in the coastal zone should include all reasonable locational economic considerations. Such considerations as existing facilities within an industry, economies of scale, production relationships with supporting existing supporting industries, and available transportation means should all be considered as well. The intent of this provision appears to be the desire to discourage location of such facilities in the coastal zone solely as a means to qualify for the financial assistance. A better approach might be to prohibit the disbursement of these funds where there is evidence of differential governmental policies that encourage siting of facilities in the coastal zone. Nevertheless, there is no reason for disallowing the disbursement of these funds where there are substantial enonomic reasons for the location of facilities in the coastal zone.

Section 931.15

The definition of "coastal energy activity" is very important since the term is used in both Sections 308 (b) and (d). The term "new or expanded coastal energy activity" appears in Section 308(c) and in the allocation procedures contained in Section 308(e)(1)(A). Thus the definition contained in Section 931.15 would be relevant to these sections. However, the definition of coastal energy activity contained in Section 304(4) is not limited to "new or expanded" coastal energy facilities. Nor are the benefits contained in Sections 308(b)(4)(C), 308(d)(1), (2), (3), or (4). These sections refer to "coastal energy activity" without the requirement that it be "new or expanded." The insertion of "new or expanded" in the definition of coastal energy activity has the effect of eliminating all prior or existing coastal energy activity. This would have serious consequences with regard to Section 308(d) loans and bond guarantees. Section 308(d) loans and bond guarantees are for the purpose of providing new or improved public facilities or public services which are required as a result of coastal energy activity. The statutory language of Section 308(d) would include the improvement of public facilities and services which were required by prior or existing coastal energy activity. The insertion in the regulations of "new or expanded" in the definition of coastal energy activity means that before a state can use Section 308(d) funds for improving public facilities or services it must first associate the need for those public facilities or services with new or expanded coastal energy activity.

Section 931.17

The Act defines Outer Continental Shelf energy activity to mean "any exploration for, or development or production of, oil or natural gas from the Outer Continental Shelf . . . , or the siting, construction, expansion, or operation of any new or expanded energy facilities directly required by such exploration, development, or production." The regulations define the second part of the definition of Outer Continental Shelf energy activity to include only the siting, construction, expansion, or operation of any new or expanded energy facilities required by such. Energy facilities are defined in the Act to include any equipment or facility which is used: (1) in the exploration for, or the development, production, conversion, storage, transfer, processing or transportation of energy resource; or (2) for the manufacture, production, assembly of equipment, machinery, products, or devices which are involved in energy activity described in (1). Thus,

energy facilities means the energy facility itself and facilities used for the manufacture, production or assembly of equipment which is involved in the energy activity. Under the Act then, OCS energy activity means: (1) the OCS energy activity itself; (2) energy facilities necessary for the OCS energy activity; and (3) equipment or facilities necessary for the manufacture of any energy activity. The limitation in the regulations to energy facilities "that are owned or operated by OCS lessees or their contractors, sub-contractors or principal suppliers" has the effect of eliminating energy facilities and equipment for facilities used in the manufacture of energy facilities.

The regulations also define Outer Continental Shelf energy activities as those which have a technical requirement that they be located in the coastal zone. This technical requirement language comes from the definition of "coastal energy activity" and is not contained in the definition of "Outer Continental Shelf energy activity." There are three separate and distinct definitions contained in the Act. They are: (1) Outer Continental Shelf energy activity, (2) coastal energy activity, and (3) energy facility. The three are not synonymous. The regulations should adhere to the definitions contained in the Act.

The listed examples contained in Section 931.17 do not contain examples of non-OCS "energy facilities" as defined above.

Section 931.19

The examples listed in Section 931.19(d) do not include examples of energy facilities contained in Section 931.19(a)(2) "for the manufacture, production, or assembly of equipment, machinery, products, or devices which are involved" in an (a)(1) activity.

Section 931.25

Section 931.25(b) which sets forth the eligibility requirements under paragraph (a)(3) of this section approaches very closely a requirement that the states comply with Section 305 of the Coastal Zone Management Act. It was not the intent of Congress in providing for eligibility where a state is consistent with the policies set forth in Section 303 to require that a state comply with all the requirements of Section 305. If that was the case the provision of Section 303 eligibility would be redundant with the provision for Section 305 eligibility. If it is necessary to provide in the regulations the eligibility requirements under paragraph (a)(3) then they should reflect the requirements of Section 303 of the Coastal Zone Management Act.

Section 931.31

The Act refers to "study of and planning for" the economic, social, or environmental consequences. The regulations only refer to "planning."

The Act refers to the economic, social, or environmental consequences which "has occurred, is occurring, or is likely to occur." The language is deleted in the regulations.

The Act refers to "as a result of the siting, construction, expansion, or operation of such new or expanded energy facilities." The regulations delete construction or expansion from the definition.

The Act also specifies that the funds shall be used for the purposes "including, but not limited to, the application of the planning process included in the management program pursuant to Section 305(b)(8)." This language is also deleted. The consequences of this deletion will be discussed later.

The objectives of planning assistance under Section 308(c) is carefully spelled out in Section 308(c). The language used in the regulations should be consistent with the Act.

Section 931.32

The Act defines eligible activity under Section 308(c) as the study of and planning for any economic, social, or environmental consequences resulting from the siting, construction, expansion, or operation of new or expanded energy facilities. Energy facilities are carefully defined in Section 304(a)(5) of the Act. The Act also defines eligible uses under Section 308(b)(4)(B) as planning for projects and programs which are required as a direct result of new or expanded Outer Continental Shelf energy activity. Outer Continental Shelf energy activity is carefully defined in Section 304(a)(12) of the Act. Nowhere in the Act does it refer to an "eligible energy facility" as being an energy facility for which a "major state or federal license or permit has been applied for; or which

will be required as a result of a federal lease sale scheduled by the U.S. Department of the Interior to occur no more than two years from the date of application for planning assistance." This would appear to be an exercise of agency discretion with regard to finding when a coastal zone has been "significantly affected" by an energy facility. With regard to Section 308(c) the agency may have this discretion. However, with regard to Section 308(b)(4)(B) funds the agency does not have the discretion to limit the availability of those funds beyond the restrictions contained in the Coastal Zone Management Act Amendments. This will be discussed later.

If the language in Section 931.32(1) is retained it should include local licenses as well as state or federal since most projects will require a local authorization.

Section 931.35

There is no statutory authority for limiting the availability of Section 308(c) assistance to those states not receiving Section 306 grants. The decision of OCZM to conserve Section 308(c) funds, while perhaps laudible, is an abuse of discretion. The Act clearly states the eligibility requirements for Section 308(c) funds. Nowhere does it exclude a state receiving a Section 306 management grant.

The requirement that a state must have a program approved under Section 306 in order to be eligible for the use of Section 308(b) grants is an even greater abuse of discretion. The Act clearly delineates how Section 308(b) grants are to be allocated to the individual states. The Act also clearly defines what are the uses of those funds. Nowhere does it state that an individual state must have a program approved under Section 306. In fact, this provision would be directly contrary to Section 308(g)(1) which provides that a state is eligible to receive assistance under this program if: (1) it has a management program which has been approved under Section 306; (2) is receiving grants under Section 305(c) or (d); or (3) is making satisfactory progress toward the development of a management program which is consistent with the policies set forth in Section 303.

This eligibility requirement for Section 308(b) grants would also seem to be contrary to the intent of the Congress in delineating the uses of these funds. Congress provided that the formula grants would be allocated to the coastal states based on a carefully constructed set of criteria. That the affected coastal state would receive funds on an annual basis and the only Secretarial discretion would occur after the funds have been committed or expanded. That the Secretary has no discretion beyond requiring certification by the state that it will be able to return to the United States any amounts not expended for purposes listed in Section 306(b)(4). Thus, Section 308(b) funds when allocated belong to the individual states. There is no discretion left in the Secretary or in the OCZM to impose any further limitations as to the eligibility or use than those contained in the Act.

Section 931.37

Section 931.37 requires a description of the proposed study and planning activities and a breakdown of costs. This is contrary to the allocation procedure envisioned by Congress. The Secretary has no discretion to review project by project requests for financial assistance under Section 308(b). The Secretary's sole discretion is to require certification by the state that it will be able to return to the United States any monies not expended for the purposes listed in Section 308(b)(4).

Section 931.38

Section 931.38(d)(1) provides that Section 308(c) or Section 308(b) planning assistance may not be used to duplicate the development of the general planning process for coastal energy facilities required of management programs under Section 305(b)(8). If the intent is to prevent the actual duplication of work then this Section would seem permissible. However, the apparent intent is that then this Section would seem permissible. However, the apparent intent is that if you are receiving a Section 306 management grant you have accomplished the Section 305 development phase. Section 305 includes the (b)(8) requirement (which was added by the 1976 Amendments) that the management program include a planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone. To use Section 308(c) funds for planning for energy facilities would be redundant. However, this ignores both the intent of the

two provisions and the statutory language of Section 308(c). Section 305(b)(8) is to provide a general planning process for energy facilities. Section 308(c) is to provide a planning process for specific energy projects. The language of Section 308(c) states that the grant shall be used for the study of, and planning for (including, but not limited to, the application of the planning process included in the management program pursuant to Section 305(b)(8)).

Section 931.38(d)

The regulations provide that a coastal state may not use for planning assistance provided under Section 308(b)(4)(B) an amount of assistance provided to it under 308(b) that exceds 5% of the total amount of credit assistance allotted to it under Section 308(e)(1). This is an absolute abuse of discretion. As stated earlier, Section 308(b) funds are allocated according to precise criteria. The uses of Section 308(b) funds are clearly spelled out. Nowhere in the Act does it give the OCZM the authority to limit the amount of planning assistance under 308(b)(4)(B) to 5% of the credit assistance allocated under Section 308(e)(1). Policy decisions of this sort are to be made by Congress and not the OCZM. Congress made it clear that the Secretary has no discretion with regard to Section 308(b) funds other than requiring certification of the ability to return the money not used in accordance with Section 308(b)(4).

Section 931.40

Throughout the section dealing with public facilities and public services the regulations refer to the use of Section 308(d)(1), (2), (3) or (4) assistance as relating to "new or expanded coastal energy activity." As stated earlier, only the allocation formula for Section 308(d) assistance applies to new or expanded coastal energy activity. The uses of Section 308(d) assistance applies to the provision of new or improved public facilities or services which are required as a result of "coastal energy activity." There is no requirement that they be new or expanded.

Section 931.42

Where does the limitation as to service of industrial facilities come from? The argument is apparently that the intent of these amendments is not to induce industry to locate in the coastal zone. Consequently the Act only covers the facilities and services needed by the workers in that industry and not the industry itself. The apparent statutory justification for this interpretation is that the only public facilities and services covered under the Act are those that are required to serve the increased population resulting from coastal energy activity or new or expanded Outer Continental Shelf energy activity. That to service an industry is to service a facility and not the population. It is difficult to understand this rationale. Regardless of whether you are serving the industry with public facilities or services, the result is to provide a public facility or service to a structure which in turn serves the individual. In one instance it provides him with a place for employment, and the other a place for shelter.

The Act specifically defines what are public facilities and services. No place does the Act state that public facilities and services required by the energy industry itself are excluded.

Section 931.42(a)(7)

The Act was very careful to define what are public facilities and services. Whatever the authority of a Secretary to qualify any additions to the statutory list contained in Section 304(a)(14), he cannot exclude items which were specifically covered. Mass transit is not limited by the statute to local bus systems.

Section 931.42(c)

Where does the requirement to increase "significantly" come from? New or improved does not require that there be a significant change.

The regulations provide that a facility is "new or improved" if it is constructed in order to serve new populations, or is expanded or renovated to increase significantly its capacity in order to serve new populations. Section 308(b)(4)(B) provides grants when new or improved public facilities and services are required as a direct result of new or expanded Outer Continental Shelf energy activity. Section 308(d) provides assistance to provide new or improved public facilities or services which are required as a result of coastal energy activity. Such assistance is available whether or not it serves new population. A public facility or

service may be required as a result of OCS or coastal energy activity without a change in population residing in the area. An example would be where new public facilities or services must be provided or existing public facilities renovated to serve new employment in new or expanded OCS energy activity or coastal energy activity who do not reside in the local community but use that community as a "jumping off point" to offshore areas.

Section 931.42(f)

Section 308(b)(4)(B) applies to public facilities or public services directly required as a result of new or expanded OCS energy activity. The limitation here in the regulation is to individuals newly employed by OCS lessees (and their contractors, sub-contractors, and principal suppliers). As stated earlier, OCS is defined to include the OCS energy activity itself and energy activities. Energy activities is defined to include the energy activity itself and the manufacture of equipment and facilities necessary for it. Therefore, the limitation to individuals employed by OCS lessees (and their contractors, sub-contractors, and principal suppliers) is unwarranted.

It should be noted that normal growth in many areas such as Louisiana already includes OCS energy activity increases in population. Consequently, this existing OCS activity population increase should be deducted from the "normal growth" in making this calculation.

Section 931.42(g)(1)

This language should be restructured to make it clear that when we talk in terms of constitutional authority we are not referring to a state's inherent powers or to the police powers of the state. Those powers are virtually unlimited and would permit any process not prohibited by state or federal constitutions. The intent here was to refer to existing authorized methods to finance projects or programs.

Section 931.46

Again, where does the requirement of a major federal permit or license have been obtained or for which exploration or development plans have been approved by the U.S. Department of Interior come from?

The determination of standardized per capita costs for public facilities and public services includes regional cost differences. The assessment of regional cost differences should include all considerations that are relevant to construction of the facilities. Specifically, the cost of construction in Louisiana's coastal zone is increased by a considerable factor because of structural load limitations of soils. Reference has been made to these limitations in several of the reports done pursuant to development of the Louisiana coastal zone program.

Section 931.46(e)(2)

The direct OCS need factor is to be computed using OCS employees and their families but not secondary population. This apparently is based on the language contained in Section 308(b)(4)(B) that the only public facilities and services covered are those required as a direct result of new or expanded OCS energy actvity. The problem with this language goes back to the definition of OCS energy activity. We can understand the exclusion only if it is recognized that OCS energy activity includes: (1) the OCS energy activity itself and (2) energy facilities as defined in Section 304(a)(5). By providing that the direct OCS need factor will be computed using OCS employees you have effectively eliminated the second part of the definition of OCS energy activity.

Section 931.48 (d)(1)

The state is not required to receive project by project approval of Section 308(b) projects.

Section 931.53

There is no statutory authority to limit the assistance available for public facilities and services to an amount which cannot exceed four times the amount of total assistance available for the prevention, reduction, or amelioration of unavoidable losses. This is particularly true with regard to Section 308(b) funds for the Administrator clearly does not retain the discretion to so limit the availability of funds. Policy decisions of this magnitude are the responsibility of Congress and not of an administrative agency.

The Act refers to unavoidable loss and not unavoidable damage. Unavoidable loss is carefully defined in the Act.

Section 931.72(c)(1)

Many areas of Louisiana have been significantly modified by man but are still regarded as environmental resources.

Section 931.74(a)

The regulations provide that the grant monies are available only if there is no feasible way to recover the cost of prevention, reduction, or amelioration, in whole or in part, from an identifiable person causing the loss, or from another federal program. The provision "in whole or in part" can be read to mean that if you recover in part you are precluded from seeking unavoidable loss assistance for the remainder. We do not believe this was the intent of the regulation and it should be clarified.

Section 931.76(a)(4)

This sections incorporates the definition contained in Section 931.72(f). That definition of "new employment" does not comply with the definition of Outer Continental Shelf energy activity. The definition of Outer Continental Shelf energy activity has been discussed earlier. New employment should include all employees involved in all factors of Outer Continental Shelf energy activity

Section 931.77

The removal of Outer Continental Shelf activities from the list of energy facilities is unsupported by any policy adopted by Congress. All OCS activities should be considered energy related activities for the purposes of this section.

Section 931.78(c)(5)

Section 308(b) does not require project by project approval.

Section 931.78(d)

The provisions of this section follow the Act in requiring you to attribute or collect against an identifiable person or persons. The question still remains: Must we identify or assess or must we identify and assess?

Section 931.79

These limitations are very important. With regard to Section 308(b)(4)(C) unavoidable loss assistance there is no discretion in the Secretary to impose these limitations.

Subsection a.—If a policy decision is made that the coastal energy project is of such great value that publicly-owned environmental or recreational resources must be foregone why cannot assistance be available for the prevention, reduction or amelioration of such loss?

Subsection b.—The statute refers to the prevention, reduction or amelioration of any loss that is caused by a coastal energy activity. It does not refer to one *primarily* caused by a coastal energy activity.

Subsections c and d.—If a policy decision must be made that a coastal energy activity is essential then regardless of the comparative values of the recreational and environmental resources lost vis-a-vis the coastal energy activity gain, the cost of prevention, reduction or amelioration shauld be considered unavoidable losses for which assistance is available.

Subsection e.—If the prevention, reduction or amelioration of an unavoidable loss requires the provision of a public facility or service this should be eligible for assistance under the unavoidable loss section.

Subsection f.—There is absolutely no authority to limit federal assistance to 80% of the cost of the project. If Congress had intended to compensate only 80% of the cost it would have stated so as it did in Section 308(c). This is particularly true with regard to Section 308(b). The only discretion the Secretary has with regard to Section 308(b) grants is to require that the state provide adequate assurance of being able to return to the United States any amount not expended for purposes listed in Section 308(b)(4).

Section 931.82

The statute provides that if no lateral seaward boundaries, or any portion thereof, have been clearly defined or fixed by interstate compact, agreement, or judicial decision, lateral boundaries shall be determined according to the appli-

cable principles of law, including the principles of Convention on the Territorial Sea and the Contiguous Zone, and extended on the basis of such principles. The regulations provide that the demarcation lines established shall be based on "equitable principles." The "applicable principles of law" under domestic United States law, customary international law, and treaty law has been, failing agreement, to apply the principles of "equi-distance."

Section 931.84

This section should make clear that where the concerned states can clearly identify the area in dispute it is only the portion of the grant allocation from that area which will be held in escrow.

Section 931.121

An environmental impact statement is not required for each individual project receiving assistance under the Coastal Energy Impact Program. To involve NEPA in project by project review under the Coastal Energy Impact Program would be a gross invasion by the federal government into the area of decision-making that has traditionally been the sole province of state and local government.

Also, to impose NEPA on individual projects would violate the provisions of Section 308(i) which 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."

Although a negative EIS may narrowly be construed as not making the siting of an energy facility in a particular location a prerequisite to assistance, it does clearly make the non-siting of that facility in a particular location a prerequisite to receiving financial assistance under Section 308. The role of NEPA in the Coastal Energy Impact Program came up in the Senate debate on S.586. It was generally agreed that "in instances which, but for a grant or loan provided under this bill [S.586] there would be no requirement of NEPA for environmental impact statements for particular projects, then there would be none required as a result of such a grant or loan." This is a proper interpretation of the role of NEPA. Where an EIS would be required by any other provision of federal law it should be continued to be required. However, where a grant or loan is made under this Act, and would not otherwise require an EIS, none will be required solely as a result of the grant or loan made.

NEPA becomes relevant only where federal action or discretion is involved. The funds being administered in this program are more in the nature of revenue-sharing than a block grant. NEPA has been held inapplicable to revenue-sharing. This will be particularly true with regard to Section 308(b) funds. The legislative history of Section 308(b) provides:

"The Formula grants [308(b)] would be allocated to the coastal states based on a carefully constructed set of criteria which are closely related to Outer Continental Shelf energy activity. This means that the affected coastal States would in fact, receive funds on an annual basis and the only Secretarial discretion would occur after the funds were committed or expended. At that point, the respective State must show that it had expended or committed the funds received for one of the purposes as set forth in the bill.

* * * * * * *

"The Secretary only has discretion to require, under Section 308(b)(5):

" 'Before disbursing the proceeds of any grant under this subsection to any Coastal state, the Secretary shall require such state to provide adequate assurances of being able to return to the United States any amounts not expended for purposes listed in Section 308(b)(4).'

"This should make it very clear that the states are entitled to their grants upon such assurances and that the Secretary has no discretion beyond requiring certification by the state. Indeed, in Section 308(b)(5) the language of the Act is written in the past tense.

" '(5) the Secretary, in a timely manner, shall determine that each Coastal state has expended or committed . . . grants which such state has received. . . .' "

This makes it clear that as to Section 308(b) there is no discretion in the Secretary of Commerce or the OCZM with regard to the use of the impact assistance. Since there is no federal discretion or action involved, NEPA is not relevant.

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NOTES CONCERNING THE PROPOSED REGULATIONS FOR SECTION 308 OF THE COASTAL ZONE MANAGEMENT ACT AMENDMENTS OF 1976 ISSUED ON NOVEMBER 29, 1976.

(By Kai David Midboe, Sea Grant Legal Program, Louisiana State University, Baton Rouge, La.)

Section 931.4

The objective is to encourage "internalization of environmental and recreational social costs" is, generally speaking, a laudible objective. However, it was not mentioned as an objective of the Coastal Zone Management Act Amendments of 1976.

