

Congress of the United States
Washington, DC 20515

December 11, 2009

The Honorable Gary Locke
Secretary
Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

The Honorable Jane Lubchenco
Under Secretary for Oceans and Atmosphere
Department of Commerce
1401 Constitution Ave NW, Room 5128
Washington, DC 20230

Dear Secretary Locke and Under Secretary Lubchenco:

As expressed in previous letters, we are troubled by the National Oceanic and Atmospheric Administration's (NOAA) proposal to move its Marine Operations Center-Pacific (MOC-P) from its long-standing home in the Puget Sound. Recently, the Government Accountability Office (GAO) sustained a protest filed by the Port of Bellingham challenging the fairness and validity of the MOC-P lease competition. By upholding this protest, the GAO confirmed that the MOC-P lease award process was seriously flawed. Under NOAA's own rules, set out in its Solicitation for Offers, the winning bidder (the Port of Newport) did not even meet the basic criteria to be eligible for the lease competition – a fact ignored by NOAA when it awarded the MOC-P lease to Newport. In our view, the GAO's findings cast serious doubt on the validity of the Newport award and the credibility of those who managed the competition leading to this flawed outcome.

As the GAO stated in its decision, NOAA should comply with the floodplain requirements laid out in both Executive Order 11988 and the agency's own Solicitation for Offers. To comply with these requirements the GAO recommended that NOAA finally do what it should have done during the competition: "consider, and document, whether there was a practicable alternative to Newport's offer." We strongly believe that NOAA should follow this guidance, and concur with the GAO's assertion that the agency is obligated to implement any such practicable alternatives to Newport's offer. We note that such an analysis does not include allowing Newport to change its offer to somehow minimize the impact on the flood plain.

As NOAA follows the GAO's advice, however, we also believe that NOAA and the Department of Commerce should give additional scrutiny to the decision-making process. We fear that if the decisions on how to respond to GAO's findings continue to rest with those who conducted the original flawed competition, we will see brazen attempts to preserve the award to Newport rather than any real effort to comply with the spirit of GAO's recommendations and Executive Order 11988. It is important that the GAO's decision be taken as an opportunity for a fresh start, and

those involved in future decisions on this matter should bring a renewed sense of independence and credibility.

We have particular concerns about any rationale that, in an attempt to preserve the agency's flawed award decision, might be used to claim that there are no "practicable alternatives" to locating the MOC-P in the Port of Newport. Any such claim would stand in stark contrast to the fact that all four of the final bids were within the competitive range and were considered during the final round of the competition. The record shows that none of the final four bids were eliminated or rejected from the competition at any point (including the final rankings) under any assertion by NOAA that their proposals were not practicable or reasonable.

For example, it has been widely reported that the Port of Newport had the lowest bid in terms of lease cost. The higher lease cost of other bids, however, does not inherently exclude them as "not practicable". The Department of Commerce Environmental Management Manual states specifically in its definition of "practical or practicable" that alternatives "shall *not* be rejected as 'impractical' solely on the basis of a reasonable increase in cost" (emphasis added). The lease costs proposed by other bidders were higher than the costs proposed by the Port of Newport, but none of those bids were rejected during the competition for being unreasonable or "not within existing constraints." To make such a claim after-the-fact would be both irrational and hypocritical.

We would also reject any assertion that alternative sites are not practicable because of schedule constraints. Any schedule constraints are a problem of the agency's own making, caused by NOAA's inability to manage the lease competition in a way that was fair and in compliance with its own rules. Over the past several years, NOAA's MOC-P employees have overcome adversity and used their can-do, innovative spirit to find ways to cope with the lack of a full and permanent MOC-P facility. While it is certainly not ideal to further delay moving into a new facility, the hard work and ingenuity of NOAA's MOC-P staff have shown that such a delay, if necessary, is certainly "practicable." It would be a serious mistake to make a flawed, twenty-year commitment just to avoid a short-term inconvenience.

Finally, we would strongly reject any claim that alternative sites are not practicable because NOAA and the Department of Commerce have already signed a lease with the Port of Newport. We are aware that the lease, as written by the government's lawyers, does not include a termination for convenience clause. At the very least, this omission is a glaring and unacceptable oversight. We are concerned, however, that a termination for convenience clause may have been intentionally omitted in an effort to preserve the Newport lease award even in the face of an unfavorable GAO protest finding. This too is a problem of the agency's own making, and one that should not force NOAA to cope with a poor decision for the next twenty years. To claim that the agency's own flawed actions justify the continuation of a flawed lease award makes poor policy sense and goes against the very spirit of GAO's ruling.

The GAO's recent ruling provides a much-needed opportunity to reassess the MOC-P lease award. In addition to the issues raised in GAO's findings, there are still numerous unanswered policy questions outside the scope of GAO's examination. We have outlined several of those policy concerns in previous letters, and we believe that now is the time for NOAA and the Department of Commerce to conduct a full, independent, and comprehensive review. Choosing a future site for NOAA's Marine Operations Center-Pacific is an important long-term decision, and we must do everything possible to ensure that the final choice is truly a wise move for NOAA, its employees, and its scientific missions.

Respectfully,



Maria Cantwell
United States Senator
Chair, Subcommittee on Oceans, Atmosphere,
Fisheries and Coast Guard



Patty Murray
United States Senator



Norm Dicks
Member of Congress



Jim McDermott
Member of Congress



Jay Inslee
Member of Congress



Brian Baird
Member of Congress



Rick Larsen
Member of Congress



Dave Reichert
Member of Congress