GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

May 12, 2000

The Honorable Don Young
Chairman, Committee on Resources
U.S. House of Representatives
Washington, D.C. 20515-6201

Dear Mr. Chairman:

This letter provides you with the Administration's views on H.R. 1775, entitled the "Estuary Restoration Act of 2000." In general, the Administration strongly supports legislation that restores vital habitat in our nation's valuable estuaries, and strongly endorses supporting local efforts to achieve these purposes. The Administration has a strong interest in the successful enactment of this legislation because estuaries are such an important part of our nation's economic and environmental well-being and are so closely tied to the Administration's mission and goals. These special coastal places provide habitat for many important species, act as nature's water treatment system, provide flood control and protection against storm damage, and are wonderful recreational areas. Estuaries and coastal wetlands provide essential fish habitat for 80-90% of the recreational fish catch and 75% of the commercial harvest. The bill will serve to coordinate estuarine habitat restoration efforts and to ensure that efforts are not duplicated.

The Administration is pleased with the emphasis in the bill for on-the-ground restoration projects that will benefit estuaries and include partnerships with local and regional organizations. While we support the purposes of the bill, we recommend a few additions and changes (as enclosed) to the House Transportation and Infrastructure Committee-passed version to strengthen the restoration of estuary habitat to ensure that maximum benefits to coastal resources are obtained. First, the bill should provide equal opportunity for all Estuary Habitat Restoration Council member federal agencies to participate in developing the priority list of projects for funding, rather than vesting this authority solely with the Secretary of the Army. This will better ensure that the full knowledge and expertise of all government scientists and agencies are incorporated into the decision-making regarding estuarine restoration projects.

The Administration recommends that the Regional Councils only provide recommendations, and not decisions, to the national Council. While it is important that these Regional Councils have representation on the Council, the Administration recommends that the regional representatives serve as non-voting members. Both of these recommendations are intended to address issues raised by the Department of Justice about the possible conflicts with the Appointments Clause of the U.S. Constitution.

The Administration looks forward to working with you to ensure that this important program is enacted to protect our valuable estuarine areas.

The Office of Management and Budget has advised that there is no objection to the submission of this letter to the Congress from the standpoint of the program of the President.

Sincerely,

Andrew J. Pincus
General Counsel
Department of Commerce

Donald J. Barry
Assistant Secretary for Fish and Wildlife and Parks
Department of the Interior

Joseph W. Westphal
Assistant Secretary of the Army
(Civil Works)

J. Charles Fox
Assistant Administrator for Water
Environmental Protection Agency

Enclosure

cc: The Honorable Jim Saxton
Chair, Subcommittee on Fisheries Conservation, Wildlife and Oceans
Committee on Resources

The Honorable Eni F.H. Faleomavaega
Ranking Minority, Subcommittee on Fisheries Conservation, Wildlife and Oceans
Committee on Resources

Identical Letters Sent to:

The Honorable George Miller
Ranking Minority Member
Committee on Resources
U.S. House of Representatives
Washington, DC 20515-6201

The Honorable Bud Shuster
Chairman, Committee on Transportation
and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515-6256

cc: The Honorable Sherwood Boehlert
Chairman, Subcommittee on Water Resources and Environment
Committee on Transportation and Infrastructure

The Honorable Robert Borski
Ranking Minority, Subcommittee on Water Resources and Environment
Committee on Transportation and Infrastructure

The Honorable Wayne T. Gilchrest
Committee on Transportation and Infrastructure

The Honorable James Oberstar
Ranking Minority Member
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515-6256

Recommended Changes on H.R. 1775, the Estuary Restoration Act of 1999

Changes to Reinstate a Collaborative Approach and Clarify Role of Councils

Sec. 3 (6) after "consideration" add "by the Regional Councils or the Council"

Justification - To make clear that both the Regional Councils or the Council consider projects, as well as the Secretary.

Sec. 4 (b) (1) after "Secretary" delete "shall, in consultation with the Council," and replace it with "and the Council shall"'

Justification - To make it clear that both the Secretary and the Council need to take the factors into account in their decisionmaking.

Sec. 4 (b) (1) strike subparagraph "(A)" and redesignate subparagraphs (B) through (H) as subparagraphs (A) through (G), respectively.

Justification - To make clear that the Council does not make mere recommendations to the Secretary, it prioritizes projects and forwards them to the Secretary for selection as in Section 8.