There are strong indications that the CEIP was not intended as an additional means of federal discretion over state environmental policy. Section 308(i) prohibits the Secretary from interceding in "any land use or water use decision . . . with respect to the siting of any energy facility or public facility by making siting of a particular location a prerequisite to, or a condition of, financial assistance under this section." The intent of this provision is further indicated by the conference report which states "(5) that the coastal states and localities, which are closer to and more cognizant of the situation, should make the basic decisions as to the particular needs which result from such new or expanded energy activity; and (6) that the discretion of the Secretary of Commerce and other federal officials should be correspondingly limited." Accordingly, the adoption of an environmental control program by a state, including an approved coastal zone program, should be considered evidence that the state has indeed internalized environmental effects to an optimum level. The disbursement of these funds is dependent on adoption of, or reasonable progress toward development of, an approved coastal zone plan. This should be the sole means by which the federal government determines eligibiity for CEIP moneys. This approach is apparently acknowledge in 931.1(b)(2) by reference to "coastal zone management programs and objectives of the individual states."

The discussion of this in 931.71 and 931.72 is ambiguous. The statement made in 931.72(a)(2) is more closely allied with the objectives of this Act, whereas 931.71(b) would seem to indicate unwarranted federal jurisdiction into environmental programs of the state.

Section 931.13

Coastal energy activity should not be limited to direct use of oil, natural gas or coal, but should include all activities necessitated by exploration, production, transportation or processing of energy. There is no indication that Congress intended any such limitation. Evidence to the contrary is supplied by Section 308(a)(1) where reference is made to "consequences resulting from the energy activities," "consequences relating to new or expanded energy facilities . . . ," "required as a result of coastal energy activity." The technical requirements that necessitate the location of a facility in the coastal zone should include all reasonable locational economic consideration. Such considerations are existing facilities within an industry, economies of scale, production relationships with existing supportng industries, and available transportation means should all be considered as well. The intent of this provision appears to be the desire to discourage location of such facilities in the coastal zone solely as a means to qualify for the financial assistance. A better approach might be to prohibit the disbursement of these funds where there is evidence of differential governmental policies that encourage siting of facilities in the coastal zone. Nevertheless, there is no reason for disallowing the disbursement of these funds where there are substantial economic reasons for the location of facilities in the coastal zone. The list of technical requirements should not be exclusive but rather should state that such technical requirements "include but are not limited to" those listed.

Section 931.15

The definition of "coastal energy activities" is very important since the term is used in both Sections 308 (b) and (d). The term "new or expanded coastal energy activity" appeared in Section 308(c) and in the allocation procedures contained in Section 308(e)(1)(a). Thus the definition contained in Section 931.15 would be relevant to these sections. However, the definition of coastal en-

ergy activity contained in section 304(4) is not limited to "new or expanded" coastal energy facility. Nor are the benefits contained in Section 308(b)(4)(B), 308(d) (1), (2), (3), or (4). These sections refer to "coastal eneryg acitivity" without the requirement that it be "new or expanded." The insertion of "new or expanded" in the definition of coastal energy activity has the effect of eliminating all prior or existing coastal energy activity. This would have serious consequences with regard to Section 308(d) loans and bond guarantees. Section 308(d) loans and bond guarantees are for the purpose of providing new or improved public facilities or public services which are required as a result of coastal energy activity. The statutory langauge of Section 308(d) would include the improvement of public facilities and services which are required by prior or existing coastal energy activity. The insertion in the regulations of "new or expanded" in the definition of coastal energy activity means that before a state can use Section 308(d) funds for improving public facilities or services it must first associate the need for those public facilities or services with new or expanded coastal energy activity.

Section 931.17

The Act defines Outer Continental Shelf energy activity to mean "any exploration for, or development or production of, oil or natural gas from the Outer Continental Shelf . . ., or the siting, construction, expansion, or operation of any new or expanded energy facilities directly required by such exploration, development, or production." Section 931.17(b) of the regulations defines the term "directly required" in the second part of the definition of Outer Continental Shelf energy activity to include only the siting, construction, expansion, or operation of any new or expanded energy facility "that are owned or operated by OCS lessees or their contractors, sub-contractors, principal suppliers, and that have technical requirements . . . which necessitate their location in the coastal zone." The statutory definition of Outer Continental Shelf energy activity refers to two things: (1) the Outer Continental Shelf exploration, development or production itself; and (2) the siting, construction, expansion, or operation of any new or expanded energy facilities required by such. Energy facilities are defined in the Act to include any equipment or facility which is used: (1) in the exploration for, or the development, production, conversion, storage, transfer, processing or transportation of the energy resource; or (2) for the manufacture, production, assembly of equipment, machinery, products, or devices which are involved in energy activity described in (1). Thus, energy facilities means the energy facility itself and facilities used for the manufacture, production, or assembly of equipment which is involved in the energy activity. Under the Act then, OCS energy activity means: (1) the OCS energy activity itself; (2) energy facilities necessary for the OCS energy activity; and (3) equipment or facilities necessary for the manufacture of any energy activity. The limitation in the regulations to energy facilities "that are owned or operated by OCS lessees or their contractors, sub-contractors, or principal suppliers" has the effect of eliminating energy facilities and equipment for facilities used in the manufacture of energy facilities.

The regulations also define new or expanded facilities that are "directly required" as those which have a technical requirement that they be located in the coastal zone. This technical requirement language comes from the definition of "coastal energy activity" and is not contained in the definition of "Outer Continental Shelf energy activity." There are three separate and distinct definitions contained in the Act. There are: (1) Outer Continental Shelf energy activity, (2) coastal energy activity, and (3) energy facility. The three are not synonymous. The regulations should adhere to the definitions contained in the Act.

The listed examples should not be exclusive but should read "include but are not limited." The listed examples contained in Section 931.17 do not contain examples of non-OCS "energy facilities" as defined above.

Section 931.19

The examples listed in Section 931.19(b) should include examples of energy facilities contained in Section 931.19(a)(2) "for the manufacture, production, or assembly of equipment, machinery, products or devices which are involved" in an (a)(1) activity.

Section 931.25

Section 931.25(b) which sets forth the eligibility requirements under paragraph (a)(3) of this section approaches very closely a requirement that the

states comply with Section 305 of the Coastal Zone Management Act. It was not the intent of Congress in providing for eligibility where a state is consistent with the policies set forth in Section 303 to require that a state comply with all the requirements of Section 305. If that was the case the provision of Section 303 eligibility would be redundant with the provision for Section 305 eligibility. If it is necessary to provide in the regulations the eligibility requirements under paragraph (a)(3) then they should reflect the requirements of Section 303 of the Coastal Zone Management Act.

Section 931.32

The Act defines eligible activity under Section 308(c) as the study of and planning for any economic, social, or environmental consequences resulting from the siting, construction, expansion, or operation of new or expanded energy facilities. Energy facilities are carefully defined in Section 304(a)(5) of the Act. The Act also defines eligible uses under Section 308(b)(4)(B) as planning for projects or programs which are required as a direct result of new or expanded Outer Continental Shelf energy activity. Outer Continental Shelf energy activity is carefully defined in Section 304(a)(12) of the Act. Nowhere in the Act does it refer to an "eligible energy facility" as being an energy facility for which a "major state or federal license or permit has been applied for; or which will be required as a result of a federal lease sale scheduled by the U.S. Department of Interior to occur no more than two years from the date of application for planning assistance." This would appear to be an exercise of agency discretion with regard to finding when a coastal zone has been "significantly affected" by an energy facility. With regard to Section 308(c) the agency may have this discretion. However, with regard to Section 308(b)(4)(B) funds the agency does not have discretion to limit the availability of those funds beyond the restrictions contained in the Coastal Zone Management Act Amendments.

Section 931.37

Congress provided that the formula grants would be allocated to the coastal states based on a carefully constructed set of criteria. That the affected coastal states would receive funds on an annual basis and the only Secretarial discretion would occur after the funds had been committed or expended. That the Secretary has no discretion beyond requiring certification by the state that it will be able to return to the United States any amounts not expended for purposes listed in Section 308(b)(4). Thus, Section 308(b) funds when allocated belong to the individual states. There is no discretion left in the Secretary or in the OCZM to impose any further limitations as to the eligibility or use than those contained in the Act.

Section 931.38

Section 931.38(b)(1) provides that Section 308(c) or Section 308(b) planning assistance may not be used to duplicate the development of the general planning process for coastal energy facilities required of management programs under Section 308(b)(8). If the intent is to prevent the actual duplication of work then this section would seem permissible. However, the apparent intent is that if you are receiving a Section 306 management grant you have accomplished the Section 305 development phase. Section 305 includes the (b)(8) requirement (which was added by the 1976 Amendments) that the management program include a planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone. To use Section 308(c) funds for planning for energy facilities would be redundant. However, this ignores both the intent of the two provisions and the statutory language of Section 308(c). Section 305(b)(8) is to provide a general planning process for energy facilities. Section 308(c) is to provide a planning process for specific energy projects. The language of Section 308(c) states that the grants shall be used for the study of, and planning for (including, but not limited to, the application of the planning process included in the management program pursuant to Section 308(b)(8)). This objection has been softened however by the addition of Section 931.31(d).

Section 931.38 (c) and (d)

Section 931.38(c) provides that a coastal state may not use for planning assistance provided under Section 308(b)(4)(B) an amount of assistance provided to it under 308(b) that exceeds 10% of the total amount of credit assistance allotted to it under Section 308(e)(1). This is an absolute abuse of discretion. As stated

earlier, Section 308(b) funds are allocated according to a precise criteria. The uses of Section 308(b) funds are clearly spelled out. Nowhere in the Act does it give the OCZM the authority to limit the amount of planning assistance under Section 308(b)(4)(B) to 10% of the credit assistance allocated under Section 308(e)(1). This same argument would apply to the limitations in Section 931.38(d). Policy decisions of this sort are to be made by Congress and not the OCZM. Congress made it clear that the Secretary had no discretion with regard to Section 308(b) funds other than requiring certification of the ability to return the money not used in accordance with Section 308(b)(4).

Section 931.40

Throughout the section dealing with public facilities and services the regulations refer to the use of Section 308(d)(1), (2), (3), or (4) assistance as relating to "new or expanded coastal activity." As stated earlier, only the allocation formula for Section 308(d) assistance applies to new or expanded coastal energy activity. The uses of Section 308(d) assistance applies to the provision of new or improved public facilities or services which are required as a result of "coastal energy activity." There is no requirement that they be new or expanded.

Section 931.42(a)

Where does the limitation as to service of industrial facilities come from? The argument is apparently that the intent of these Amendments it not to induce industry to locate in the coastal zone. Consequently the Act only covers the facilities and services needed by workers in that industry and not the industry itself. The apparent statutory justification for this interpretation is that the only public facilities and services covered under the Act are those that are required to serve the increased population resulting from coastal energy activities or new or expanded Outer Continental Shelf energy activity. That to service an industry is to service a facility and not the population. It is difficult to understand this rationale. Regardless of whether you are serving the industry with public facilities or services, or you are serving the individual at home with public facilities or services, the result is to provide a public facility or service to a structure which in turn serves the individual. In one instance it provides him with a place for employment, and the other a place for shelter.

The Act specifically defines what are public facilities and services. The statute defines the public facilities and services in terms of financing by state or local government. There is no distinction in the statute based upon the user. Nor does the Act state that public facilities and services required by the energy industry itself are excluded.

The definition of the term "public facility" should not be exclusionary. The term "includes only the following" should be redefined to be "includes but is not limited to the following."

Section 931.42(a)(7)

The Act was very careful to define what are public facilities and services. Whatever the authority of a Secretary to qualify any additions to the statutory list contained in Section 304(a)(14), he cannot exclude items which were specifically covered. Mass transit is not limited by the statute to local bus systems.

Section 931.42(a)(8)

Public facilities are defined under the Act to mean facilities which are financed, in whole or in part, by any state or political subdivision thereof. Where does the limitation that only local public utilities will be considered public facilities come from? This would appear to be an abuse of discretion.

Section 931.42(b)

Again where does the limitation as to the service of industrial facilities come from?

Section 931.42(e)

Public facilities and services may be required because of the character, rather than the size, of the population changes. The energy activity may create a need to train residents in different skills, so that local unemployment not be created while non-residents take the jobs in energy activity. It will also be necessary to prepare for the phasing out of coastal energy activity. The population base definition does not consider the need for these public facilities and services.

Section 931.42(g)(1)

This language should be restructured to make it clear that when we talk in terms of constitutional authority we are not referring to a state's inherent powers or to the police powers of the state. These powers are virtually unlimited and would permit any process not prohibited by state or federal constitutions. The intent here was to refer to existing authorized methods to finance projects or programs.

Section 931.43(a)

The availability of credit assistance for the provision of public facilities and services is not limited to those required as a result of "new or expanded" coastal energy activity. Credit assistance is available for all coastal energy activity.

Section 931.46(d)

The previous draft version of the regulations referred to the "regional cost differences." This language has been changed to read "and changes in regional prices." The assessment of regional cost differences should include all considerations that are relevant to the construction of the facility. Specifically, the cost of construction in Louisiana's coastal zone is increased by a considerable factor because of structural load limitations of soil. These are additional regional cost differences which should be included in addition to regional price differences.

Section 931.46(e)(2)

The direct OCS need factor is to be computed by using OCS employees and their families but not secondary population. This apparently is based on the language contained in Section 308(b)(4)(B) that the only public facilities and services covered are those required as a direct result of new or expanded OCS energy activity. The problem with this language goes back to the definition of OCS energy activity. This exclusion can be understood only if it is recognized that OCS energy activity includes: (1) the OCS energy activity itself and (2) energy facilities as defined in Section 304(a)(5). By providing that the direct OCS need factor will be computed using OCS employees you have effectively eliminated the second part of the definition of OCS energy activity.

Section 931.48

The application and requisition procedures with regard to Section 308(b) grants would seem to be contrary to the intent of the Congress in delineating the uses of these funds. Congress provided that the formula grants would be allocated to the coastal states on a carefully constructed set of criteria. That the affected coastal states would receive funds on an annual basis and the only Secretarial discretion would occur after the funds have been committed or expended. That the Secretary has no discretion beyond requiring certification by the state that it will be able to return to the United States any amounts not expended for the purposes listed in Section 308(b)(4). Thus, Section 308(b) funds when allocated belong to the individual states. There is no discretion left in the Secretary or in the OCZM to impose any further limitations as to the eligibility or use than those contained in the Act.

Section 931.48(b)

To note again, Section 308(d) credit assistance is not limited in the Act to "new or expanded" coastal energy activity.

Section 931.52

There is no statutory authority to limit the assistance available for public facilities and services to an amount which cannot exceed four times the amount of total assistance available for the prevention, reduction, or amelioration of unavoidable losses. This is particularly true with regard to Section 308(b) funds where the Administrator clearly does not retain the discretion to so limit the availability of these funds. Policy decisions of this magntude are the responsibility of Congress and not of an administrative agency.

Section 931.64(b)

Where does the requirement "and if the inability to repay results from a change in scope of the coastal energy activity or the related population" come from? The Act provides that repayment assistance is available after an effort to modify, refinance, or make a supplemental loan when a costal state or unit

of general purpose local government is unable to meet its obligations "because the actual increases in employment and related population resulting from the coastal energy activity and the facilities associated with such activity do not provide adequate revenues to enable such states or units to meet such obligations in accordance with the appropriate repayment schedule." There is no requirement that there be a change in the scope of the energy activity or the related population.

Section 931.72(a)(2)

The word reasonable should be moved to follow the word through. The sentence should read "cannot be prevented, reduced, or ameliorated by an assessment of the loss against an identifiable person or persons through reasonable implementation or enforcement of the existing regulatory authority of the state or of any political subdivision of the state."

Section 931.72(f)

The definition of "new employment" does not comply with the definition of Outer Continental Shelf energy activity. The definition of Outer Continental Shelf energy activity has been discussed earlier. New employment should include all employers involved in all factors of Outer Continental Shelf energy activity.

Also, the legislative history makes it clear that persons formerly employed in onshore energy activity who take jobs resulting from OCS activity, even with the same employer, have new employment.

Section 931.77

Removal of Outer Continental Shelf activity from the list of energy facilities is unsupported by any policy adopted by Congress. All OCS activity should be considered energy-related activities for the purposes of this section.

Section 931.78(c)

With regard to Section 308(b) funds the Secretary has no discretion beyond requiring certification by the state that it will be able to return to the United States any amounts not expended for purposes listed in Section 308(b)(4). Once Section 308(b) funds are allocated they belong to the individual states. There is no discretion left in the Secretary or in the OCZM to impose any further limitations as to the eligibility or use than those contained in the Act.

Section 931.78(c)(7)

The provisions of this section follow the Act in requiring you to attribute or collect against an identifiable person or persons. The question remains: must we identify or assess or must we identify and assess?

Section 931.79

These limitations are very important. With regard to Section 308(b)(4)(C) unavoidable loss assistance there is absolutely no discretion in the Secretary to impose these limitations.

Section (a)

If a public policy decision is made that the environmental energy project is of such great value that publicly owned environmental or recreational resources must be foregone why cannot assistance be available for the prevention, reduction, or amelioration of such loss?

Section (b)

The statute refers to the prevention, reduction, or amelioration of any loss that is caused by a coastal energy activity. It does not refer to one *primarily* by a coastal energy activity.

Subsection (c) and (d)

If a public policy decision must be made that a coastal energy activity is essential then regardless of the comparative values of the recreational and environmental resources lost vis-a-vis the coastal energy activity gained, the cost of prevention, reduction, or amelioration should be considered unavoidable losses for which assistance is available.

Subsection (e)

If the prevention, reduction or amelioration of an unavoidable loss requires the provision of a public facility or service this should be eligible for assistance under the unavoidable loss section.

Subsection (f)

There is absolutely no authority to limit federal assistance to 80% of the cost of the project. If Congress had intended to compensate only 80% of the cost it would have stated so as it did in Section 308(c). This is particularly true with regard to Section 308(b). The only discretion the Secretary has with regard to Section 308(b) grants is to require that the state provide adequate assurances of being able to return to the United States any amounts not expended for purposes listed in Section 308(b)(4).

Section 931.81

The Act provides that the interstate compact, agreement, or judicial decision must have been entered into, agreed to, or issued before the date of the enactment of "this paragraph." This paragraph refers to the paragraph in the Act and not the time when the "regulations become effective."

Section 931.90

To state again with regard to Section 308(b) funds, the Secretary has no discretion beyond requiring certification by the state that it will be able to return to the United States any amounts not expended for purposes listed in Section 308(b)(4). Once allocated Section 308(b) funds belong to the individual states. There is no discretion left in the Secretary or in the OCZM to impose any further limitations as to the eligibility or use than those contained in the Act.

Section 931.93(a)

An environmental impact statement is not required for each individual project receiving assistance under the Coastal Energy Impact Program. To involve NEPA in project by project review under the Coastal Energy Impact Program would be a gross invasion by the federal government into the area of decision-making that has traditionally been the sole province of state and local government.

Also, to impose NEPA on individual projects would violate the provisions of Section 308(1) which 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 prerequsite to, or a condition of, financial assistance under this section."

Although a negative EIS may narrowly be construed as not making the siting of an energy facility in a particular location a prerequisite to assistance, it does clearly make the non-siting of that facility in a particular location a prerequisite to receiving financial assistance under Section 308. The role of NEPA in the Coastal Energy Impact Program came up in the Senate debate on S. 586. It was generally agreed that "in instances which, but for a grant or loan provided under this bill [S. 586] there would be no requirement of NEPA for environmental impact statements for particular projects, then there would be none required as a result of such a grant or loan." This is a proper interpretation of the role of NEPA. Where an EIS would be required by any provision of federal law it should be continued to be required. However, where a grant or loan is made under this Act, and would not otherwise require an EIS, none will be required solely as a result of the grant or loan made.

NEPA becomes relevant only where federal action or discretion is involved. The funds being administered in this program are more in the nature of revenue sharing than a block grant. NEPA has been held inapplicable to revenue sharing. This will be particularly true with regard to Section 308(b) funds since the Secretary has no discretion beyond requiring certification by the state that it will be able to return to the United States any amounts not expended for purposes listed in Section 308(b)(4). Section 308(b) funds when allocated belong to the individual states. There is no discretion left in the Secretary or in the OCZM to impose any further limitation as to the eligibility or use of those funds than those contained in the Act. Since there is no federal discretion or action involved NEPA is not relevant.

The same argument would apply to the rest of the acts contained in the list.

STATEMENT OF EDWIN W. EDWARDS, GOVERNOR OF LOUISIANA

Since the first offshore oil well was put into production off the coast of Louisiana, our state has taken the lead in developing offshore oil and gas re-

sources. Moreover, we have encouraged other coastal states to do likewise. I hope they will follow in Louisiana's footsteps. Only by doing so will there be any chance of reversing our critical national energy dilemma.

A stated objective in the proposed regulations is "to encourage development of domestic energy resources, and thus to further the objective of increased energy self-sufficiency". This objective we agree on wholeheartedly, but we should ask whether it can be achieved under the proposed program.

Louisiana and many other coastal states have supported the enactment of legislation providing for sharing of revenues from OCS energy activities with adjacent coastal states. This is the most equitable and administratively simple means of providing financial resources to coastal states and providing real incentives to them. I believe that Congress will realize this is the best method, and we have been given encouragement by the incoming Administration. We will make an all out effort to enact such legislation in the next Congress.

Although we in Louisiana, and many others, favor the more direct approach of revenue sharing, the Coastal Energy Impact Program is now the law of the land. Therefore, we must follow it, for the present, and make sure that the limited financial assistance provided in it is made available "in a manner that is administratively simple and that permits the State and local governments involved a high degree of control and discretion".

