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

April 27, 2005

The Honorable Sherwood L. Boehlert
Chairman, Committee on Science
U.S. House of Representatives
Washington, DC 20515-6301

Dear Mr. Chairman:

This letter provides the Department of Commerce's views on H.R. 50, the "National Oceanic and Atmospheric Administration [NOAA] Act." The Department strongly supports the Committee's efforts to pass a NOAA Organic Act, legislation we believe should codify the establishment and purposes of NOAA.

While the Department supports the intent of H.R. 50, we have serious concerns about the version reported out of the Subcommittee on Environment, Technology, and Standards. We continue to prefer the recently transmitted Administration bill, and believe that H.R. 50 should be modified as outlined below.

Most importantly, the bill should be amended to allow NOAA to determine how best to structure the organization to meet current and future challenges. An organizational structure that serves the Nation well today may not be the best structure to serve the Nation in twenty years. Sections of H.R. 50 read more like an authorization bill than a true organic act. We believe it would be more appropriate to handle specific programmatic charges through authorization bills that are revisited every few years and would be happy to work with the Committee on such bills.

NOAA's ability to fulfill its mission would be strengthened if the bill directed establishment of only three positions, the Under Secretary (Administrator), Assistant Secretary (Deputy Administrator) and Deputy Under Secretary, giving NOAA the flexibility to decide now and in the future what additional senior positions should be established or maintained. Additionally, the bill should codify in one place NOAA's core administrative authorities, now residing in over two hundred separate statutes. We will continue to work with the Committee to resolve these concerns.

The bill should encompass the full spectrum of NOAA's responsibilities, including programs to protect and restore the Nation's fisheries and its responsibilities to provide products fostering safe transportation on marine highways. We understand that the Committee will be working with other Committees with jurisdiction over other aspects of NOAA's programs to address this issue.

In light of the broad scope of H.R. 50 overall, we believe it is necessary to include a clause similar to Section 108 in the bill that has been transmitted by the Administration that this Act will not affect or otherwise supersede other laws or responsibilities of other Federal agencies. Likewise, we are concerned that some of the changes to the proposed NOAA Science Advisory Board and reporting requirements for NOAA are very broadly written and recommend that they be narrowed to more appropriately reflect that they apply only to NOAA's programs and functions and not to parallel activities that are the responsibility of other agencies.

Sections 9 and 12 of the bill raise concerns under the Recommendations Clause of the Constitution. The Recommendations Clause vests in the President discretion to recommend to Congress "such Measures as he shall judge necessary and expedient." To the extent that these sections require the Administrator of NOAA to recommend measures to Congress, they violate the Recommendations Clause. We suggest that these provisions be deleted or rephrased to specify that the making of any recommendations is discretionary. In addition, Section 8 of the bill also raises constitutional concerns. Although we would be pleased as a matter of comity to provide scientific information when Congress so requests, there are separation of powers concerns with the attempt by Section 8 of the bill to create an entity inside the Executive Branch that is obligated to serve the Congress on coequal terms with its obligations to serve the Executive Branch. Enclosed are recommendations that would satisfy these constitutional concerns.

The Department of Commerce appreciates the opportunity to present views on H.R. 50 and looks forward to working with you to ensure passage of a satisfactory NOAA Organic Act codifying the establishment and purposes of NOAA. Should you be interested, the Department would welcome the opportunity to provide more detailed comments as technical drafting assistance.

The Office of Management and Budget has advised that there is no objection to the transmittal of these views from the standpoint of the Administration's program.

Sincerely,

Jane T. Dana

Jane T. Dana
Acting General Counsel

Enclosure

cc: The Honorable Bart Gordon, Ranking Member

The Honorable Vernon J. Ehlers, Chairman,
Subcommittee on Environment, Technology, and Standards

The Honorable David Wu, Ranking Member,
Subcommittee on Environment, Technology, and Standards

Modifications to Sections 8, 9 and 12 to Satisfy Constitutional Concerns

(1) In Section 8 we suggest striking the phrase "the Committee on Commerce, Science and Transportation of the Senate, or the Committee on Science or on Resources of the House of Representatives" from Section 8(a) and striking the phrase "and the appropriate requesting party" in Section 8(d)(1). At a minimum, we suggest replacing "advice" with "information" in Section 8(a) and replacing "to the Administrator and the appropriate requesting party" with "through the Administrator" in section 8(d)(1).

(2) In Sections 9(a)(1) and 9(b)(1) we suggest replacing "shall include" with "should include" to ensure that the provisions are consistent with the President's constitutional authority to submit for consideration of the Congress such measures as the President deems necessary.

(3) In Section 12(b) we recommend striking "and budget proposal" and striking "proposal for" to render the provision consistent with the President's constitutional authority to submit for consideration of the Congress such measures as the President deems necessary.