Sec. 4 (b) (1) (H) after "Secretary" add "and the Council," strike the "s" on "determines," and strike " including recommendations from the Council."

Justification - To make it clear that both the Secretary and the Council can consider other factors.

Sec. 4 (b) (2) after "Secretary" add "and the Council"

Justification - To make it clear that both the Secretary and the Council shall give priority consideration to certain projects.

Sec. 4 (d) (1) after "Secretary" add "and the Council"

Justification - To make it clear that both the Secretary and the Council should take interim actions to carry out an estuary habitat restoration activity.

Sec. 5 (b) (1) replace "making recommendations concerning such" to "producing a final list of"

Justification - To make clear that the Council does not just recommend projects to the Secretary, but prioritizes projects as outlined in Section 8.

Sec. 5 (c) (7) After "Secretary." add "These representatives will be non-voting members of the Council."

Justification - This language is requested to help avoid conflicts with the Appointments Clause of the Constitution.

Add new section after Sec. 5 (g) (2): "Sec. 5 (g) (3) DECISION MEETINGS. -- As provided in section 8(c), and subject to the availability of appropriations for this purpose, the Secretary will convene meetings, as appropriate, of the Council to produce a final list of projects to be funded."

Justification - To ensure meetings are held to produce the final list.

Replace Sec. 8 (b) (3) with new Sec. 8 (b) (3) "Review-- A Regional Council shall develop a list, for each fiscal year, of those proposals for estuary habitat restoration projects that the Regional Council determines are eligible for funding under the factors specified in section 4(b)(1). The Regional Council will make recommendations on the merits of the projects and/or modifications that would improve the eligible projects, and shall transmit such list, recommendations, and all applications, whether or not determined to be eligible, to the Council for further review. For each eligible project, the members of the Regional Council shall recommend a lead federal agency from among those agencies that serve on the Council to assist with project development and implementation and shall transmit such recommendations to the Council."

Justification - This language is requested to help avoid conflicts with the Appointments Clause of the Constitution, and to allow the Regional Councils the opportunity to recommend a lead Federal agency from among those serving on the Council to serve as a project sponsor.

Delete present Sec. 8 (c) and replace with: "Sec. 8 (c) CONSIDERATION BY THE COUNCIL.-
"(1) At such times as the Secretary deems appropriate, the Secretary will convene meetings of the federal members of the Council to produce a final list of projects to be funded, as described in (2) of this section.

"(2) The federal members of the Council shall review the proposals for estuary habitat restoration projects transmitted to the Council by a Regional Council under subsection (b), based on the factors specified in section 4(b)(1), and shall produce a final list of priority projects. Placement of projects on this list will be by majority vote of those Council members who are present and voting. In the event of a tie vote, the Secretary shall make the final determination on whether or not to fund a project."

Add new section after Sec. 8 (c): "Section 8 (d) FINAL SELECTION BY THE SECRETARY. - The Secretary, subject to the availability of appropriations for this purpose, shall fund all of the projects on the final list in order of their ranking under 8 (c) except the Secretary may delete any estuary restoration project that the Secretary finds is not cost effective or sound from an engineering perspective."

Justification - To allow the Council to prioritize the list by majority vote, allow the Secretary to break a tied vote, and allow Secretary to fund projects.

Technical Changes on Other Matters

Sec. 4(b)(3) delete "governed" and replace it with the word "required".

Justification - The word "governed" is too vague and could be interpreted to narrow the eligibility of estuary habitat restoration projects.

Section 6 (c) (2) replace "such as those developed under the Coastal Zone Management Program" with "such as those developed under the Coastal Zone Management Act programs."

Justification - To ensure that the National Estuarine Research Reserves, a program authorized by the Coastal Zone Management Act, is included as eligible to serve as a non-voting member of the Regional Council.

Sec. 6 (c) add new (3) "representatives of nonprofit and charitable organizations that undertake estuary habitat restoration activities."

Justification - This language was contained in the original version of the bill. We believe that it is appropriate for representatives of nonprofit and charitable organizations that undertake estuary habitat restoration activities to have input into the Regional Councils.

Section 11(g)(1) after "community" add "and appropriate Federal agencies,".

Justification - Ensuring that other Federal agencies who have expertise and do work on bioremediation issues are also involved.