The proposed regulations were published in the Federal Register on October 22, 1976. The public is asked to comment by November 22. It is my understanding that you anticipate publishing the final regulations for CEIP by January 24, 1977.

The comment period should be extended for several reasons. Proposed regulations on Federal Consistency have been published and the comment period on these proposed regulations closes on November 29. Thus, state and local governments have had only a short time to evaluate two sets of proposed regulations on one of our most important programs.

Secondly, the January 24 final publication date is only four days after the President-elect takes office. Since he will have the responsibility for the program, his administration should have the privilege of reviewing and suggesting modifications to the regulations it must follow. The Act provides that the regulations must be published within 270 days of the effective date of the Act; this is March 22, 1977, ample time to allow for an extension.

Numerous comments on the proposed regulations have been made. I am attaching comments prepared for me, jointly, by the Louisiana Seagrant Legal Program, the Louisiana Department of Justice, the Louisiana State Planning Office, and the Louisiana Coastal Commission. These comments are particularly relevant as they are directed at major substantive matters contained in the proposed regulations. The staff of the Office of Coastal Zone Management has already been informed of some of them. Additional comments will be submitted by these agencies, other Louisiana state agencies and local governmental bodies. We ask that these comments be received and considered as constructive, with the purpose of clarifying Congressional intent in the proposed regulations.

I do wish to briefly comment on several provisions of the proposed regulations which I feel are not in accord with Congressional intent. Please keep in mind that these points are stressed by the Government of a state that has been involved in OCS and coastal energy activity for many years. We are not on the threshold of new or expanded activity. The proposed regulations are too biased toward frontier areas, with little consideration for states with long histories of OCS activity.

Our interest is primarily in the grant portion of the program, contained in Section 308(b). We certainly are not ignoring the loan and loan guarantee provisions of the program, but they are considered by us to be secondary sources of financial assistance. It must be understood that there is less enthusiasm for these portions of the program because of the insertion, at the last minute during the conference, of the requirement that grants can not be used for "bricks and mortar" projects until other sources of financing under the program are exhausted.

The proposed regulations for disbursing the grants do a complete about-face from the specific language of the Act and constitute a step backwards into federal intervention into state and local affairs. They require each state to submit its Christmas list of schools, hospitals, erosion projects, etc., to Santa Claus, who shall decide which gifts go into his bag. This is a contradiction of one of the basic

objectives as set forth in the proposed regulations themselves which "permits the state and local governments involved a high degree of control and discretion."

In order for the Secretary to disburse the grant money to Louisiana, all we should be required to do is provide the assurance that we are capable of repaying any portion of the grant that is not spent in accordance with the Act. The Secretary's only discretion should be in determining if the grant was used in conformity with the Act. This approach embodies the new concept of federal revenue sharing which now prevails, but certain aspects of the proposed regulations seem to work against this very important principle.

If the provision of the proposed regulations requiring project by project approval is retained, another factor comes into play, namely the requirement for an Environmental Impact Statement on each project; or, in the event none is required, possible legal action because of alleged violation of the National Environmental Policy Act. Although I may not like them, I am not arguing against EIS's required by NEPA. I do strongly oppose, however, any regulation that will impose unnecessary, costly burdens and delays on our people in the form of unrequired EIS's. This program is to provide financial assistance and is not meant to intentionally or unintentionally expand environmental control. Incidentally, who pays for the EIS on each project?

The regulations are written in a manner which makes available to Louisiana a portion of the grants for prevention, reduction, or ameliorization of unavoidable loss to environmental and recreational resources resulting from coastal energy activity. We have experienced losses, most of which can be attributed to the expansion of the area needed for the siting of energy activities and the industries and people that support them. Other losses are the result of cumulative factors and cannot be attributed to any single person or company. For example, how do we assess the damages caused by erosion along a canal bank? We are pleased that the proposed regulations do not require us to attempt to assess for past losses of environmental and recreational resources. We can apply directly for grants, but again, we must submit our shopping list for approval.

In charging the cost of future losses to specific persons responsible for the losses, the proposed regulations utilize the concept of internalization of cost. The important question is, how much of the cost must be internalized by charging the loss to specific persons? We need to know. All oil spills, all saltwater intrusions, and all loss of wildlife habitat can conceivably be prevented at a cost to someone. Complete internalization, no; a reasonable assessment of cost, yes. Otherwise, we will drive energy activity out of our coastal areas where geographic, economic, and other factors dictate they must be if we are to meet our energy needs.

Setting aside our position on revenue sharing, and on the other matters discussed above, there still are other major differences in our views on the proposed program. My comments and the attachments which I submit for the record illustrate these differences. Others may not be able to sway me from my philosophic position nor I them from theirs. But, I hope that we will be able to achieve a mutually acceptable working relationship.

In addition to the aforementioned comments on the proposed regulations, I am attaching two documents which provide additional support for Louisiana's position. One, Louisiana House Concurrent Resolution 21, Second Extraordinary Session, 1976, requests deletion of certain language from CZM legislation, and the second, a letter from the Chairman of the Louisiana Coastal Commission to the Administrator of NOAA, requests extension of the comment period on the proposed regulations.

Thank you for the opportunity to present my views to you today.

Mr. BREAUX. Does that conclude the remarks?

Do you have some comments?

Mr. THOMAS. I did not plan to make any remarks as chairman of the group in order that the committee would have the benefit of the submissions of the various States.

However, I would point out, in the absence of Mr. Bucciero, I think that there are two points that should be lifted up for the committee's consideration.

One of these relates to the procedures spelled out for the determination of the lateral seaward boundaries. The draft which appears in the Federal Register provided a 21-month period for this determination.

I understand the December 6 draft has shortened this time to 12 months; and it is my understanding from conversations with Ms. Murphy that she proposed to establish some boundary of her own in order to disburse the funds.

I think two questions arise out of this.

One is the legislative history. The conference report clearly says this should be done in 270 days. Admittedly, this is tremendously difficult.

The question has been raised by some States that ignoring totally this 270-day thing and imposing a different one might pose some problems as to the validity of the use of legislative history in other areas.

Second, whether or not the arbitrary designation for disbursement of funds is clearly within the statute.

The other question which some of the States have is a provision which would allow the review of the process by which the intrastate funds were disbursed, once the process has been approved, based upon an appeal by any unit of local government.

Some States feel that this may have a constitutional element in it in the review of a State procedure by a Federal agency.

These are questions which might be addressed later on but I raise them here in a germane manner, lacking the legal detail that would be necessary simply because our attorney general has not had a chance to develop a position on this because they both appear in the December 6 draft.

On behalf of the coastal States organization, I want to express our appreciation to you and the members of your committee for this opportunity to comment.

Mr. BREAUX. Thank you very much, Mr. Thomas.

Some very interesting questions have been raised.

I want to thank all of you.

I think Mr. Midboe's points in particular with regard to some definitions which seem to cause problems are important, and I am going to ask Mr. Kitsos to direct some of those questions to Mr. Knecht.

Mr. KITSOS. As I understand it, you are saying that the definition of Outer Continental Shelf energy activity now includes, for the regulations, a new concept regarding the technical requirements that require the location of energy facilities in the coastal zone; is that right?

Mr. MIDBOE. Yes.

Mr. KITSOS. I wonder if Mr. Knecht or Mrs. Murphy could respond to that.

The statute doesn't mention it.

Ms. MURPHY. We think we have incorporated the definition of Outer Continental Shelf according to the statutory language and in the context of the legislative history.

About the question of technical requirements, if you go back to the original House definitions, it did have the technical requirements in the Outer Continental Shelf definition under coastal energy activity. That is where we picked it up: so it is in the legislative history.

The statute as passed said that the term Outer Continental Shelf energy activity means any exploration for, or any development or production of, oil or natural gas from the Outer Continental Shelf; or

the siting, construction, expansion, or operation of any new or expanded energy facilities that are directly required by such exploration. development, or production.

I would like to read from pages 40, 41 and 45 of the House Report on H.R. 3981.

"The criteria for determining whether a particular facility is 'made necessary' by OCS exploration or development should be specified by the Secretary of Commerce when he promulgates regulations for the administration of the amendments to the Coastal Zone Management Act."

The words "made necessary" were the original words in the House bill. They were later changed to "directly required."

Second, "through the rules and regulations promulgated to carry out these amendments, the Secretary of Commerce should establish more specific criteria on how such terms as 'used primarily' and 'directly used' will be implemented."

Then on page 45, the report says, "It also provides a detailed list of the Outer Continental Shelf support activities which would be covered to avoid possible absurd links in the supply chain that might result in impact aid being provided for a plan making items which are used for Outer Continental Shelf development even though most of the company's business involves manufacturing these items for other purposes."

We think the legislative history is clear that we should put in "directly required" into the regulations and specify what we mean by that. We have defined it as those facilities that are publicly-owned transportation systems to the extent that they serve Outer Continental Shelf energy activities; or are owned or operated by Outer Continental Shelf lessees or their contractors, subcontractors, or principal suppliers."

I hope you note that this is a very broad definition. It also includes discretion to add other facilities which the Associate Administrator determines to be directly required by Outer Continental Shelf exploration, development or production.

Mr. KITSOS. But have you included the concept of "technical requirements" that they be in the coastal zone to your definition of OCS energy activity?

Ms. MURPHY. No; it refers to new or expanded energy facilities that have technical requirements necessitating their location in or near the coastal zone. We pick that up from the original House bill which had the technical requirements condition in it.

Mr. KITSOS. But the original House bill goes back to a time in which the concept of technical requirements in the coastal zone was intended for a different purpose than what came out in the final version of the bill.

What you have done is picked up legislative history from a time that is no longer appropriate. I think Mr. Midboe's comments are good. It seems to me that you are relying on a legislative history that perhaps is not applicable.

On the second point, Mr. Midboe, will you briefly summarize your point in the coastal energy activity definition again?

Mr. MIDBOE. Coastal energy refers to coastal energy activity. It does not refer to new or expanded activity.

One of the reasons we are concerned with it is that the words "new or improved" public facilities have been interpreted to mean renovating public facilities; and we are very concerned in looking to be able to use these loan funds to upgrade these facilities for prior personal energy activity and the insert does not exist in the act as an effect of eliminating the use of that money.

Mr. KITSOS. You mean now in the CEI definition we are only talking about Outer Continental Shelf facilities that are new or expanded?

Mr. MIDBOE. New or expanded out to July 26, 1976.

Mr. KITSOS. And this is a coastal energy activity?

Mr. MIDBOE. Yes.

Mr. KITSOS. As interpreted in the regulation?

Mr. MIDBOE. No; it is not in the statutory definition. It is in the regulations.

Mr. TREEN. Mr. Kitsos, I believe that witness is referring to the fact that the regulations use in subpart E, and define in 931.42(e), the phrase "required as a result of new or expanded coastal energy activity", although the act uses the phrase "required as a result of coastal energy activity" throughout section 308(d).

Mr. BREAUX. Mr. Midboe, let me suggest this:

I think that the points you have raised are terribly important. I get the impression that the legislative history we are using to justify some of the new definitions consist of legislative history that is really unrelated to the last act of Congress passed and what is actually the final version; so I think we have some real problems.

I, as Chairman, would deeply appreciate a memorandum from you which precisely outlines some of the problems you see, particularly in regard to these definitions, because it does, in my opinion, introduce something that is new and that probably, in my opinion, is not intended by the statute itself.

Mr. BREAUX. Mr. Treen?

Mr. TREEN. I just have one question here, I think.

Does the State of Louisiana have an objection to the application of any of the other statutes that are listed in 931 of the regulations besides NEPA?

Mr. MIDBOE. Yes.

Mr. TREEN. That begins on page 67, a whole list of Federal statutes. Any of the others?

Mr. MIDBOE. Our objection mainly is that we don't think the Coastal Zone Management Agency was the agency designated to enforce the other statutes, that we are a State, and we are required to comply with these statutes under law, and we will do it; but we don't think it is a responsibility of the Federal Coastal Zone office to say what we must comply with.

If they wish to do so, we would like to see a list of what we must comply with.

Mr. TREEN. Would you comment, Mr. Knecht?

Mr. KNECHT. Yes.

I would ask Ms. Murphy.

Ms. MURPHY. They are required for all recipients of Federal assistance. Carl Close, who has developed that section of the requirements, can better address this question.

Mr. CLOSE. Our intent is to give the applicants or grantees the best possible information for making applications and requisitions and to give them the best possible assistance in complying with the various acts.

These various acts state that Federal agencies which give assistance may not, in some cases, give assistance to agencies which are not in compliance with those acts; rather than running the risk of running afoul of one of those, we prefer to list them as do most other granting agencies.

Mr. TREEN. Does this mean this is another area, then, in which the Office of Coastal Zone Management will make inquiry before the money is allocated to the State, the formula grant money is sent to the State? There is a whole batch of things listed here, including the Clean Air Act, 1972 Education Amendments, various Executive orders, the Davis-Bacon Act, Endangered Species Act, et cetera?

Will you be looking at all of these in the application?

Mr. CLOSE. Only on an exception basis, where there would be evidence of noncompliance. We would not attempt to look at every provision in all the applications.

Mr. TREEN. I am glad to have that statement in the record.

Mr. KNECHT. This was required by law. Our intention was to make it more convenient for this recipient to find these requirements listed.

Mr. TREEN. There is no quarrel about that, that we have to comply with these laws. It is just a question of whether all of these things will be investigated, in addition to the things you outlined in your statement.

You say that is not the intent.

Mr. KNECHT. That is not the intent, Mr. Treen.

Mr. TREEN. Yes.

Mr. KNECHT. May I comment on the fundamental point with regard to congressional intent and the two-step process that Mr. Midboe raised? We have not responded to Mr. Midboe. Would you grant me 2 minutes? I feel I didn't read appropriately from Chairman Murphy's letter. Since the intent of the House of Representatives on this point is crucial, let me quote two paragraphs.

Mr. BREAUX. I think it is already a part of the record.

Mr. KNECHT. I am referring to the June 30 letter to Secretary Richardson from John M. Murphy.

The key paragraph states:

> As Chairman of the subcommittee which produced H.R. 3981 and House Floor manager for the S. 586 Conference Report, I would like to note my agreement with Senator Hollings that you will have the discretion you need before disbursement to assure that the proceeds of the formula grants will be expended for the proper purposes. This was my understanding of the intent of the majority of the House conferees as well as of the Senate conferees.

That is very plain.

Mr. BREAUX. That has to be read in connection and alongside the debate on the House floor when the specific questions were asked and answered by the participants.

Do you have another comment?

Mr. MIDBOE. To me, the Federal agencies have adequate assurances of their problems by the fact that we must give assurances that we

will comply with the law and that, in fact, if we will not, they can recover the funds under this act from us. That is the "adequate assurances" that the act is talking in terms of.

Ms. MURPHY. Could I add another joint on technical requirements?

The technical requirements section appears in the statute as passed on both the House and Senate floors.

In the definition of coastal energy activity, and as the present statute is constructed, Outer Continental Shelf activity is a subset of the definition of coastal activity.

We picked up the technical requirements condition from the past as well as what is in the statute as signed into law.

Mr. KITSOS. Outer Continental Shelf stands by itself. Isn't that true?

Ms. MURPHY. Outer Continental Shelf energy activity is part of the definition of coastal energy activity. The technical requirements refer to both because of the inclusion of Outer Continental Shelf under the definition of coastal energy activity.

Mr. BREAUX. If we have no other comments from the representatives of our coastal States panel, I would like to thank them on behalf of the committee, and particularly for the long distance that they had to travel in order to get here and for the time they have spent analyzing very complicated sets of regulations which have been proposed.

I would appreciate it if the material that I asked for, particularly that from Mr. Midboe, would be brought to the committee as soon as it can be put together.

I think it would be very helpful to elaborate.

Mr. THOMAS. Thank you.

Mr. MIDBOE. Thank you.

Mr. BREAUX. I would like to call for purposes of testimony our next witness who represents the National Association of Counties. This is Mr. Don Gilman, who is presently serving as the mayor of Kenai, Alaska.

I understand you have a plane to catch back for a very long trip.

Please introduce whoever you have with you in your testimony.

STATEMENT OF DON GILMAN, MAYOR, KENAI, ALASKA, REPRESENTING THE NATIONAL ASSOCIATION OF COUNTIES AND THE ALASKA ASSOCIATION OF MAYORS, AND CHAIRMAN, AD HOC COMMITTEE ON COASTAL ENERGY IMPACT; ACCOMPANIED BY JAMES EVANS, STAFF, NATIONAL ASSOCIATION OF COUNTIES

Mr. GILMAN. Thank you, Mr. Chairman.

I have with me Mr. Jim Evans from the staff of the National Association of Counties, and I do appreciate your allowing me to advance on the agenda.

The National Association of Counties is the only nationwide organization representing county government in the United States. Its membership includes both rural and urban counties and is dedicated to improving county government, acting as the national spokesman for counties, and achieving public understanding of the role of counties as an integral part of the federal system.

On behalf of NACO and the Alaska Association of Mayors, I would like to express our appreciation for your invitation to present our views on the proposed rules and regulations for the coastal energy impact program.

My statement will refer to the draft prepared by the Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, and dated December 6, 1976.

The National Association of Counties, NACO, supported the enactment of the Coastal Zone Management Act; we supported the enactment of the Coastal Zone Management Act amendments earlier this year; and we continue to support implementation of the coastal zone management program.

NACO believes the coastal zone management program offers the opportunity for counties and other local governments to work in a true partnership effort to plan for the utilization of resources in the coastal zone. We recognize that there are important State and Federal interests in the coastal zone as well as local interests.

The coastal energy impact program established this year as part of the coastal zone management program is an example where the Federal, State, and local governments must work together for the program to succeed. For this reason, we are pleased that this committee is conducting these oversight hearings.

We would at this point like to submit specific comments from the Policy Jury Association of Louisiana. These comments have also been submitted to the Office of Coastal Zone Management and respond to the October 22 draft of the proposed regulations.

Mr. BREAUX. Without objection, that may be done.

[The comments from the Policy Jury Association from Louisiana follow:]

POLICE JURY ASSOCIATION OF LOUISIANA,
November 16, 1976.

MS. JEANNIE MOSLEY,
County Resources Department,
National Association of Counties,
Washington, D.C.

Dear MS. MOSLEY: In response to your memorandum of November 4, 1976, relative to the new coastal energy impact program, we have reviewed the proposed regulations and are pleased to present our comments herein. At the outset, let me say that based on the information we have been able to obtain, we are very disappointed in the form in which the coastal program was adopted, and we are equally disappointed in the manner in which the regulations have been drafted. For many years, Louisiana has had extensive mineral exploration off its shores, and has contributed significantly to supplying a large proportion of this country's energy needs. This new program was promoted on the basis that it was going to provide assistance to those state and local governments where such activities have or may take place in the future, but as it was finally passed, it appears to us that our state is going to receive very little material benefit from the legislation. I realize that there is some confusion over this point, and it is a complex piece of legislation, and I sincerely hope that this initial assessment will eventually be proven incorrect.

There are two fundamental features that we strongly object to in this new program. The first is that as we understand it, most of the assistance that is going to be made available under the program, for providing governmental services and facilities, is going to be in the form of loans and loan guarantees rather than in the form of grants. This, we feel, seriously weakened the value of the program.

The coastal energy impact program was based on a realization that coastal energy activities can and do result in expanded demands for governmental services, often straining the limits of the affected locality's resources. It was also seen

as an inducement to states to permit expanded off-shore energy exploration, to produce the energy fuels this country needs which was seen as a national problem or concern.

To inject the philosophy that in order to qualify for assistance under this new program, an affected government must tax itself to the limit, or completely exhaust any debt or borrowing capacity it may have before it can become eligible for grant assistance, we do not feel, is completely being fair to those governments. The fundamental thrust of this legislation (PL 94–370) appears to us only to make it easier for affected state and local governments to go into debt—debts that they and their citizens are eventually going to have to repay. Thus, the benefits of the activities they are supporting are going toward solving a national need—while the burdens and the financial obligations still remain for the most part local obligations.

Another serious problem we view in this legislation, which is carried even further in the proposed regulations, is that the assistance it is proposing to make available is by and large tied to "new or expanded coastal energy activities." This is of limited help to a state like Louisiana that has had energy exploration off its coasts for 25 years. We have already gone through the expense of building the roads, the schools, hospitals and the other facilities needed to support these activities. Millions and millions of tax dollars have been spent supporting governmental services required by our off-shore mineral exploration activities. We therefore feel that more emphasis should be placed on governmental demands and needs which have resulted from prior and existing or continuing activities.

The proposed regulations impact this issue very strongly. The term "new or expanded coastal energy activity" appears in Section 308(c) of the legislation (PL 94–370), and in the allocation procedures contained in Section 308 (e)(1)(A). Thus, the definition contained in Section 931.15 of the proposed regs would be relevant to those sections. However, the definition of coastal energy activity contained in Section 304(4) of the Act is not limited to "new or expanded" energy facilities. Nor are the benefits contained in Sections 308(b)(4)(C), 308 (d)(1), (2),(3) or (4). These sections refer to "coastal energy activity" without any requirement that it be new or expanded. The insertion of "new or expanded" in the definition of coastal energy activity has the effect of eliminating all prior or existing coastal energy activity. This would work directly contrary to the provisions of Section 931.74(a), which provides that the monies are available to "prevent, reduce, or ameliorate environmental and recreational losses in the coastal zone resulting from past or new coastal energy activity, regardless of which the loss occurred."

It further appears to us that the authors of the proposed regulations went to unnecessary and unwarranted lengths to make it more difficult for states and local governments to qualify for the assistance, be it loans or grants, that the program purports to make available. For example, Section 931.42 of the regs prohibits the use of program funds to provide public facilities which primarily serve industrial facilities. We do not find this limitation in the Act. The argument is apparently that the intent of the legislation was not to induce industry to locate in a coastal area. Consequently, the Act covers only the facilities and services needed by the workers in that industry and not the industry itself. The parent statutory justification for this interpretation is that the only public facilities and services covered under the Act are those that are required to serve the increased population resulting from coastal energy activity or new or expanded outer continental shelf activity. That to service an industry is to service a facility and not the population.

We have trouble understanding this rationale. Regardless of whether you are serving the industry with public facilities or services, or you are serving the individual's home with public facilities or services, the result is to provide a public facility or services to a structure which in turn serves the individual. In one instance it provides him with a place for employment, and the other, a place for shelter.

Also, the Act provides that loans and loan guarantees are to be available to assist states and units of local government to provide new or improved public facilities or services which are required as a result of coastal energy activity. The Act also provides that Section 308(b) grant money is to be available for the study of, planning for, development of, and the carrying out of projects and programs to provide new or improved public facilities and services which are required as a direct result of new or expanded OCS energy activities. The Act

specifically defines what are public facilities and services. No place does the Act state that public facilities and services required by the energy industry itself are excluded.

The regulations (Section 931.42(c) further provide that assistance may be made available under the program to a "new or improved" public facility only if it is constructed in order to serve new populations, or it is expanded or renovated to increase significantly its capacity in order to serve new populations. Section 308(b)(4)(B) provides grants when new or improved public facilities and services are required as a direct result of new or expanded outer continental shelf activity. Section 308(d) provides assistance to provide new or improved public facilities or services which are required as a result of coastal energy activity. Such assistance is available whether or not it serves new population. A public facility or service may be required as a result of OCS or coastal energy activity without any change in population residing in the area. An example would be where new public facilities or services must be provided or existing public facilities and services renovated to serve employment in new or expanded OCS energy activity or coastal energy activity who do not reside in the local community but use that communnity as a "jumping off point" to the off-shore areas.

With respect to the limitations provided in Section 931.79 of the regs, which deals with limitations, here too we find objections. With regard to Section 308(b)(4)(C) Unavoidable Loss Assistance, there is no discretion given the Secretary by the Act to impose these limitations.

In Subsection (a) of Section 931.79, we do not understand the reasoning of this subsection. If a public policy decision is made that the coastal energy project is of such great value that publically owned environmental or recreational resources must be foregone, why cannot assistance money be made available for the prevention, reduction or amelioration of such loss.

In Subsection (b) of the Section, the Act refers to the prevention, reduction or amelioration of any loss that is caused by a coastal energy activity. It does not refer to one primarily caused by coastal energy activity. If Congress had intended to limit the availability of this assistance to only those losses primarily caused by energy activity, it would have stated so.

In Subsection (e), if an unavoidable loss results from the provision of a public service or facility which is necessitated because of coastal energy activity, we see no reason why this should not be eligible for assistance under the unavoidable losses section.

Finally, in Subsection (f), there is absolutely no authority to limit federal assistance to 80 percent of the cost of the project. Again, if Congress had intended to compensate only 80 percent of the cost, it would have stated so as it did in Section 308(c). This is particularly true with regard to Section 308(b). The formula grants are allocated to the coastal states based on a carefully constructed set of criteria. The affected coastal state receives funds on an annual basis and the only Secretarial discretion occurs after the funds are committed or expended. At that point, the respective state must show that it has expended or committed the funds received for one of the purposes set forth in the Act. The only discretion the Secretary has before disbursing the proceeds of the Section 308(b) grants is to require that the state provide adequate assurances of being able to return to the United States any amount not expended for purposes listed in Section 308(b)(4).

These are just a few of the areas where we feel the authors of these proposed regulations went to unwarranted lengths to further restrict whatever assistance that this new program may make available, and which we feel should be revised to bring the actual operation of this program closer to the intent of the Act and its legislative history.

We appreciate the opportunity to submit these comments, and would be happy to expand or supplement any point on which you might like some clarification

Cordially,

JAMES T. HAYS,
Executive Secretary.

Mr. GILMAN. Mr. Chairman, we are concerned that the overall complexity of the act itself is out of step with other Federal assistance programs enacted by Congress earlier this year.

Programs, for example, like the general revenue sharing program, the Mineral Leasing Act, the Counter-Cyclical Assistance Act, and the Payments-in-Lieu-of-Taxes Act; all provide for Federal assistance, including energy impact assistance, without the stringent requirements of the Coastal Zone Management Act.

However, we believe that implementation of the regulations and the formula grants in section 308(b) should not be delayed. Counties and other local governments are now facing social and economic impacts from coastal energy impact activity. Those problems which remain with the current draft and to which I will refer in a moment, should be corrected before final publication.

COMMUNITY IMPACT AND THE ROLE OF LOCAL GOVERNMENTS

Mr. Chairman, both associations I represent today believe that the coastal energy impact program should concentrate on the front-end problems of coastal energy development and its resulting impact on communities and important natural resources.

It should focus assistance on planning and early steps to avoid the kind of environmental degradation and community disruption which often flow from major industrial and commercial activity. We want to make sure that the communities most affected by this activity have the resources and the management, capability, and capacity to guide their own destiny and maintain both fiscally and environmentally viable communities in which to live and work.

As an integral part of the federal system, counties, and other local governments seek a major participatory role in all stages and at all levels during the development and implementation of the coastal energy impact program. NACO took an active role during the congressional consideration of the amendments of 1976, and through a special task force established to review these regulations, has provided specific recommendations for the intrastate allocation of assistance on this Federal report.

Mr. Chairman, the Kenai Peninsula Borough is a microcosm of the kinds of issues and problems with which the amendments of 1976 and these regulations are designed to deal with. It has its five incorporated areas and there Indian villages are surrounded by the impending Outer Continental Shelf lease sales in the northern gulf, the lower Cook Inlet and the western gulf. It is estimated that our population will increase by approximately 50 percent between now and 1983.

Our present community facilities and services are either at or beyond their planned capacity. An influx of even 200 persons into any of our communities will mean a complete restriction of water, sewer, electrical, transportation, and governmental facilities and service.

A large increase in population, either temporary or permanent, cannot be accomplished without severe impact on the residents of these communities unless we have access to some front-end planning money and quick access to loans or grants to provide the needed facilities and services.

In providing the assistance to deal with this need, this coastal energy impact program presents an important opportunity for structuring a Federal assistance effort which takes account of varying State condi-

tions and traditions, while creating a partnership among local, State, and Federal governments.

However, there are three specific points we would like to make regarding planning assistance and the fiscal impact of credit assistance on local communities.

First, while section 308(c) is the primary source for planning grants for meeting the impact of all coastal energy activity, the level of assistance available from that fund is low.

The formula grants provided in section 308(b) are a secondary source of assistance. We urge the administration and the Congress to provide full funding of section 308(b) as the most important source of assistance for improving local and State government planning and management capacity.

Second, the regulations make no special provisions for communities unable to demonstrate their ability to repay.

This requirement penalizes precisely those jurisdictions which are in greatest need of assistance. As a result, a community which is too poor to build public facilities on its own, may be too poor to qualify for Federal loans.

The burden will fall most heavily on towns that must provide services for those employees who work at energy facilities outside of their taxing jurisdictions. Such communities will have neither the benefits of an increased tax base nor assistance from the Federal government.

This situation can be remedied within the intent of Congress by relaxing the requirements on the use of section 308(b) formula grants under such circumstances, or by providing for immediate repayment assistance under section 308(d).

Third, the repayment assistance portion of the impact program is central to its mission. Without the safeguard of repayment assistance, the credit assistance offered by this program may be meaningless. The proposed regulations do not effectively implement the intent of Congress regarding repayment assistance for the following reasons.

Congress clearly intended repayment assistance to be automatic. This is appropriate. Communities contracting high-risk debt deserve to know what their obligations are at the beginning and precisely what circumstances will occasion repayment assistance. The current proposed regulations give the Administrator discretion to approve or disapprove a community's request for repayment assistance. Thus, repayment assistance is not automatic but discretionary.

There are no procedural safeguards which insure that a community will promptly receive repayment assistance when circumstances necessitate it.

Congress intended a community's repayment schedule, and need for repayment assistance, to be based on their ordinary rates and methods for generating tax revenue. Communities were protected from undue fiscal intereference by the proviso that the repayment schedule, which triggers repayment is to be agreed upon in advance.

The proposed regulations fail to implement this provision adequately and assure that local communities will not be required to increase their tax burden instead of receiving repayment assistance.

Local officials, both elected and appointed, realize that meeting the impact of coastal energy development will rest on their shoulders. While the Congress has mandated a central role for State government,

local officials believe that they should play a major role in development of policies and procedures at the State level. In essence, we want early and meaningful involvement to assure that our views are given more than passing notice and that decisions are both fair and equitable since program decisions will directly touch our communities and our capacity to respond.

The recommendations developed by the NACO task group on the impact regulations would provide a set of minimum procedures for involving county and municipal governments at the State level. Recommendations which have been submitted to the Office of Coastal Zone Management are contained in a separate document which I have available here today.

Mr. Chairman, we would request that it be made a part of the record of this hearing.

Mr. BREAUX. Without objection, it will be so done.

[The material referred to follows:]

NATIONAL ASSOCIATION OF COUNTIES

Comments and Recommendations Regarding the Intrastate Allocation Process for the Coastal Energy Impact Program, Section 308(g)(2); Subpart K, 931 CFR

LOCAL GOVERNMENT PARTICIPATION IN INTRASTATE ALLOCATION PROCESS

The Coastal Energy Impact Program presents an important opportunity to develop a federal assistance program which takes account of varying state conditions while creating a partnership for efficient allocation of federal financial assistance. Procedures and institutional arrangements should be included in the process which provides for objective and expeditious allocation of assistance and adequate administrative remedies for avoiding or resolving disputes.

While local officials recognize the role which the coastal zone management legislation confers on state governments, they know that much of the implementation of state energy impact programs will be the responsibility of local government. Management decisions will be made and carried out at the local level and local officials desire meaningful involvement on more than an ad hoc or advisory basis. Many have grown cynical about advisory groups which have no meaningful impact on the development of policy that controls decisions made by local officials. In essence, they want front-end involvement to assure that their views are given more than passing notice and that decisions are both fair and equitable from their point of view in programs which directly touch their interests.

City and county officials recognize that decisions about intrastate allocation of grant funds cannot be made on purely technical grounds. Many factors must be weighed in making what are essentially judgmental decisions. To avoid a traditional pork-barrel approach, a priority list system should be used which provides an opportunity for open decision-making based on objective, quantifiable, and public policy oriented criteria.

Finally once all dispute settling remedies are exhausted at the state level, local governments would like to have an opportunity to appeal the most important disputes to an independent authority where federal dollars and other forms of assistance are involved, and where state government has the initial responsibility for administering the assistance effort.

Since resource allocation decisions are fundamental to the needs and future of local governments, city and county officials desire a direct and significant role in development policy governing such allocation decisions.

SUBPART K—INTRASTATE ALLOCATION OF FINANCIAL ASSISTANCE

The county officials reviewing Subpart K found that it goes a long way towards satisfying the need for minimum standards to govern the intrastate allocation process. There is a recognition that these reqquirements should be

flexible in order to take account of varying conditions and traditions among the states and to provide a desirable level of discretion by both state and local officials.

The following recommendations provide specific minimum elements in addition to those included in the rules proposed on October 22, in order to assure that meaningful involvement becomes a reality. These suggestions provide greater assurance that broad and more general requirements for "direct consultation" or "reasonable and significant involvement."

Objectives of process

Add a new subsection (a) to Section 931.112—Process for intrastate allocations, as follows:

(*a*) Implement the following objectives:

(1) Assure that existing and near term impacts resulting from energy development are given priority.

(2) Provide for direct and meaningful participation by units of general purpose local government throughout the allocation process;

(3) Assure that financial assistance is apportioned, allocated, and granted to units of local government in an expeditious manner; and

(4) Assure that information on the financial assistance and its allocation shall be published and otherwise made available to the public throughout the allocation process.

Comment: This addition provides a general statement of principles and purposes to support the balance of Section 931.112, and guide state government development of a process in cooperation with local government, while allowing for flexibility. While state representatives have not responded to this specific language, the discussion between state and local representatives evidenced some general acceptance of these objectives in concept.

Priority list system

Substitute a new subsection 931.112 (f) as follows and delete subsection (g):

"(*f*) Include a method of assigning priority for the purpose of providing financial assistance to projects for which assistance is not otherwise available from Federal or State sources. Such method shall include but shall not be limited to a priority list based on objective criteria which shall include but shall not be limited to the following:

"(1) (A) immediacy and severity of the impact to the public facilities and service needs included in the definitions in section 931.42, subsections (a) and (b) of these regulations;

"(B) during the first year, favor existing and near-term impact from coastal energy development;

"(2) the establishment of resource and impact management capacity of units of general purpose local government which shall include but shall not be limited to the collection of base line information and the establishment of an environmental monitoring system; and

"(3) the prevention or mitigation of the impact to environmental and recreational resources, and tourism."

Comment: The priority list limits a pork-barrel approach to administering coastal energy impact assistance. The suggested minimum criteria focus on the most important bases for establishing the list while allowing the addition of other criteria to fit the needs of individual states. This will go a long way towards assuring an open process by requiring states to make decisions based on previously announced policy and standards.

Effective participation

Change subsection 931.112(e) to read as follows:

"(*e*) include methods and procedures to assure an effective level of participation by affected State agencies and local governments throughout the development and implementation of the intrastate allocation process;"

Comment: This new language provides a more specific test for involving local governments throughout the preparation and implementation of the process while permitting the development of specific procedures or methods tailored to the needs and traditions of each state.

Task force

Add a new subsection 931.112(g), as follows:

"(g) Include representation of local elected officials or their designees on either

an existing state body or create a coastal policy task force, as a method for assuring effective participation of local government required by subsection (e). Such body or task group must have the power to participate in the development and implementation of and approval of the intrastate allocation process and each annual priority list for financial assistance under Section 308 of the Act;"

Comment: States would have two choices under this amendment: use an existing body or establish a new body or task force which includes membership of local elected officials or their designees. Such a group would be required to have significant policy responsibilities for each stage of the intrastate allocation process, but as a minimum would have the power to participate in the approval of the process and each annual priority list.

Such a state body or task force would assure the existence of a forum through which local government views could be made known and participation would be more than ad hoc or advisory in nature. It would provide the type of meaningful involvement necessary to assure the cooperation of local governments while providing a method for reconciling major policy differences and disputes with state government. This commitment to establishing a continuing forum for local participation in major policy approvals would go a long way toward assuring local officials that state governments are serious about direct consultation and involvement.

Definition of Maximum Extent Practicable

Add a new subsection 931.113(c), Pass-through of assistance, as follows and renumber all other subsections:

"(c) A state government shall not retain more than 5% of the financial assistance allocated to it by OCZM, unless the body or task force referred to in subsection 931.112(g), establishes a higher percentage."

Comment: This arrangement provides a minimum guidepost and procedure for defining "maximum extent practicable" for allocating financial assistance, referred to in Section 308(g)(2). It will assure that some type of objective criteria will be used for defining minimum level of assistance to be retained at the state level, unless and until the forum referred to in subsection 931.112(g) finds it appropriate to change the level of assistance for use by state agencies. The result will be to avoid the retention of unnecessarily large amounts of financial assistance by state governments and to assure the allocation of most of the assistance to that level of government which is best able to judge community needs.

Appeal to OCZM

Add a new subsection 931.114(b), as follows, and renumber all other subsections:

"(b) A unit of local government may appeal a decision of a state agency to the Associate Administrator to determine whether the State properly followed the intrastate allocation process established pursuant to these regulations in apportioning, allocating, or granting assistance under Section 308 of the Act. Such appeal must be taken within 30 days of any such allocation."

Comment: This addition provides a last resort method for appealing a decision by state government. The appeal would be limited to determining whether the state had followed its own allocation process as approved by OCZM. Any appeal would have to be taken within thirty days of an allocation, in order to avoid delay in using impact assistance. Only the amount and type of assistance involved in the appeal would be subject to any delay rather than all assistance allocated to the state by OCZM.

Such an appeal would be a last resort to deal with those extraordinary situations where a state failed to follow its own allocation process. It could follow any other administrative appeal at the state level, and limits the need for seeking redress in the federal courts by establishing at the federal level an independent appeals arranagement to judge state action. This arrangement is appropriate where federal financial assistance is involved and is consistent with concepts of due process which require the separation of an initial administrative determination from a final judgment on appeal.

This approach is also consistent with the proposed regulations which require an annual review of a state's allocation process; it would permit earlier triggering of a review by local government thus avoiding delay in redress of grievances and implementation of financial assistance. In essence this appeal process permits states to administer the program without day-to-dy federal supervision and permits federal review only where necessary.

COMMENTS ON NGC RECOMMENDATIONS

Generally, the recommendation of the National Governors' Conference fail to provide minimum tests or methods to support involvement of or direct consultation with local governments. While it is recognized that flexibility among the states is desirable, the foregoing methods or procedures will assure a minimum level of conduct not included in NGC's recommendations.

NGC's recommendation that the intrastate allocation process: "Stipulate in the allocation process the reasonable time requirements for state allocation of financial assistance to local units of government;" should be included in the final regulations.

The concept behind NGC's recommended subsection 931.112(k) which would require a process for appeal according to state administrative due process or to the designated agency should be included in the final regulations. However, this appeal process is not a substitute for a final appeal to OCZM as recommended above. An independent evaluation of a state gency decision involving federal assistance cannot be made by the agency making the initial determination and should be tested by an independent authority which has ultimate responsibility for the administration of Section 308.

CONCLUSION

The recommendations for assuring effective local government involvement in the intrastate allocation process contained herein, are minimum tests for meaningful participation by local officials. They provide a forum for more than just an advisory role and come closer to creating the kind of partnership among local, state and federal levels necessary for the efficient administration of the Coastal Energy Impact Program. These minimum tests provide the flexibility necessary to meet varying state conditions while giving local officials a stake in the successful implementation of impact assistance.

Finally these minimum criteria provide notice to states and local governments of the basis for OCZM's review of individual intrastate allocation processes, thus limiting the opportunity for dispute among all three levels of government as to the basis for process approval.

Mr. GILMAN. Many of our recommendations regarding the intrastate allocation process have been incorporated in the most recent draft of the proposed regulations.

The office of Coastal Zone Management has been exceptionally responsive to the need for involving local governments at each stage of impact-program development and implementation, and to many of our recommendations. There are essentially three points which I would like to highlight briefly:

(1) Local governments want to be assured of significant involvement in the policy decisions of State government. Mere consultation on a government-by-government basis does not always result in meaningful impact on the development and execution of policy.

The NACO task force has recommended that the impact program regulations provide for the establishment of a State level task force or the use of an existing State committee, if it were composed of local officials, to participate in the development and implementation of the intrastate allocation process in each State.

While the proposed regulations do not include this recommendation, we are hopeful that each State will either make use of an existing group of local officials or establish a new group for this purpose.

(2) Allocating assistance among various communities and counties will not be any easy task. The NACO task force recommended that each State establish a priority list system which would be based on need, immediacy and severity of the impact, and the establishment of local resource and impact management capacity.

This approach is aimed at an open and objective allocation procedure and we are pleased that the proposed regulations include this procedural requirement.

(3) Finally, in view of the fact that Federal dollars are involved and that the States have much discretion in their allocation, we recommended that local governments have the opportunity to appeal the administration of the intrastate allocation process to the Office of Coastal Zone Management.

The basis of this appeal would be limited to determining whether each State followed its own process in making allocation decisions.

We are pleased that the draft regulations contain this appeal which should be used only as a last resort, and should be carried out in an expeditious manner.

Frankly, this type of procedure will eliminate the need for lengthy court battles. We note that the appeal to the OCZM is conditioned on exhausting an administrative appeal at the State level first. This is an acceptable idea for resolving disputes, but any final appeal should be beyond the State level, since the State will be making the initial allocation decision.

Mr. Chairman, the National Association of Counties hopes that the process followed in the development of these regulations will be a model for other parts of the Coast Zone Management program, both at the State and Federal levels.

Local governments are anxious to play a strong role in developing and implementing coastal management programs in partnership with State government. We are ready to help implement those procedures now being established for integrating Federal agency actions into State and local policy frameworks.

Thank you again, Mr. Chairman, for the opportunity you have accorded us, to testify today. I would be glad to answer any questions you may have.

Mr. BREAUX. Thank you very much, Mr. Mayor.

We might add that a related committee, chaired by Mr. Murphy, visited this very, very beautiful area, and I know you are anxious to get back to it.

Mr. GILMAN. It was 23° below zero when I left.

Mr. BREAUX. I did not know those temperatures existed.

There are three important points to raise that I am interested in.

In the planning range, you said that your area will be very heavily involved in planning for the effecting of energy activity.

I wanted to raise the point in the regulation about 10 percent use of the planning grants. No more than 10 percent of the grant received under the assistance section could be used for planning. That was something that was not spelled out in the statute. It is something I disagree with.

You should be able to use 50 percent of that amount for planning whatever you think is necessary for planning services. I think that is also the opinion of the National Association of Counties.

Mr. GILMAN. The planning grant is a central issue. In our opinion it is the most important front-end money available. It is the only front-end money available.

Mr. BREAUX. What does the 10 percent restriction do to you as far as that is concerned?

Mr. GILMAN. You are speaking of the State of Alaska?

Mr. BREAUX. Either way you would like to phrase it.

Mr. GILMAN. In the State of Alaska, we requested—the original draft was 5 percent. We requested that that be increased to at least 10 percent because that makes, in our opinion, sufficient funds available to us to do our planning.

Mr. BREAUX. Are you satisfied with 10 percent or if you had your choice, would you have no limitation and let the areas determine what they need for planning?

Mr. GILMAN. I am sure we would take the restrictions off. That would be our final point. We were satisfied to get it doubled.

Mr. BREAUX. One of the last points that you raise, and maybe Mr. Knecht could have some comment on this, is where you apparently talk about the local governments. If they disagree with the allocation formulas established by the State government in their particular area, then the local government should have input directly to the Office of Coastal Zone Management as to what the State has set out for the proper amount to local counties.

Mr. GILMAN. In our National Association of Counties Committee, this was the unanimous feeling from the representatives from the various counties. It was not the intent to go running to the Office of Coastal Zone Management on every small project allocation.

What we want to make sure about is that the process that is developed at the State level, which will be developed with local participation, is followed then by the State and there is a provision that that purpose is reviewed annually.

We want to be able to come back to the table if we see the State not following its own process that it has submitted to Office of Coastal Zone Management for approval so we can get it back on the table in a quicker manner; and I believe there is a 30-day provision; that is, after the approval of the process. Am I not right?

Mr. BREAUX. Would you comment?

What under the regulations are the local governments given in bypassing decisions of the State government?

Mr. KNECHT. Well, Mr. Chairman, we have responded to the suggestion of the counties, the National Association of Counties and have included this kind of appeal or process in the draft regulations.

I think you may hear from the National Governors Conference a recommendation to the contrary. It is difficult to satisfy both sides, as you will see in a few minutes.

Nonetheless, our firm position is that it is appropriate and it does allow for safeguards against inadvertent and unintentional mistakes.

Mr. BREAUX. The individual allocation?

Mr. KNECHT. No; the individual allocation will not be appealed to our office. The only grounds for appeal is an apparent violation of the State to follow the process.

Mr. BREAUX. The numbers couldn't be questioned?

Mr. KNECHT. No.

We have had a very productive relationship with the local governments in Alaska and especially with Mayor Gilman. His testimony today also is very helpful to us. We will go back and again look at the provisions and questions he raised to see if the points are adequately covered.

We have had a positive relationship, and will try to be responsive to his desire to have the program go forward.

Mr. BREAUX. The second point I want to bring out from your testimony is the fact of questioning the ability of communities unable to demonstrate their ability to repay any loans. As I interpret what the problem is, maybe some communities cannot show they have the ability to repay a loan; therefore, they would not be able to get a loan and therefore they would never be put in a position to repay the loan to qualify them for grants?

Mr. KNECHT. Yes; I think that is a concern of local governments. It is as if we were attempting to run a hospital for the well rather than the sick. That is what he is suggesting, but I think we have handled it.

I would like to ask Ms. Murphy to explain how that problem will be dealt with. We will fully examine it as a result of the testimony.

Ms. MURPHY. As part of the fiscal management schedule in order to qualify for a loan, we ask them to calculate projected revenues and expenditures and if there is a fiscal surplus; that is, revenues exceeding expenditures, then the repayment schedule would be based on that fiscal surplus.

The payments will be set according to how much revenue will be available. If the fiscal surplus is insufficient or is in fact negative, we have provided in the regulations that the Administrator will make a loan and determine an appropriate repayment schedule which may include deferral of payments.

In other words, there could be no payments for the first few years if there were not sufficient revenues.

So we have addressed the problem when you cannot project sufficient revenues to fully amortize the loan. It will be taken into account.

Then under the repayment section, we have also said that if the remedies which are specified under the statutes to be used before a repayment grant can be given—the modification, the refinancing, or the supplemental loans—are inadequate then the Associate Administrator will authorize a repayment grant in an amount sufficient to enable the borrower to meet the payments specified in the fiscal management schedule. That is the assurance that the amount of the repayment is in the amount of fiscal deficit, or the problem area, when they don't have sufficient revenues. I think we have addressed the problem, but we will go back once again and make sure that it is in proper order.

We are, however, locked in by the statute which says that the Associate Administrator can only make a repayment grant after he has exercised modification of the terms, refinancing, or a supplemental loan.

There is no way we can give a repayment grant under the repayment statute ahead of doing one of those three things. But we have tried to deal with the problem through this fiscal surplus insufficiency, which I mentioned before.

Mr. BREAUX. It would seem—and I would suggest to everyone involved—that the intent of the committee and the intent of Congress was if repayment was impossible under a loan, that that would be available in order to pay back the loan and then they could immediately go into the payment grants section.

Mr. KNECHT. But we have to exercise at least one of the first three

remedies, according to our reading of the statute. Clearly, the program should be designed to help just those kinds of communities.

There is another factor. Perhaps the projections that were made initially that suggested a continuing deficit and inadequate revenues could be an error in one way or another and by allowing a certain length of time to elapse during which no payments would be required one could check the situation and make a final determination or final confirmation that, indeed, there was inadequate money coming in to repay the loan.

Mr. GILMAN. Mr. Chairman, may I respond?

Mr. BREAUX. Mr. Mayor, go ahead.

Mr. GILMAN. Central to this issue is how do you derive the revenue; and I think our concern is that the Associate Administrator comes back and says: well, yes, but you can put on another 10 mills on your tax levy or raise your sales tax. We want to make sure it is on current rates.

Ms. MURPHY. There is a disclaimer in the regulations that that is not what we have in mind at all.

Mr. BREAUX. Determination of unavailability of funds to pay back could be determined at the point when the loan is applied for. A determination could be made under the existing tax structure that the community could not pay it, it is not available, and then it could move directly to formula grants.

You raised a key point.

Mr. EVANS. Once the determination is made, is the repayment automatic then?

Mr. BREAUX. Can you respond to that?

Ms. MURPHY. Yes; after we have made a modification of the terms and conditions, or refinanced, or made a supplemental loan, the repayment grants will be automatic and be sufficient to enable the borrower to meet his obligations. But we have to exercise one of these three mechanisms according to the statute. We must try them first. Then the repayment goes out automatically.

Mr. BREAUX. We would like to thank the Mayor and the National Association of Counties for their excellent testimony.

Counsel, do you have any questions?

I would like to thank you very much. You have had some very helpful suggestions.

Off the record.

[Discussion off the record.]

Mr. BREAUX. Our next witness, representing the Council on Environmental Quality, is the staff director, Mr. Steve Jellinek.

Mr. Jellinek, will you please come to the witness table?

STATEMENT OF STEVE JELLINEK, STAFF DIRECTOR, COUNCIL ON ENVIRONMENTAL QUALITY

Mr. JELLINEK. Thank you.

Mr. Chairman and members of the subcommittee:

I appreciate this opportunity to present the Council's views on the role of the National Environmental Policy Act in the new coastal energy impact program.

The National Environmental Policy Act of 1969 requires Federal agencies to prepare written environmental impact statements on "major Federal actions significantly affecting the quality of the human environment." Executive order 11514 directs the Council on Environmental Quality to issue guidelines to Federal agencies for complying with this requirement.

The purpose of an environmental impact statement is to inform government officials and the public at large of the environmental consequences of Federal programs.

An EIS must contain a thoroughgoing evaluation of a program's probable environmental impacts and an analysis of alternatives to the program and measures which can be taken to minimize its adverse effects.

While an environmental impact statement does not necessarily direct the outcome of agency decisionmaking, it must be considered by the responsible official before major Federal actions are taken.

Under the Council's guidelines, NEPA applies to Federal grant programs where the agency involved is authorized to guide the way in which funds will be spent at the local level.

In these circumstances, an agency is required to consider an environmental impact statement during its review and appraisal of grant applications.

As we understand NOAA's interpretation of the Coastal Zone Management Act, the Associate Administrator of NOAA is more than a disbursing agent when he approves funding requests under section 308(b). It is true, of course, that funds are set aside for the States according to a fixed statutory formula. But according to NOAA, the Associate Administrator is authorized to insure that a State's plan for the use of this money are consistent with the purposes of the act. The exercise of any such discretionary authority would be Federal action within the meaning of NEPA.

The cases decided under NEPA support this view. The courts have exempted general revenue sharing programs largely because no agency is authorized to oversee local planning for expenditure of these Federal funds. Where block grant programs have been involved, however, environmental impact statements have been required.

Apart from these purely legal considerations, the Council believes that environmental impact statements would prove valuable to the Office of Coastal Zone Management and to the States in the implementation of the coastal energy impact program.

Important environmental trdeoffs will of necessity be made as states prepare to accommodate the onshore impacts of oil drilling operations along the coast. The environmental data contained in an impact statement will provide a sound basis for evaluating these decisions and assist the Associate Administrator in his review of grant applications.

It bears emphasis that NEPA is a flexible statute and affords Federal agencies wide latitude in deciding how they will comply with its terms.

Indeed, the EIS requirement does not even apply unless NOAA first determines that a grant application is one significantly affecting the quality of the human environment. NOAA is also free to prepare

a single area-wide EIS to expedite a more time-consuming project-by-project analysis.

Other agencies are subject to NEPA in their administration of similar Federal grant programs. The Law Enforcement Assistance Administration complies with NEPA in making block grants to States under the Safe Streets Act of 1968, for example, and NEPA applies to the community development block grant program administered by the Department of Housing and Urban Development.

In closing, the Council on Environmental Quality sees no reason why NEPA should unnecessarily complicate or delay the distribution of Federal funds under section 308(b).

Indeed, we are confident that environmental impact statements will enhance the quality of NOAA's decisionmaking and promote the purposes of the Coastal Zone Management Act.

Accordingly, we have concluded that the Office of Coastal Zone Management must comply with NEPA and the EIS process in its administration of its coastal energy impact program.

This completes my formal testimony and I will be happy to answer your questions.

Thank you.

Mr. BREAUX. Thank you very much for your testimony. It does affect a very key area that we are talking about. It has been used somewhat to justify the decision that the funds are to remain in the general treasury rather than to be allocated to the States.

I do not think it is anyone's intent on this committee—I certainly know it is not the chairman's intent—that we are trying to do anything to get around the National Environmental Policy Act or the requirements of an environmental impact statement on any actions that could affect the environment.

On page 2 of your statement, you describe the job of the Associate Administrator as more than a disbursing agent when he approves funding requests, and you further state that this discretionary authority would constitute a Federal action.

You mean this adjustment by the Administrator is the major action triggering the EIS requirement?

Mr. JELLINEK. The authority of the Administrator to make the judgment, as we read the act, to disburse funds under the act consistently with the various purposes of the act does provide the kind of discretion that makes the program or that action subject to NEPA and potentially subject to the EIS.

Mr. BREAUX. There seems to be a similarity under this act and the grants under the General Revenue Sharing Act.

You support the granting of the funds under this program, but not the General Revenue Sharing Act? Why do you feel that way about one and not the other?

Mr. JELLINEK. I guess it boils down to the fact that we do not see that the General Revenue Sharing Act is similar to this type of act.

The key differences are that in revenue sharing local or State agencies do not make specific requests for specific programs or projects, and that there is no Federal agency which is specifically directed with overseeing the grants. There are no strings attached, so to speak, to the general revenue sharing, but as we read the Coastal Act and as

we understand NOAA's interpretation of it, none of those tests apply.

Mr. BREAUX. I understand what you are saying, I do not want to agree. I understand your argument, but I don't agree with it.

Suppose a State certified it would not spend funds for any specific projects until the responsible Federal agency had an opportunity to make a determination whether EIS or an environmental impact assessment has been issued?

A certification by the State could be made prior to disbursement of Federal grant funds and the Federal agency would still comply with its responsibilities to NEPA.

Would this be satisfactory to the Council on Environmental Quality?

Mr. JELLINEK. Would you explain that again?

Mr. BREAUX. I am talking about moneys being distributed to the State, remaining in the State treasury. When the State determines what they want to use it for, they would not be able to expend the money for those projects until they get an EIS, or environmental impact statement, from the appropriate agency.

The funds would be in a State. Before they are used for anything, they would have to have an EIS determination made.

Mr. JELLINEK. Well, I would be glad to think about that one some more and get back to the committee. I think the basic requirement under NEPA is that an environmental impact assessment or statement be done, where the action has major significant impacts, before the action takes place.

We are usually talking about the Federal action, though, not a State action.

That is the area of complexity that I would like to think about some more.

The Federal action, as NOAA interprets it, is its decision to disburse the proceeds of the grant and the question of whether the impact statement could come after that, but prior to the actual project or program being commenced is, I think, too complicated for me to give you a legal opinion on this morning.

Mr. BREAUX. I am not pressing for a legal opinion, or the affect of a legal opinion. We do not want to allow any projects that would adversely affect the environment.

If the money is not used until an environment impact statement is completed, it seems that the goal of NEPA would be satisfied.

Mr. JELLINEK. It certainly sounds within the spirit of NEPA. I would like to think more about the legal implications.

Mr. BREAUX. Mr. Treen?

Mr. TREEN. Yes, along the same lines, I am having some difficulty understanding the reason for applying NEPA. What is the major Federal action that triggers the application of NEPA in this situation? Is it the decision to allocate the funds to the States?

Is that the major Federal action?

Mr. JELLINEK. It would be the decision to dispurse funds to a project or program that the agency defines as major and that has potentially significant impacts on the environment.

Mr. TREEN. So the action applying the formula, determining how much a State gets and making that allocation to the State's account—

that, in itself, would not be a major Federal action requiring application of NEPA, would it?

Mr. JELLINEK. The allocation wouldn't; the disbursement would.

Mr. TREEN. Everything the Federal Government does to that point would not be a major Federal action under NEPA; is that correct?

Mr. JELLINEK. That is correct.

Mr. TREEN. So it is only the utilization of the funds to the extent to which the Federal action is involved in the use of funds by the State that is a Federal action; is that correct?

Mr. JELLINEK. The disbursement decision itself is a Federal action.

Mr. TREEN. That disbursement decision is, in turn, based upon judgments as to how the State intends to spend the money?

Mr. JELLINEK. As I understand the act and the regulations, the disbursement decision is based on a number of factors, a number of decisions that the associate administrator has to make with respect to a determination that the proposal would meet the purposes of the act.

Mr. TREEN. That the money would be spent in accordance with the act?

Mr. JELLINEK. That is true.

Mr. TREEN. That is true under general revenue sharing. There are certain restrictions on the use of the funds by the States. There are provisions that require repayment and so forth.

Mr. JELLINEK. My understanding of the General Revenue Sharing Act is that there is no front-end action. The treasurer does not make front-end determinations on how the funds will be spent. There are certain reporting requirements and accountability that are part of the general program, but the Treasury itself does not have to make a specific decision prior to disbursing the funds. Indeed, the Treasury may not know and usually doesn't know what the funds are going to be used for.

Mr. TREEN. Nor does this act require NOAA to make these predeterminations.

Isn't your opinion based actually on the interpretation of the statute by NOAA? I think that is what you are saying on page 2 of your statement?

Mr. JELLINEK. I think that is part of it.

Let me see if I can explain it a little bit more.

Mr. TREEN. They are somewhat relying upon your interpretation in order to justify their present interpretation; so it is just a circle.

Mr. JELLINEK. I am going to help them out a little bit.

Mr. TREEN. OK.

Mr. JELLINEK. If I may digress, if any of you read the book, "Gamemanship," that came out a few years ago, I have a feeling I am in the game called let's you and him fight.

Mr. TREEN. It is friendly.

Mr. JELLINEK. Yes.

Mr. TREEN. Thus far.

Mr. JELLINEK. As we see it and the courts interpret it, there are three ways in which the EIS does not apply to a Federal program. One is through a specific statutory exemption. The other is where the statute in question is directly conflicting with NEPA; and the third is the area in which the Administrator has absolutely no discretion.

In our view, in this case none of those tests have been met. It is not only a matter of our deferring to NOAA's interpretation of whether or not they have discretion, but our own reading of the act, as well as our reading of the legislative history. Indeed, a proposed NEPA exemption was taken out of one version of the bill. Finally, we cannot see any direct conflict between this act and NEPA.

If, for example, the act required that, instead of coming out with regulations in 270 days, NOAA had to disburse grants within 30 days of enactment, it would be difficult for the EIS requirement to apply.

NEPA has substantive objectives and goals, no matter what.

Mr. TREEN. Would you object if NOAA made a decision not to exercise judgments about the disbursal of funds prior to the use by the States? In other words, if NOAA took the position that we contend for that the formula should be applied and the money sent to the State on a nondiscretionary basis but, of course, with the right to enforce repayment if the funds are not used in accordance with the statute? If NOAA took that position, interpreted the act in that way, would you object?

Mr. JELLINEK. I think it would be a much closer call. We would have to look it over very carefully. I think though that even if NOAA tried to do that, we probably would object because of the way the act is constructed. I think it is a good bet that if it were challenged in court, NEPA would be found applicable. It is so similar to the law enforcement assistance administration program and the Safe Streets Act, and that has been tested in court; and this is a leading case in the application of NEPA to block-grant-type programs.

But we would have to look at it a lot more carefully if NOAA, the agency charged with interpreting the act, interpreted it as you suggest.

Mr. TREEN. Well, I have read excerpts of the court decision involving LEAA and I don't agree with your interpretation, but this is not the place for legal arguments. We have to change the act, apparently. I asked the American Law Division of the Congressional Research Service to compare the Coastal Zone formula grants with LEAA bloc grants and general revenue sharing, since both had been the subject of litigation, and I would like to request permission to insert in the record the study prepared by George Costello on October 12, 1976, of court decisions bearing on the issue of NEPA's applicability to formula grants.

Mr. BREAUX. Without objection, it will be made part of the record.

[The material follows:]

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., October 12, 1976.

To: Hon. David Treen, attention of Dennis Daugherty.
From: American Law Division.
Subject: Applicability of environmental impact statement requirement of National Environmental Policy Act to formula (or "automatic") grants under Coastal Zone Management Act Amendments of 1976.

The enclosed report is provided in response to your request for an analysis of the subject matter thereof.

GEORGE COSTELLO,
Legislative Attorney.

* * * * * * *

COURT DECISIONS BEARING ON THE ISSUE

Case law provides some assistance in analyzing NEPA's applicability to the CZMA automatic grant provisions. The United States Court of Appeals for the Fourth Circuit has held NEPA applicable to issuance of "block" grants by the Law Enforcement Assistance Administration (LEAA) pursuant to the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. Sec. 3701 *et seq.*, but inapplicable to disbursement of general revenue sharing Funds pursuant to the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. Sec. 1221 *et seq.* (hereinafter referred to as the Revenue-Sharing Act). Applicability to CZMA automatic grants of the factors emphasized by the court in distinguishing disbursement of general revenue sharing funds from approval of LEAA block grants is probably the best guide available for resolution for our issue.

In *Ely* v. *Velde*, 451 F.2d 1130 (1971), the Fourth Circuit held NEPA applicable to LEAA block grants to States, despite contentions on the part of LEAA that its function in making grants is "non-discretionary" under the applicable statute. The governing section directed that LEAA "shall make grants . . . to a State planning agency if such agency has on file with [LEAA] an approved comprehensive state plan . . ." 42 U.S.C. Sec. 3733. Also, LEAA was authorized to withhold payments only for violation of the statute, the regulations or the comprehensive plan (42 U.S.C. Sec. 3757) ; environmental factors were not among these grounds. The court rejected this proffered interpretation, and held NEPA and the Safe Streets Act to be compatible. Emphasizing NEPA's directive that agencies comply "to the fullest extent possible," the court determined that "(a)n LEAA requirement, in every comprehensive state plan and grant application, of enough information to assess the environmental and cultural impact of the proposed plan or grant, would not remotely approach the apprehended 'control over any police force or other law enforcement agency' " which the Act's policy was designed to prevent.

In 1974 the appeals court was again faced with the *Ely* litigation. Following the 1971 decision, Virginia had attempted to transfer that part of the block grant funds originally designated for the controversial correctional facility at Green Springs to other projects not as environmentally controversial, and to fund the Green Springs facility entirely with State money. The court held that Virginia could not do this, but instead would have to return that portion of the block grant allocated to the facility if it desired to avoid the NEPA process with respect to that facility. *Ely* v. *Velde*, 497 F.2d 252 (4th Cir. 1974).

The significant point is that the state is retaining federal funds that it obtained for the center on the premise that it would comply with federal environmental Acts, while at the same time it is planning to construct the center without compliance. It may well be that even if the state had never applied for funds for the center, its overall block grant would not have been diminished, because such grants are apportioned on the basis of population and the state could have proposed projects of a lower priority than the center to secure approval of equivalent funds. But this we believe is irrelevant. A block grant is not the same as unencumbered revenue sharing, for the grant comes with strings attached. The state voluntarily requested federal participation in the center and in this manner obtained construction funds conditioned upon compliance with NEPA and NHPA. The federal grant thus served national policy in two respect: it contributed to law enforcement in Virginia, and it encouraged preservation of environmental values at Green Springs. The state, we hold, is not entitled to use this money without fully observing both aspects of the national policy the grant was designed to promote. We conclude therefore that the district court erred in approving the state's decision to retain the funds, bypass NEPA and NHPA, and build the center. (497 F.2d at 256)

In the revenue sharing case, *Carolina Action* v. *Simon*, 522 F.2d 295 (1975), the Fourth Circuit merely affirmed *per curiam*, referring to the reasons expressed in District Judge Gordon's "excellent memorandum opinion." That decision is reported at 389 F. Supp. 1244 (M.D.N.C. 1975), and is the focus of our attention here.

The district court's decision in *Carolina Action* emphasized two factors. One was the substantial degree of deference to be accorded the Council on Environmental Quality's interpretation that Federal involvement and control over revenue sharing is an insufficient nexus to trigger the EIS requirement. The other was the court's own analysis of the distinctions between revenue sharing and

the LEAA block grant program held subject to NEPA in the *Ely* decisions. In this latter regard the court relied heavily on the *Ely* II analysis quoted above.

CEQ Guidelines on Preparation of Environmental Impact Statements contain the following interpretation quoted by the district court in *Carolina Action:*

"[NEPA applies to] new and continuing projects and program activities; . . . supported in whole or in part through Federal contracts, grants, subsidies, loans or other forms of funding assistance (except where such assistance is solely in the form of general revenue sharing funds . . . with no subsequent Federal agency control over the subsequent use of such funds. . . .

". . . The action causing the impact must also be one where there is sufficient Federal responsibility and control to constitute Federal action in contrast to cases where such Federal control and responsibility are not present, as, for example, when Federal funds are distributed in the form of general revenue sharing to be used by State and local governments." (40 C.F.R. Secs. 1500.5(a)(2); 1500.6(c).)

Relying on the court of appeals' interpretation of the LEAA block grant program, the district court found two basic distinctions in the revenue sharing program.

The block grant from the LEAA was generated by Virginia's request for federal participation as part of a comprehensive plan filed with the LEAA in conformance with the purposes and requirements of the Safe Streets Act. Under the Revenue Sharing Act, the funds are not disbursed as a consequence of a state's request and are not conditioned on the filing of a comprehensive plan but are disbursed almost automatically and with considerably less federal involvement. (389 F. Supp. at 1248)

Federal control over revenue funds was not found to be completely lacking, however. The court acknowledge that States are required by 31 U.S.C. Sec. 1241 to submit a report, prior to the receipt of funds, setting forth the amounts and purposes of intended expenditures, that funds are to be used only for priority purposes, that Federal monitoring of State compliance is provided for, and that noncompliance can result in repayment with penalty.

Despite this impressive array of federal involvement in the Revenue Sharing procedure, the Court is not persuaded that another significant and conspicious federal act, namely NEPA, should be read into the requirements for disbursement of revenue sharing funds. The requirements enumerated above relate exclusively to compliance with specifically designated priority uses and specifically named laws The planned use report does not relate to the amount of money to be received and, more importantly, does not entail federal approval of any specific project or confine the discretion of local governments as to the purposes for which the funds should be spent. (389 F. Supp. at 1249)

It would appear that the automatic grants required by section 308(b) of the CZMA amendments of 1976 are more similar in critical respects to the revenue sharing funds at issue in *Carolina Action* than to the LEAA block grant at issue in *Ely*. The court's language with respect to revenue sharing is, in one particular, not directly applicable to section 308(b) grants. In a general sense, the formula grants are "disbursed as a consequence of a State's request" insofar as section 308(g) conditions receipt of any financial assistance under the section on a state's having in effect an approved management program, having received a grant to develop one, or having been judged by the Secretary of Commerce to be making satisfactory progress toward developing one. However, the connection between any such "request" by the state and receipt of 308(b) funds is less immediate than the connection between a state's application for and receipt of an LEAA grant for correctional facilities. There is no counterpart in section 308 to the requirements in 42 U.S.C. § 3750a that an application for correctional facility grant funds be incorporated in the comprehensive state plan to be submitted for each fiscal year. In fact, there is no counterpart to the "application" the requirements of which are detailed in 42 U.S.C. § 3750b. Unlike the comprehensive plan submitted to LEAA annually, a Coastal Zone Management program is approved but once and does not contain any description of a state's plans for the use of the assistance in question here, energy impact assistance. In other respects, what Federal involvement is called for with respect to the automatic grants is quite similar to that summarized by the court for revenue sharing. The requirements or authorizations of Federal involvement seem limited. Prior to disbursing the grants, the Secretary must require each State to provide assurance that it would be able to repay the grant with penalty (308(b)(5), may

require a State to provide assurances that it will use the grant for priority purposes (308(b)(5)), and must collect enough information concerning adjacent OCS acreage, production, etc., to be able to calculate accurately the formula for each State (308(b)(3)(A)). Except for the limited use of information to calculate the formula, it could also be said of the required reports that they "do not relate to the amount of money to be received, and, more importantly, [do] not entail federal approval of any specific project or confine the discretion of local governments as to the purposes for which the funds should be spent." In this latter regard, of course, the priority purposes listed in both statutes do to some extent confine the discretion of recipient governments; the main point is that information is provided to facilitate a determination of whether there has been compliance, and not to make issuance of the grant itself, or of specific parts thereof, subject to review.

Counter arguments can of course be made. For example, *Ely* I might be relied on to suggest that the CZM office might require in addition to the information it is expressly authorized to collect, "enough information to assess the environmental . . . impact" of a State's proposed use of automatic grant money. The argument would be stronger, of course, if regulations are promulgated exercising the discretionary authority of paragraph (5) to determine that a State "*will* expend or commit grants . . . in accordance with the purposes set forth in paragraph (4)." In the event that the information obtained revealed that a grant was to be used for purposes specified in subparagraph (4)(B), to provide new or improved public facilities, or subparagraph (4)(C), to prevent loss of an environmental or recreational resource, it is possible that an EOS could be required. Such an interpretation would not be inconsistent with our analysis above of Senate consideration of the issue, indicating an understanding by some Senators that the EIS issue would be resolved on a case-by-case basis. Arguably, such an interpretation would also serve to effectuate NEPA's command that agencies comply with the EIS requirement "to the fullest extent possible." It should be noted, however, that a holding that the automatic grant provision is similar enough to revenue sharing to bring it within the principles of *Carolina Action* would necessarily preclude sole reliance on the "to the fullest extent possible" language to compel the agency to prepare an EIS. Such a holding would, in effect, interpret the CZMA provision in such a way that it would not be "possible" to superimpose an EIS requirement without damaging the policy limiting Federal control over the grants.

GEORGE COSTELLO,
Legislative Attorney.

Mr. TREEN. Mr. Chairman, I have no further questions. Apparently it is CEQ's view that we have to change the act to avoid predisbursement review through NEPA.

Mr. BREAUX. Mr. Jellinek, one of the points I have is this:

Are you aware of the debate that took place in the Senate between Senator Jackson and Senator Hollings regarding the question of whether the disbursement of the funds was to be considered a major Federal action, whether it was actual disbursement, or what was done to the funds after they were disbursed?

Mr. JELLINEK. I have not read the debate, but I am aware that the amendment in the Senate was taken out.

Mr. BREAUX. I would suggest—and I don't have it before me, which is the reason I won't read it to you directly—but I suggest that you read it.

I suggest in writing your legal opinion that you look at that before you come back with a response to the committee on that particular point. I think it is important. It is addressed very specifically, and whether the disbursement of the funds constitutes——

Mr. JELLINEK. You are talking about the other point on which I agreed to come back with your proposal?

Mr. BREAUX. Yes.

Mr. KITSOS. If NOAA would interpret 308(b) in such a way that the awarding of the money to the State is automatic, like revenue sharing with no discretion, are you saying you are still unsure whether NEPA would apply at this point? You calculate the data and send the money to States and they put it in escrow.

If NOAA were to interpret it in this way, or if Congress were to change the statute, are you saying you are still uncertain whether NEPA would apply during that sharing? It seems very much like general revenue sharing.

Mr. JELLINEK. It depends on whatever else in the act you would change. If you make the act just like revenue sharing and take out some of the apparent limitations and requirements that are in there now, sure, I would agree with you.

If the act is roughly similar to what it is now. but you clarify that one point, NEPA may still apply. NEPA may be overriding. We don't always agree with our sister agencies in our executive branch, so that is why I was avoiding an answer right here; but it would be harder for us to come to that conclusion.

However, it may not be hard for a judge to come to that conclusion.

Mr. KITSOS. Do you support Mr. Knecht's statement on pages 9 and 10 of his testimony that, in his judgment, NEPA also requires advance review of a proposal to use formula-grant proceeds?

In other words, is NEPA another argument in support of NOAA's interpretation of that problem?

Mr. JELLINEK. Yes; I can read something to you. This is part of a judge's opinion in a case which held that the Food and Drug Administration, which has a very narrow statutory basis on which to make its determination about the health effects of food additives and drugs. This case was heard in the U.S. District Court in the District of Columbia. The decision held that NEPA did apply and FDA had to consider environmental factors in its decisionmaking.

[The decision in the U.S. District Court referred to follows:]

EDF VERSUS MATHEWS, 8 ERC 1877 (1976)

NEPA does not supersede other statutory duties, but, to the extent that it is reconcilable with those duties, it supplements them. Full compliance with its requirements cannot be avoided unless such compliance directly conflicts with other existing statutory duties . . .

This is not to say that NEPA requires FDA's substantive decisions to favor environmental protection over other relevant factors. Rather, it means that NEPA requires FDA to consider environmental factors in its decisionmaking process and supplements its existing authority to permit it to act on those considerations. It permits FDA to base a decision upon environmental factors, when balanced with other relevant considerations.

Mr. KITSOS. But the question is, in your testimony you said NEPA doesn't apply. Is that a judgment based on a reading of the statute or a reading of NOAA's interpretation?

Mr. JELLINEK. A combination.

Mr. KITSOS. If you were to read the statute by itself, would you come to the same conclusion?

Mr. BREAUX. Let me interrupt and save you answering that question. What we are asking is for a legal opinion from the council on environmental quality on this point in writing after you look at the

statute, history of the debate on the floor in the House and Senate, and anything else you need to refer to.

Mr. JELLINEK. OK.

Mr. BREAUX. I think it is very important.

One of the things that the Office of Coastal Zone Management mentioned is that is one of the reasons why the funds stay in the general treasury.

Mr. JELLINEK. I will be happy to do that, Mr. Chairman.

[The legal opinion from the CEQ follows:]

EXECUTIVE OFFICE OF THE PRESIDENT,
COUNCIL ON ENVIRONMENTAL QUALITY,
Washington, D.C., January 10, 1977.

Hon. JOHN B. BREAUX,
Chairman, Subcommittee on Oceanography, Committee on Merchant Marine and Fisheries, U.S. House of Representatives, Longworth House Office Building, Washington, D.C.

DEAR CONGRESSMAN BREAUX: On December 13, 1976 you wrote Mr. Steve Jellinek, Staff Director of the Council on Environmental Quality, requesting the Council's opinion on the application of the National Environmental Policy Act to the Coastal Energy Impact Program ("CEIP") currently being developed by the Office of Coastal Zone Management. Your letter followed oversight hearings held by the Subcommittee on Oceanography at which Mr. Jellinek testified that CEIP, and in particular Section 308(b) "formula grants" under this program, are subject to the requirements of NEPA.

Before turning to the specific questions raised in your letter, we wish to emphasize that no interpretation of NEPA will resolve the apparent disagreement which now exists between some members of the Subcommittee and the Office of Coastal Zone Management. Whether, for example, formula grants are "rather automatic" as you contend, or subject to broader controls under Section 308 as OCZM maintains, depends on how the Coastal Act itself is construed.

As you know, the Council on Environmental Quality was not principally involved in the drafting of Section 308 or the legislative deliberations which preceded its enactment. Accordingly, we are not in a position to settle this disagreement over whta the language of Section 308 was actually intended to mean.

In responding to the questions raised in your letter, therefore, our analysis initially reflects OCZM's interpretation of Section 308, as codified in its "Interim-Final Regulations for Financial Assistance to Coastal States," 42 Fed. Reg. 1163 (Jan. 5, 1977) ("CEIP Regulations"). We then address the issues on which a contrary legal conclusion might be reached under the view of Section 308 taken by some members of the Subcommittee.

Your letter poses two basic questions: First, does the disbursement of grant proceeds under Section 308(b) represent "major Federal action" within the meaning of Section 102(2)(C) of NEPA? (Question #2). Second, assuming that Section 102(2) (C) applies to the formula grant program, is there any bar to the immediate disbursement of proceeds to coastal states so long as the required environmental review is conducted prior to the actual commitment of these funds to any particular activity or construction project? We have concluded that the formula grant program does involve "major Federal action" under Section 102 (2)(C) of NEPA but that NEPA presents no bar to the immediate disbursement of grant proceeds to the states, subject to the qualifications explained below.

As we testified, whether the formula grant program involves "major Federal action" depends in large measure on the amount of discretion exercised by OCZM over disbursement of grant proceeds. According to the Council's "Guidelines for the Preparation of Environmental Impact Statements," 38 Fed. Reg. 20550 (August 1, 1973) ("CEQ Guidelines"), "sufficient Federal control and responsibility" must be present before the requirement of an environmental impact statement is triggered. Section 1500.6(c).

As you know, OCZM asserts the authority to ensure that a state's plans for the use of grant proceeds are consistent generally with the purposes of the Coastal Zone Management Act, and in particular, with the purposes set forth in

Section 208(b). For example, Section 931.48(c)(2) of the CEIP Regulations requires the Associate Administrator to verify a state's certifications submitted under Section 931.48(a) that

> grant proceeds will be used "in a manner that is compatible with the State's developing, or consistent with the State's approved, coastal zone management program" (Section 931.48(a)(2)); and that
>
> the public facilities for which the grant proceeds will be used are "required either as a result of new or expanded coastal energy activity or as a direct result of new or expanded OCS energy activity" (Section 931.48(a)(4)).

In making these determinations, and others required by the CEIP Regulations, the Associate Administrator will be required to exercise a measure of Federal control and responsibility sufficient to render the formula grant program "Federal action" under Section 102(2)(C) of NEPA. Accordingly, we have concluded that the grant proceeds disbursed under Section 208(b) are subject to the EIS process.

This does not, of course, mean that an environmental impact statement is required for every formula grant made by OCZM. Only those grants which are ones "significantly affecting the quality of the human environment," (NEPA Section 102(2)(C)), will necessitate the preparation of an EIS. It does mean, however, that OCZM must make this threshold determination with respect to each activity or construction project for which assistance is sought under Section 308(b).

We recognize that some members of the Subcommittee do not subscribe to OCZM's view of the formula grant program. If CEIP were identical to a general revenue sharing program, Section 102(2)(C) of NEPA would not apply.[1] CEQ Guidelines, Section 1500.6 (c). Whether NEPA would apply under other interpretations of Section 308(b)—such as your view that grants are "disbursed rather automatically—is not clear. Suffice it to say that there is a strong presumption in favor of Section 102(2)(C)'s application to major Federal programs such as this one, and exemptions from the EIS process have rarely been granted by the courts. Unless OCZM acted solely as a disbursing agent for this program, and possessed no authority whatever to make judgments about the eligibility of coastal states to receive formula grants or the adequacy of state plans for the use of grant proceeds, Section 102(2)(C) of NEPA would in all probability apply.

You have also asked whether NEPA presents any bar to the disbursement of grant proceeds to coastal states prior to the completion of the EIS process. (Questions #1 and #3.) There is nothing in NEPA which bears on the issue of when grant proceeds actually change hands under Section 308(b), except to the extent that the transfer of funds might prejudice OCZM's environmental review under NEPA or foreclose its options in evaluating state proposals for the use of grant proceeds. In our view, both OCZM's plans for the interim retention of Federal funds in the U.S. Treasury and your proposal to transfer funds immediately to the states could be acceptable under NEPA. The choice between these two procedures depends entirely on how Section 308 is construed and administered.

We wish to emphasize that the EIS process required by NEPA must be completed *before* and not after OCZM takes "major Federal action"—in this case, before it makes the discretionary determinations required by Section 931.48 and other sections of the CEIP Regulations. This, of course, ensures that requisitions for grant proceeds will be evaluated in the context of their environmental impacts and that OCZM will be in a position to address these issues when it reviews proposed activities and construction projects for compliance with the Coastal Act. Accordingly, if OCZM makes these determinations before disbursing grant proceeds to the states, the EIS process must also be completed at that time. On the other hand, if OCZM were to defer these determinations under Section 308(b) until after the states receive grant proceeds, we see no reason why environmental review under Section 102(2)(C) could not be similarly deferred until the states sought approval to draw on or expend disbursed funds.

Please feel free to contact the Council if we can be of further assistance.

Sincerely,

JOHN A. BUSTERUD, *Chairman.*

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[1] It should be noted that Section 101 of NEPA and the remainder of Section 102(2) apply to all Federal agencies evenn where "major Federal action" is not involved.

Mr. TREEN. Some agencies have established thresholds, dollar thresholds, in determining if an action is major. If a dollar threshold were adopted here and the State then gave an estimate below that cost, would that satisfy the requirement of the regulations that the states furnish the associate administrator sufficient information to determine whether an environmental impact statement was needed?

I do not know if you are familiar with it; but maybe Ms. Murphy could make it available to you. It is on page 57.

The state must, in its requisition "Include factual information necessary to evaluate the project's environmental impacts in detail sufficient to enable the associate administrator to determine whether an environmental impact statement will be required under NEPA."

If a dollar threshold were established, and the State, furnished the associate administrator nothing but an estimate on the project which would fall below that threshold, would there be any problems with respect to NEPA?

Mr. JELLINEK. I think this point gets to what I said earlier about flexibility of EIS requirements and the statute.

I would expect relatively few projects funded would require the full environmental impact statement process and, frankly, it is within the authority of the Coastal Zone Management Office to set thresholds, dollar thresholds, or other kinds of thresholds for projects that would generally trigger an impact statement or would not trigger an impact statement.

Mr. TREEN. Is there any consideration to the dollar threshold in your guidelines?

Mr. KNECHT. Yes, Mr. Treen; we would examine carefully what other agencies are doing that operate similar programs and try to benefit from their experience and simplify the processes involved to an absolute minimum. The answer is yes; consideration is being given.

Mr. TREEN. Thank you.

Mr. BREAUX. Thank you very much, Steve. We appreciate your testimony.

Mr. JELLINEK. Thank you, Mr. Chairman.

Mr. BREAUX. The final panel is the National Governors Conference, Mr. Ed Helminsky, energy program director, and Mr. Wayne Brown, staff assistant, Subcommittee on Impact Assistance.

Please proceed, and identify yourself first.

STATEMENT OF ED HELMINSKY, ENERGY PROGRAM DIRECTOR, NATIONAL GOVERNORS CONFERENCE, AND WAYNE BROWN, STAFF ASSISTANT, SUBCOMMITTEE ON IMPACT ASSISTANCE

Mr. HELMINSKY. I am Ed Helminsky, energy program director of the National Governors Conference and I have with me Mr. Wayne Brown, who is the staff assistant, Subcommittee on Impact Assistance of the National Governors Conference.

Mr. Wayne Brown is providing staff assistance to us with regard to our energy impact assistance effort.

I would like to request permission to read into the record a statement to be delivered by the Governor of Alaska via frozen telephone lines later on in the proceedings.

Mr. BREAUX. This is separate from the statement which you have here?

Mr. HELMINSKY. Yes.

Mr. BREAUX. Off the record.

[Discussion off the record.]

Mr. BREAUX. Without objection, the Governor's statement is submitted.

[The document referred to follows:]

STATE OF ALASKA,
OFFICE OF THE GOVERNOR,
Juneau, December 9, 1976.

Hon. JOHN BREAUX,
Chairman, Subcommittee on Oceanography, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN BREAUX: As Governor of the coastal state most directly and massively affected by the federal OCS lease program—9 frontier area lease sales scheduled in 4 years—I am thankful for the attention that the Subcommittee on Oceanography of the Committee on Merchant Marine and Fisheries is directing to the status of the Coastal Energy Impact Program (CEIP) authorized under Section 308 of the Coastal Zone Management Act amendments of 1976. I appreciate this opportunity to present to Committee members our State's concerns and perceptions of the progress being made by the Office of Coastal Zone Management toward implementation of the CEIP.

We believe that Congress intended to create under Section 308 a timely, equitable and administratively expedient program of compensation to states adversely affected environmentally or fiscally by the federal OCS program. The State of Alaska and its local governments are urgently concerned to see an effective program of coastal energy impact assistance to the states in operation at the earliest possible moment. We are already planning for and dealing with the impact of recent and near future federal OCS leases.

Thus, when the draft CEIP regulations were first published in the Federal Register on October 22, 1976, we reacted with dismay, as did nearly all the coastal states, at their complexity and restrictive tenor. The regulations seemed drafted to defeat the objectives of the law—expedient and equitable aid. Nevertheless, the immediate needs of our State's communities did not allow us to dismiss or delay indefinitely implementation of the CEIP, before we had exhausted all means of achieving a workable and fair set of administrative regulations. We did not wish to risk the jeopardy of an infeasible CEIP while there was no other source of impact aid authorized under law and no sure alternative on the horizon.

Therefore, we decided, in cooperation with many other states and the National Governors' Conference, to engage with the Office of Coastal Management in an intense effort to recast the regulations into workable form. In this process, our State has found the Office of Coastal Zone Management exceptionally accessible and attentive to some of the many criticisms and constructive recommendations we and other states have presented to them. Substantial improvements have been made on many features of the regulations. We are encouraged to continue to try to work out the remaining differences.

Nevertheless, serious disagreement remains on a critical issue concerning the Section 308(d)(1) loans and repayment assistance. This issue lies at the heart of the CEIP for our State and, I believe, for many other states. The most recent revised draft of the regulations simply does not achieve Congress' purpose of protecting State and local governments against the risk of default or inequitable fiscal burdens due to coastal energy projects. No responsible local government can borrow when repayment assistance, if it proves needed, is available only at the mercy or whim of the federal lender. Such borrowing, and the inherent threat of default, would imperil the financial standing of a local government more than it would assist. The regulations must guarantee repayment assistance automatically and without delay when warranted and not at the discretion of the lending federal agency. We have submitted recommended changes to accomplish this and cannot support regulations that do not clearly incorporate this guarantee concept.

For the present, we believe that it is premature to make a final judgment or seek a long or indefinite delay in completing the regulations, especially since a final version of the regulations may soon be available. Then, we feel we will all be better able to conclude whether the CEIP is finally a useful program or so irretrievably flawed as to need radical overhaul or replacement prior to letting the regulations pass into law.

A final question that I believe we share with all coastal states concerns the intentions of the Administration with regard to the first year funding level for the CEIP. We believe that full funding for all parts of the CEIP is essential to an effective and successful program. The executive budget should reffect a commitment to seek the full supplemental appropriation authorized by Congress and we urge the Subcommittee to seek assurances that this will be the case. An unfunded program is no more effective than an unworkable program.

Looking beyond the fate of the CEIP, I want to affirm to the Subcommittee our conviction that the CEIP is, at best, only a partial solution to the fiscal inequities associated with the OCS program and similar federally sponosred major energy development programs in coastal areas. The CEIP should be seen as the first step toward a broader, balanced set of energy impact aids. We believe that the problems shared by impacted states would be better addressed by a direct revenue sharing approach that provided funds immediately and as a matter of right whenever federally sponsored developments imposed serious fiscal or environmental burdens upon the states. In our judgment, the CEIP can best serve as a fall-back program to insure states against the possibility that their unrecoverable costs might outrun the revenues provided under a basic revenue-sharing formula.

Also, as we have in the past, the State of Alaska will continue to advocate modernization of the Outer Continental Shelf Lands Act and other improved environmental and energy resource management legislation as an essential part of a sound overall national energy development program.

Again, I want to thank you for this opportunity to present to the Subcommittee the views of the State of Alaska on the status of he CEIP. I believe and hope that the Subcommittee's attentiveness to the CEIP will add constructive impetus to the effort to shape the administration of the program to comport with Congressional intent and the needs of the states and their city and regional governments.

Sincerely,

JAY S. HAMMOND, *Governor.*

Mr. HELMINSKY. Mr. Chairman and honorable members of the subcommittee, I am here today at the request of your distinguished subcommittee to testify in my capacity as director of energy programs for the National Governors' Conference, an association of the Governors of the 50 States and four territories.

The National Governors' Conference has sought to assist the State and the Office of Coastal Zone Management, OCZM, by bringing the States together and providing a forum for discussion, review, modification, and development of recommendations concerning the proposed regulations for financial assistance to coastal States, coastal energy impact program which appeared in the Friday, October 22, 1976, issue of the Federal Register.

Because of the limited time for response to the proposed regulations, the National Governors' Conference initially convened a small task force of those States who were vitally interested in the coastal energy impact program.

Participating in that first meeting on October 25 and 26 were representatives of the States of Alaska, Texas, Louisiana, Colorado, and New Jersey.

At the following meeting, on November 18 and 19, also in Washington, additional States were brought into the process and a joint session was also held with county representatives in order to discuss

the intrastate allocation process. States which were represented included Maine, Massachusetts, New Jersey, Maryland, Louisiana, Texas, and Alaska.

Throughout the past months we have been in conversation with other States through telephone and receiving telephonic communications.

Following the second meeting, an informational package on the proposed regulations was forwarded by NGC to 40 States. Samples of the package have been made available to the subcommittee. Other coastal States have been in contact with the NGC energy program over the telephone and through correspondence.

Initially, the States voiced a considerable amount of confusion about, and criticism of, the proposed regulations because of: (1) their complexity; (2) the ambiguities; (3) uses of definitions which were not consistent with the act; (4) restrictions on funding which were not included in the act; and, (5) the short review period.

The concerns expressed by the states were transmitted to OCZM. We are very pleased that, after consultation between the States and NGC, the OCZM has made the majority of changes which were recommended by the States.

We compliment the OCZM on its openness and its receptivity to changes as presented by the various States and as illustrated by the succeeding draft regulations issued on November 29 and December 6, and the extension of the comment period to December 14, 1976.

We are here today to share with you the individual State views transmitted to us regarding these regulations. It does not purport to be unified policy or requests for new legislation.

At the second meeting of the States, it was decided that we should focus our energies on seeking the following actions in order to change seven major areas.

These were the points raised among the States, but they are not necessarily the major concerns of all coastal States.

We have not tried to obtain a concensus on these points because they have differing significance to various States. We have tried to determine and articulate the concerns of several significantly impacted States in order to transmit their views to the OCZM.

First, it was recommended that action be taken to: (1) eliminate the project-by-project requisition procedure for formula grants; (2) clarify the States' requirements for internalization of cost and the definition of unavoidable loss; (3) clarify the regulation concerning the determination of when credit assistance was considered to be "unavailable"; (4) clarify the regulations in order to insure that States and units of local government are eligible for a loan or bond guarantee and a grant for public facilities and services when it is known at the time of application, that revenues generated as a result of the coastal energy activity will not be sufficient to cover the cost of the needed facilities or services; (5) clarify the repayment provisions in order to insure that (1) States and local units of government understand the terms and (2) that grants are made automatically when the State or local unit of government demonstrates an inability to meet its repayment obligations; (6) Simplify the loan and bond guarantee program regulations; and (7) insure that the regulations on the intra-

state process provide maximum control, discretion, and flexibility to the States in the design of their respective allocation processes.

I would like to add that what we recommend has sometimes been viewed in direct conflict with the counties, but we believe we have provided language to OCZM that involves and does something with respect to the decisionmaking problem.

This morning I would like to concentrate my comments on three of these areas where the States believe that the regulations "strayed" from the congressional intent as embodied in the act.

One: Section 308(b): formula grants.

As mentioned earlier, one of the major concerns expressed by the States is the requisition procedure specified in the proposed regulations.

These procedures require a project-by-project review by the OCZM. The impact of this requirement is that it would result in (1) delays in the use of moneys; (2) additional administrative cost to States and units of local government; and (3) a significant reduction in the control and discretion afforded to States and local units of government.

The participating States have no objection to signing assurances that a State has a process for, and will, return to the United States an amount equal to the grant received, should the State not expend the funds in accordance with the act.

The States do, however, object to the project-by-project requisition procedure for 308(b) formula grants, and it is their understanding of the act and the legislative history that such a process was not the intention of Congress.

Two: Section 308(f). Repayment assistance.

The second major area relates to the repayment assistance section. Prudent public management requires sound planning based upon fiscal certainty—governments must remain accountable to their citizenry.

Accountability means full disclosure as to the terms of public debt obligations. The coastal energy impact program as embodied in the Coastal Zone Management Act Amendments of 1976 provides for sound fiscal management—the proposed regulations designed to implement it fall short of the mark. The credit assistance portion of the CEIP is the major mechanism to provide front-end financing for public facilities and services required as a result of coastal energy activity.

The purpose of utilizing credit assistance, as opposed to outright grants, is the avoidance of possible windfalls.

The corresponding disadvantage, however, is the potential for wipeouts; or circumstances where future revenues generated by new coastal zone energy activity are not sufficient to repay debts contracted for through credit assistance.

The CEIP recognizes this weakness and compensates by providing repayment assistance. Such repayment assistance is a safety valve to help prevent wipeouts.

It shifts the risks associated with planned development back to the Federal Government. Credit assistance coupled with repayment assistance must be viewed as a suitable approach which minimizes the potential for both windfalls and wipeouts.

It is important to note that credit assistance and repayment assistance should be treated as integral parts of the same whole, as one system.

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It is the States' understanding that repayment assistance was envisioned by the drafters of the CEIP to be objectively predicable not discretionary.

States and local communities incurring debt under the CEIP program to prepare for impacts from the development of Federal OCS revenues and other energy activities were not supposed to bear the risks of such development.

Rather, they establish a complicated procedure wherein the Administrator is empowered to award repayment assistance at his/her discretion, with no provision to insure procedural due process or fiscal certainty.

Communities contracting debt must go on faith, hoping that the Administrator will heed their call should they find themselves in a fiscal crisis.

No responsible program should require communities to incur large public debts without providing a clear and binding agreement as to the terms and conditions under which repayment assistance shall be granted.

We believe the proposed regulations, while sympathetic to this end, fail to provide the kind of fiscal certainty intended by the legislation and mandated by the dictates of sound fiscal management public accountability. Therefore, we suggest the following:

One: That the regulations be redrafted to provide specifically for automatic credit assistance; and

Two: That procedures be established which will insure procedural due process, such as mandatory arbitration of disputes where there is disagreement as to the existence of conditions which trigger automatic repayment assistance.

Three: Our third major point is contained in section 308(g)(2): interstate allocation of financial assistance.

The third major area and one which OCZM requested assistance from the National Governors' Conference and the National Association of Counties concerns the intrastate allocation of financial assistance.

In surveying the attitudes and interests of the coastal States, there was a general opinion reflected that the rules and regulations concerning the intrastate allocation process should provide for maximum discretion and control on the part of the States.

The general reasoning was that if a State were to administer the program, it should have the flexibility and control to tailor a system to meet the special needs and circumstances of the respective State.

The State representatives believe that the environmental resources, the citizen attitudes and preferences, the governmental organizations, authority, and capabilities and the magnitude of expected development all are sufficiently different to warrant maximum control and discretion at the State level.

Because of these differences, the States believe that the process of assigning priorities and administering funds should be designed by each respective State. Without this authority, the States would become merely another layer of Federal Government.

The difficulty and undesirability of the regulations specifying a detailed intrastate allocation process is compounded by the fact that CEIP is a combination loan, bond guarantee, automatic formula grant,

and categorical grant assistance program. Each form of assistance has different eligibility criteria and different application and requisition procedures.

The different types of assistance, combined with the unique situation in each of the respective States form the basis for the conclusion that the regulations relating to the intrastate allocation process should be broad and general with maximum control and discretion afforded to the States.

This conclusion is supported in the existing regulations through the provision that planning funds can be utilized by a State to design its intrastate allocation process—931.33(a)(2)(IV), purpose. More important, a stated overall objective of the CEIP is: "To provide assistance in a manner that is administratively simple and that permits the State and local governments involved a high degree of control and discretion"—931(c), overall objective.

A specific concern, as the regulations now read, is the requirement in section 931.114 review and appeal which specifies that the Associate Administrator will review the States intrastate allocation of section 308 assistance to determine whether the process resulted in a distribution of assistance which, to the maximum extent possible and practicable, is proportional to need.

This review would put the OCZM in the position of second guessing the States with the potential penalty of withheld assistance.

I think this refers to a question that was brought up earlier by Mr. Treen.

The Associate Administrator must initially approve the intrastate allocation process to be used by a State. The States have no objection to this. However, in reviewing a State program to determine if funds should be withheld, the Associate Administrator should review the record solely to determine whether or not the State complied with its approved process.

If, in the review, it is determined that the approved process did not result in an allocation which is proportional to need, then the States allocation process may be changed for the future allocation of CEIP assistance.

However, because the process was initially approved by the Associate Administrator, and as long as the State complies with its approved process, the State should not be required to reallocate the previous year's assistance in proportion to needs as identified in the annual review.

The second specific concern with the intrastate allocation process relates to the appeal procedures as prescribed in the November 29 and December 6 draft regulation.

On behalf of all the States we were in contact with, the States agreed that there should not be an appeal process which would encourage local units of government to go around the State government and appeal directly to the Federal Government, nor should the regulations dictate establishment of new State administrative processes. The draft regulations issued on November 29 and December 6 regulations by the OCZM provide for an appeal procedure which is totally unacceptable to the States and generally considered by the States to be extralegal, but at least the language is more in line with what could be achieved.

We feel that the appeals process will result in counties—this is very important as far as the States are concerned, even though the procedure is to appeal on the process any county not getting its allocated amount of the fund say the process was at fault and delay the funding of moneys to the States and, therefore, to local counties and local governments. That would not delay funding to that specific county, but to all the counties and units of government in that State.

Those are essentially my comments with regard to the SEIP.

In addition to the specific comments that I have made with respect to the implementation of the Coastal Zone Management Act Amendments, I would like to comment on energy impact assistance programs generally.

In reviewing the CZM program, efforts by the Department of the Interior to implement the BLM Organic Act, the administration's generic impact assistance bill, H.R. 11792, as well as drafts of the synthetic fuels bill, H.R. 12112, which was rejected in a procedural vote in the House, it is clear that a number of themes remain constant throughout these pieces of legislation and programs.

Specifically, the programs designed to provide energy impact assistance are divided from the Federal decisions which actually precipitate the impact.

The responsibility of a Federal official to engage in a leasing program or initiating a Federal development program is in no way tied to a responsibility to deal with the impacts caused by that program.

Until some system is constructed which will insure the initiation of Federal programs to deal with the impact problems at the time the resource is committed, we will continue to talk about energy impact problems in their abstract.

Second, the philosophical basis for most Federal energy impact assistance programs carries a notion that the additional growth generated by any particular development will ultimately be able to pay for itself.

Given this philosophy, the Administration's approach is almost entirely in the area of loans and loan guarantees.

This means that the entire impact assistance program pivots on the ability to convince local communities to further indebt themselves on the faith that either the new growth will pay for itself or Federal officials who have this discretion will forgive such loans or loan guarantees.

NGC policy observed that: "Different States have different legal provisions regarding incurring debt, pledging revenues or credit assistance in passing through funds.

These should be respected as far as possible in providing assistance for amelioration. Furthermore, present economic development programs should not be sacrificed or diminished in addressing the new impacts caused by accelerated energy development."

This is attached as appendix I in the National Governors' Conference impact assistance policy position as referenced under National Energy Policy, see page 32.

[The material referred to follows:]

APPENDIX I

General programs in the public interest may produce hardships for one region or sector of society. General programs in the public interest may burden one

group while benefiting others. Compensation should be provided to ensure that benefits and burdens are equitably distributed.

Regional differences produce regional viewpoints. Respect for diversity and a willingness to compromise remain crucial ingredients of an effective national energy policy. The nation's Governors have demonstrated that they can resolve regional differences to serve the national interest.

State laws relative to the protection of the environment, the siting of energy-related facilities, land use planning, and the use and regulation of intrastate water rights should not be preempted by federal laws, rules or regulations.

D. 2—NATIONAL ENERGY POLICY

The nature of the present economy coupled with growing problems of energy availability and higher prices makes strong, coordinated and clear action necessary by all governmental levels and individuals to develop a national energy policy. The nation's energy policy that finally emerges should be truly national in scope and developed and implemented in partnership with the States. Full and early opportunity for public review and comment should be afforded as new policies are formulated or when changes to existing policy are proposed.

The people of this country are receptive and responsive when the problems are clearly described and when realistic, achievable objectives are set forth. The fractionalization of the executive and legislative branches of the federal government impedes effective consideration and enunciation of a coherent energy policy. Both branches should more clearly define the missions of various components and reduce the overlaps that confuse and frustrate purposeful action.

A conservation program of massive proportions must be the central focus of the nation's short-range energy management program. The federal government has a responsibility for necessary national leadership in the accomplishment of such a program on a largely voluntary basis. To date, there is no such over-all integrated effort. Consequently, those who have concluded that voluntary citizen actions have been either too slow or inadequate fail to recognize that there is no real program in place. Rather, there is only the concept, not an over-all integrated plan. A comprehensive conservation plan must be adopted quickly. It should set forth specific, understandable and measurable goals for collective and individual actions. It should be coordinated through all levels of government and should be amply financed and staffed.

A properly constructed program will build on existing public and private elements. It will recognize the key factor of automotive efficiency and use. It will support positive measures and incentives to accomplish its objectives. It will also include the following ingredients:

1. Accelerated and stronger standards for automobiles, including gasoline usage requirements and taxes and other disincentives for inefficient vehicles. While this element would mandate changes for a prime user of petroleum resources, it would also provide an economic stimulus to the automotive industry after a period of redesign and adjustment.
2. A more vigorous enforcement of the 55 mile per hour speed limit.
3. Stronger programs for public transportation, including more federal commitment.
4. Tax and other incentives to encourage conservation.
5. Better and more intensive educational efforts on a national scale with necessary adaptations to differing state and local requirements.
6. Accelerated state energy management programs with federal financial support.
7. Weatherization of buildings.

These initiatives should be prepared and implemented quickly. Close monitoring of the program will be necessary to determine if basic objectives are being met.

If additional measures are necessary to meet these objectives, then the price mechanism or allocation programs could be brought into play. Prices will necessarily rise as a result of efforts to increase supplies and discourage wasteful use. Such price increases should be phased to avoid abrupt impacts and allow time for adjustment.

Tied to this approach should be a standby allocation program if progress toward meeting reduced usage goals is inadequate. If the volumetric allocation process is used, the program should conform to previously prepared plans and should provide the flexibility necessary to minimize inequities or unfair burdens

on regions or individual States. Allocation management plans should involve the States. An allocation program should be implemented only if the foregoing elements fail.

This comprehensive plan, based on immediate broad-gauged conservation, has the most promise of quick effective action, citizen receptivity and response, and achievement of goals. With a backup program of price-supported usage adjustments and a standby allocation program, the country will be prepared to move toward an energy ethic which stresses wise use of energy with a clearer recognition of necessary fundamental changes to be made over the next few years and encourages the immediate development of alternate energy sources.

It is clear that the federal government has a profound responsibility to initiate specific policies and programs to close the gap between energy supply and demand. Each individual State fully acknowledges its responsibility to see that this country reduces its dependence on foreign sources of energy.

However, the primary responsibility of each chief executive is to protect the health, welfare and safety of citizens. This responsibility should in no way be inconsistent with the national goal of averting an energy crisis. Each individual State that provides energy resources has the clear responsibility to apply all state laws and regulations designed to assure maximum protection while necessarily accelerating energy production.

As individual federal programs are designed through administrative and legislative channels, they must clearly delegate authority to the States to apply state laws and regulations governing environmental protection, extraction and use, taxes, water rights, health, safety and land use concerns, if those individual laws and regulations are at least as stringent as applicable federal laws and regulations.

IMPACT ASSISTANCE

Additionally, the impacts of energy development should be fairly borne by the ultimate beneficiaries of such developments. Citizens living in areas experiencing accelerated energy development should not be asked to bear inequitable impacts.

As a condition to any federal energy development program, appropriate federal authorities, after consultation with the Governors of the affected States, must assume the responsibility of ensuring that all direct and indirect impacts are identified and ameliorated.

Different States have different legal provisions regarding incurring debt, pledging revenues or credit and passing through funds. These should be respected as far as possible in providing assistance for amelioration. Furthermore, present economic development programs should not be sacrificed or diminished in addressing the new impacts caused by accelerated energy development.

Individual States recognize their responsibility to meet the challenge of closing the energy gap; they stand ready to work with the federal government and with industry to provide appropriate policies and programs. By honoring valid state concerns and providing for joint action, national energy goals will be much more attainable.

D. 3—CONSERVATION

The nation's Governors are dedicated to promoting the conservation of energy to slow down the increase in demand which far exceeds the population increase. Saving energy will help to relieve the depletion of resources and increase the time period for developing more efficient energy sources.

States must take the lead in national efforts to conserve energy. States should require that all state agencies follow sound energy conservation practices in their operations (including construction of public buildings) and program activities. Both state and federal procedures should be established to require energy resource statements on all projects as part of the existing system of environmental impact statements.

A national standard on thermal efficiency for new residential and commercial buildings should be supported and implemented.

Utility rates, tax rates, license fees and other regulatory or revenue-raising practices should be reviewed for their impacts on energy consumption. The utility rate structure could be altered to discourage wasteful use of energy. Personal and property tax rates can be set to encourage the use of energy-saving devices or practices. Registration fees for automobiles or other vehicles can be used to promote less fuel consumption.

Mr. HELMINSKI. In light of these general observations, together with the BLM Organic Act and other programs, provide some very helpful and useful tools for dealing with impact assistance.

However, we still lack a comprehensive system for coordinating the impacted situation with the Federal decision which precipitates it as well as being able to more fully understand and deal with the complexities of the entire impact problem.

In closing, I wish to thank you on behalf of the States for this opportunity to express our thoughts and concerns relating to CEIP.

Mr. Wayne Brown and I are willing to respond to questions.

I am awaiting also, as you have given me permission, to enter into the record the statement of the Governor.

Here it is.

I would like to relay at this time a letter from the Governor of

I would like to relay at this time a letter from the Governor of Alaska to Chairman Breaux.

Mr. BREAUX. Do you want to summarize it or read it?

Mr. HELMINSKI. I have been requested by the Governor to read this letter to you.

Mr. BREAUX. All right.

Mr. HELMINSKI [reading]:

DEAR CONGRESSMAN BREAUX: As Governor of the coastal state most directly and massively affected by the federal OCS lease program—9 frontier area lease sales scheduled in 4 years—I am thankful for the attention that the Subcommittee on Oceanography of the Committee on Merchant Marine and Fisheries is directing to the status of the Coastal Energy Impact Program (CEIP) authorized under Section 308 of the Coastal Zone Management Act amendments of 1976. I appreciate this opportunity to present to Committee members our state's concerns and perceptions of the progress being made by the Office of Coastal Zone Management toward implementation of the CEIP.

We believe that Congress intended to create under Section 308 a timely, equitable and administratively expedient program of compensation to states adversely affected environmentally or fiscally by the federal OCS program. The state of Alaska and its local governments are urgently concerned to see an effective program of coastal energy impact assistance to the states in operation at the earliest possible moment. We are already planning for and dealing with the impact of recent and near future federal OCS leases.

Thus, when the draft CEIP regulations were first published in the Federal Register on October 22, 1976, we reacted with dismay, as did nearly all the coastal states, at their complexity and restrictive tenor. The regulations seemed drafted to defeat the objectives of the law—expedient and equitable aid. Nevertheless, the immediate needs of our state's communities did not allow us to dismiss or delay indefinitely implementation of the CEIP, before we had exhausted all means of achieving a workable and fair set of administrative regulations. We did not wish to risk the jeopardy of an impossible CEIP while there was no other source of impact aid authorized under law and no sure alternative on the horizon.

Therefore, we decided, in cooperation with many other states and the National Governors' Conference, to engage with the Office of Coastal Zone Management in an intense effort to recast the regulations into workable form. In this process, our state has found the Office of Coastal Zone Management exceptionally accessible and attentive to some of the many criticisms and constructive recommendations we and other states have presented to them. Substantial improvements have been made on many features of the regulations. We are encouraged to continue to try to work out the remaining differences.

Nevertheless, serious disagreement remains on a critical issue concerning the Section 308(d)(1) loans and repayment assistance. This issue lies at the heart of the CEIP for our state and, I believe, for many other states. The most recent revised draft of the regulations simply does not achieve Congress' purpose of protecting state and local governments against the risk of default or inequitable fiscal burdens due to coastal energy projects. No responsible local government can borrow when repayment assistance, if it proves needed, is available only at the mercy or whim of the federal lender. Such borrowing, and the inherent threat of default, would imperil the financial standing of a local government more than it would assist. The regulations must guarantee repayment assistance

automatically and without delay when warranted and not at the discretion of the lending federal agency. We have submitted recommended changes to accomplish this and cannot support regulations that do not clearly incorporate this guarantee concept.

For the present, we believe that it is premature to make a final judgment or seek a long or indefinite delay in completing the regulations, especially since a final version of the regulations may soon be available. Then, we feel we will all be better able to conclude whether the CEIP is finally a useful program or so irretrievably flawed as to need radical overhaul or replacement prior to letting the regulations pass into law.

A final question that I believe we share with all coastal states concerns the intentions of the Administration with regard to the first year funding level for the CEIP. We believe that full funding for all parts of the CEIP is essential to an effective and successful program. The executive budget should reflect a commitment to seek the full supplemental appropriation authorized by the Congress and we urge the Subcommittee to seek assurances that this will be the case. An unfunded program is no more effective than an unworkable program.

Looking beyond the fate of the CEIP, I want to affirm to the Subcommittee our conviction that the CEIP is, at best, only a partial solution to the fiscal inequities associated with the OCS program and similar federally sponsored major energy development programs in coastal areas. The CEIP should be seen as the first step toward a broader, balanced set of energy impact aids. We believe that the problems shared by impacted states would be better addressed by a direct revenue sharing approach that provided funds immediately and as a matter of right whenever federally sponsored developments imposed serious fiscal or environmental burdens upon the states. In our judgment, the CEIP can best serve as a fall-back program to insure states against the possibility that their unrecoverable costs might outrun the revenues provided under a basic revenue-sharing formula.

Also, as we have in the past, the State of Alaska will continue to advocate a modernization of the Outer Continental Shelf Lands Act and other improved environmental and energy resources management legislation as an essential part of a sound overall national energy development program.

Again, I want to thank you for this opportunity to present to the Subcommittee the views of the State of Alaska on the status of the CEIP. I believe and hope that the Subcommittee's attentiveness to the CEIP will add constructive impetus to the effort to shape the administration of the program to comport with Congressional intent and the needs of the states and their city and regional governments.

Sincerely,

JAY HAMMOND, *Governor of Alaska.*

Mr. BREAUX. Thank you very much and please convey the committee's thanks to Governor Hammond of Alaska for his statement.

You have raised a number of very important topics that we discussed in the question and answer session that we have already had, things that I think were the keys to what these hearings were all about.

Mr. Treen?

Mr. TREEN. Let me ask you a question about this allocation.

I have read the regulations setting forth the guidelines for intrastate allocations.

Supposing the State would demonstrate that the State itself could use all of these funds that it would be entitled to under the formula grant and the aggregate of the counties involved in the coastal areas or parishes could also show they could use 100 percent of the funds? How would we allocate between the States and counties or parishes in Louisiana?

Have you got any views on that?

Mr. HELMINSKI. That is up to the State of Louisiana, and that is what we are trying to have, that kind of philosophy reflected in the regulations.

Wayne?

Mr. BROWN. I think that is pretty much what is reflected in the regulation. Through a consultation process, State and local govern-

ments will work together to design the process, and then it is signed off by the associate administrator. It is up to the States and governments to sign those and weight those different need factors according to the specific interests and needs of the specific State.

Mr. TREEN. Do you think the present regulations give the State wide discretion in that regard?

Mr. HELMINSKI. The present regulations, if followed and if not changed by the administrator give the State that prerogative. However, in determining and reviewing and certifying the allocation procedure, I believe the Office of Coastal Zone Management can—well, essentially review the need factors. So the actual assessment of need and priorities is reviewed by the Office of Coastal Zone Management; and if they do not agree with the State's interpretation, they will ask you to change their program to reflect their recommendation; isn't that true?

Mr. TREEN. All you are going to do or supposed to do is approve the process?

Ms. MURPHY. That is right; and if the allocation results in a different need factor, all we ask is that the State submit a justification. We do not require that they reallocate the money. The only appeal is on whether or not the State adhered to the process. So there is not an appeal to the associate administrator on a proportional need. All we ask is that the States submit a justification.

It can happen that they used the process and it came out that the State needs had a higher priority than local needs, or the opposite. That is the justification we ask for and that is all.

Mr. TREEN. I can envision, depending upon the level of the appropriations, but even if the level of appropriations is fairly generous, in many areas, both the local communities and counties and States will be able to show a need for all of them.

If the State makes a determination that it can better spend the money rather than the parishes, I am hoping we are not going to have too much unfairness.

Ms. MURPHY. The final determination rests with the State. The only appeal that the associate administrator entertains is whether or not the State followed the process that it agreed to in the beginning.

Mr. TREEN. Let me ask one other question, and I will take a comment from the governors' conference.

Suppose OCZM alloted a State $20 million and $10 million through intrastate allocation went to the State and $10 million to the local government. Six months into the year, the State has borrowed the full $10 million. The local governments have not exercised all their rights. The State finds another public facility which it finds is urgently needed.

Under those circumstances, does it have to amend the intrastate allocation? Or can it use its formula grants?

Mr. HELMINSKI. I would like to hear the Office of Coastal Zone Management's response.

Ms. MURPHY. The allotment was $20 million under the credit and $10 million has been allotted to the State and $10 million to the counties, and the counties have not come in to borrow the money and the State wants some more?

Mr. TREEN. The State needs some more.

Ms. MURPHY. The determination of unavailability of credit with

respect to whether or not formula grants can be used for public facilities will be made at the time of the allotments of the various sources of funds; so that if, in fact, the calculations were made that the State need factor was say $30 million, and $5 million of that was for direct OCZ needs, and Congress only appropriated $20 million; then $5 million could be used from the formula grant. That would be determined as part of OCZM's allotment process. The determination of unavailability under the formula grants does not really refer to the intrastate allocation system. It occurs ahead of that time.

But the State must also allocate the money from the formula grants as well as from the fund. Say that it is $5 million that is to be used from the formula grants. Then the State must also allocate that money according to the G–2 process. The same thing I said before adheres. It is the State's final determination as to where that money goes, using their interstate allocation process.

Mr. TREEN. Do you want to make a comment?

Mr. HELMINSKI. Yes. I am looking through 931.114 in the review and appeal process and the wording in section A, it is on page 78 of the regulations released December 6, says, "The associate administrator will review the States' intrastate allocation of section 308 assistance to determine whether the allocation process results in a distribution of assistance which, to the maximum extent practicable, is proportional to need."

Now, I think the point we are arguing about is who determines the needs, the Office of Coastal Zone Management? And under the language of this section, I think it is rather vague and according to the authority, I think the Office of Coastal Zone Management would again—he could essentially review the allocation process and determine whether you needed your highway in Louisiana. That is my interpretation.

Mr. BREAUX. Would you comment specifically on that point? We have gone through it a number of times and we need a definitive statement of what that means.

Ms. MURPHY. It is in section 3, on page 78 of the December 6 draft. If there is a substantial discrepancy between the two portions, the amount allotted and the amount we calculated under the original need factor, the State agency responsible for the intrastate allocation process will be asked to submit a justification.

It does not say we will hold up allocation or distribution. It doesn't state that the funds must be redistributed. It just says the States must submit a justification.

Mr. BREAUX. What if your office doesn't approve the justification?

Ms. MURPHY. We assume there is a reason for the State's decision and if they have adhered to the process which is equitable and fair and puts the needs on a priority basis, then the allocation is justified under the process.

Mr. BREAUX. Mr. Treen?

Mr. TREEN. Do the regulations determine that there will be different allocation processes for, let us say, the loans, the loan guarantees, and funds for reduction or amelioration of environmental losses?

Ms. MURPHY. It depends on the State.

Mr. TREEN. Is there the same process?

Ms. MURPHY. It depends on the State. There is an overall set of criteria which the process has to meet for the distribution of all funds.

But if the State wants to use a different administrative process for allocating environmental moneys than for allocations loan funds, that is fine as long as all those processes meet the criteria specified in the regulations.

That is under 931.112. The criteria we set forth in the regulations as to the process are broad in matters of principle, but it is in terms of administrative procedures that the State could develop different processes for each type of system, if it wanted.

Mr. BREAUX. The Chair would like to thank the representatives of the National Governors' Conference as well as all the representatives on the other panels who have appeared today and part of this afternoon to present testimony.

It goes without saying that the Subcommittee on Oceanography of the House Committee on Merchant Marine and Fisheries will continue our responsibility of oversight on the Office of Coastal Zone Management.

We intend to take the testimony and try to formulate that into a recommendation to the Office of Coastal Zone Management.

In addition, the Chair will note that we are awaiting information from I think both Kai Midboe from the State of Louisiana, as well as from the Office of the Council on Environmental Quality on a legal opinion that we have requested.

We would like to be able to receive those statements and that information from these two individuals before we prepare a statement to the Office of Coastal Zone Management.

It is the Chair's opinion that we are not going to be able to do that within the time frame left open for comments. We have 11 days from December 6. It will not give us the time to receive the information we requested; therefore, we will be requesting an extension to allow us to get that information and then to prepare comments to the Office of Coastal Zone Management; and rather than request any arbitrary figure, I would like to meet with the Office of Coastal Zone Management, the Administrator, after we come up with a time that might be agreeable.

With that——

Mr. Knecht?

Mr. KNECHT. Mr. Chairman, would it be reasonable for us to submit responses to suggestions made by the National Association of Counties and the National Governors' Conference?

There were also a number of questions in the testimony of the Coastal States Organization. There were five or six that we didn't have a chance to respond to adequately.

Mr. BREAUX. That would be helpful, I think.

Mr. KNECHT. We will do that.

Mr. BREAUX. In addition, we would like to have those answers, together with the two items I just mentioned in order that we can prepare comments. That would be part of what we would like to talk to you about.

If there are no other questions or statements, the Subcommittee on Oceanography will stand adjourned until further call of the Chair.

[The following was submitted for the record:]

STATEMENT OF LT. GOV. THOMAS P. O'NEILL OF MASSACHUSETTS

Mr. Chairman, members of the committee. I appreciate this opportunity to present Massachusetts' views on the recently established Coastal Energy Impact

Program, its rules and regulations, and the process by which this program will be implemented.

Massachusetts strongly supported the 1976 Amendments to the Coastal Zone Management Act which you worked so diligently on. We, along with many other states saw the enactment of the Energy Impact Program as an integral part of OCS development. The policy of providing monies to offset any adverse environmental, social or economic impacts which might accompany OCS and other coastal energy development recognizes that the need for energy production is in the national interest and the need to ameliorate the impacts associated with providing such energy is a national responsibility.

There are two basic points Massachusetts would like to emphasize on the program. The first point involves the legislative amendments and the second, the regulations interpreting the amendments.

On the legislation—I think it is clear that certain constraints on the use of the monies provided are statutorily established. This is not to say that those constraints are not warranted. I simply want to mention that while we may have some disagreements on interpretation, in my opinion there are definitely legislative constraints within which OCZM must work.

Massachusetts along with many other states supported incorporating constraints in the use of the money in order to guarantee that it be used only to ameliorate or avoid environmental, social and economic impacts of energy development and not be available for any uses which might tend, as a carrot, to draw extraneous development to the coastal zone.

In conjunction with these constraints however, there was a Congressional intent which sought to provide maximum flexibility for the use of these monies under those guidelines at the state and local level. It is at this juncture that I feel the regulations interpreting the act are perhaps not an accurate reflection of Congressional intent.

I understand the difficulties in arriving at a consensus on points of such a controversial nature and the further difficulty of translating complex agreements into regulations. I would like to suggest however, that with regard to the procedures under which the formula grants (under Sec. 308 (b)) will be processed and distributed to the state, there is room for disagreement as to whether the process goes beyond the statutory language and intent of Congress.

My interpretation of the current set of regulations given my office on December 6 provides for what might be euphemistically titled a 2-step process. First, OCZM allocates money based on the formula in the Act to accounts for each eligible state. Second, each state requisitions on a project-by-project basis those monies for the purposes provided for under the Act. Under this approach, the Administrator still retains the power to disburse monies on a case-by-case basis. The arguments advanced for such a two-step procedure revolve primarily around the need to comply with the National Environmental Policy Act and to certify that the monies will be used in the appropriate manner for each project with a guarantee of a pay back if they are not.

Many states have argued that the legislation intends only a one-step process under which the monies once allocated pursuant to the Act are distributed immediately to the states for use consistent with the purpose of the Act.

Without raising the issue of which approach is supported by the Congressional history—Massachusetts would like to propose a modified process which might respond to the concerns of both the states and of OCZM. Under our proposal, the monies allocated to each state would flow directly to the states and held in an account at that level.

Subsequent to receipt of these monies, the states would have to provide OCZM with the requisite certification and assurances that money would be expended for the appropriate purposes and funds not so expended would be returned.

In addition, OCZM would, in conjunction with the Council on Environmental Quality, establish a categorical exemption process whereby certain thresholds would be established for projects below which NEPA would not apply. Thus, for those projects which fall below the thresholds, the states would be able to expend the monies immediately without the necessity of a requisition or review process by OCZM. Those projects which are not deemed categorically exempt would still necessitate an EIS as currently provided for by NEPA and revenues for those projects could not be expended until the NEPA review has been completed and the necessary assurances and certifications received by OCZM.

This process could be termed a modified two-step which would provide OCZM with the necessary administrative controls and at the same time provide the

states with substantially more flexibility in their planning and timing of projects than is currently provided. This process, however, would still protect the integrity of NEPA by identifying those thresholds above which a project should be assessed for its environmental impacts.

While I do not have specific language to suggest for incorporating into the regulations, if this approach meets with consensus, members of my staff and I will be glad to work with OCZM in order to accomplish this result.

I should note at this time that the OCZM staff has been very cooperative in working with the states and has accommodated many of our concerns in previous meetings. I would like to commend them for a great deal of hard work and effort in producing the regulations to date.

In conclusion, while I feel that there are other areas of specific disagreement with the regulations, I feel that the one I have described is of a critical nature to the entire program. It is deserving of this committee's attention as well as that of OCZM's.

I hope that this committee will, in its review of the CEIP, re-examine the amendments to the Coastal Zone Act to identify legislatively imposed constraints and procedures which might also be considered for modification in order to provide further clarity and flexibility in its implementation.

U.S. DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
Rockville, Md., December 20, 1976.

Hon. JOHN B. BREAUX,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. BREAUX: This letter is in response to several of the points made at the Oversight Hearings conducted by you on December 10. At that hearing you expressed concern that additional time was needed for comment on the draft regulations prepared by my office in connection with the Coastal Energy Impact Program. The purpose of this letter is to indicate the course of action we now propose to follow and how it meets both your objectives and ours in the time immediately ahead.

Taking full account of comments received during the formal comment period (October 22–December 14), and especially those emanating from your December 10 Oversight Hearing, we intend to publish interim regulations in the *Federal Register* on or about December 29, 1976. Simultaneously with this publication, we will issue a final Environmental Impact Statement. Based on comments received on both the FEIS and the interim regulations, we will then publish final regulations, probably during the week of February 15–21, 1977.

From our side, the following advantages will be gained from this approach: (1) coastal states needing financial assistance from the CEIP immediately, such as Alaska, will be able to begin collection of necessary data and preparation of their applications based on the interim regulations; (2) a single set of regulations, published in the *Federal Register* and widely available, will replace the earlier drafts and provide a uniform basis for such further comment as may be necessary; (3) Congressional action of the fiscal 77 supplemental appropriation request can be taken with the knowledge that interim regulations have been published.

From your side, an additional 30 days is available for comment on both the FEIS and the interim regulations. In this connection, you have my assurance that comments received during this period will be considered in the same manner as those received during the earlier formal comment periods. Also, since we will not be publishing final regulations earlier than mid-February, the incoming administration will have a full opportunity to review the situation in further detail if they so choose.

Again, let me reiterate that those of us connected with the administration of this new program appreciate the interest and attention of your subcommittee.

With best personal regards,

Sincerely,

ROBERT W. KNECHT,
Assistant Administrator for
Coastal Zone Management.

STATE OF LOUISIANA, DEPARTMENT OF JUSTICE,
CIVIL DIVISION—LANDS AND NATURAL RESOURCES,
Baton Rouge, La., December 7, 1976.

Mr. DENNY DAUGHERTY,
Legislative Assistant to Congressman Dave Treen,
Cannon Building,
Washington, D.C.

DEAR DENNY: I enclose questions which should be made a part of the record concerning the escrow of state grants under Section 931.85.

I added Subsection B as a suggestion to cover the question of place of escrow and payment of interest. This will become quite important in the case of large grants.

We should make efforts to amend the Act itself to provide for even stronger language to better Louisiana's position. I will discuss this with you personally.

Would you please see that Kai Midboe is given a copy of these two items.

Yours very truly,

GARY L. KEYSER,
Chief, Lands and Natural Resources.

SECTION 931.85 FORMULA GRANTS HELD IN ESCROW FOR DISPUTED AREAS

A. That portion of a State's allotment of Section 308(b) formula grants which is dependent on outer Continental Shelf acreage and production in disputed areas will be held in escrow until such time as the required delimitation lines have been established by the Associate Administrator using the procedures outlined in Section 931.82.

B. All funds of a State held in escrow, whether as a portion of Section 308(b) formula grants or otherwise, shall be impounded by the United States in a separate account in a federally chartered savings institution and interest shall be paid thereon at the maximum rate authorized by law, and such interest shall become a part of the funds payable to the State.

QUESTIONS ARISING UNDER SECTION 931.85 OF THE CZM REGULATIONS

Question 1. Will funds of a state held in escrow pending establishment of delimitation lines or for some other reason be constantly available for distribution to the state and not used by the federal government?

Question 2. Will the federal government pay over to the states the funds which are due when they are due?

Question 3. Will interest be paid on these funds due the states?

Question 4. Where will the funds be held in escrow?

BACKGROUND

A part of Louisiana's dispute with the federal government in the Tidelands case (*U.S.* v. *Louisiana*, Original No. 9, U.S. Supreme Court) concerns a failure of the United States to impound in a separate fund certain moneys due Louisiana. The federal government has paid Louisiana over $140,000,000 but denies any liability for interest due or for the value derived by the United States in its use of the funds until payment. Paragraph 7(a) of the Interim Agreement of 1956 required the United States "to impound in a separate fund in the Treasury of the United States a sum equal to all bonuses, rentals, royalties, and other payments heretofore or hereafter paid to it for and on account of each lease . . . in the disputed area . . ." This paragraph implies that the United States will segregate all Tidelands funds in a separate account and will not just deposit the funds in the general Treasury subject to day to day withdrawals.

Additionally, a federal statute provides as follows:

"All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than 5 percentum per annum."

The federal government failed to follow the terms of the Interim Agreement and denies liability for interest on the funds due Louisiana. This same problem may arise under the CZM Act Amendments.

[Whereupon, at 1:40 p.m., the hearing in the above-entitled matter was recessed, to reconvene subject to the call of the Chair.]

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