

Congress of the United States
Washington, DC 20515

January 15, 2010

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. Despite the strong recommendation of GAO and our clear expression of concern it appears that NOAA has not yet taken any steps to begin the EO 11988 process of assessing the practical alternatives to the Port of Newport ("Newport") site and the process for complying with the requirements of the National Environmental Policy Act and the Endangered Species Act.

Executive Order 11988 requires that federal agencies avoid, to the extent possible, the long and short term adverse impacts associated with the occupancy and modification of floodplains to avoid direct or indirect support of floodplain development wherever there is a practicable alternative. With regard to NOAA's selection of Newport, GAO noted that NOAA failed to conduct an EO 11988 analysis before accepting Newport's proposal.

On this record, there was no reasonable basis for the agency to conclude that Newport's proposal did not fall within the scope of either the solicitation's express floodplain limitation or EO 11988's limitations regarding potential environmental impacts. *Accordingly the agency was required to consider the environmental impact of Newport's proposed pier structure and to determine whether there was a practicable alternative to Newport's offer, the record is clear it did not.* [emphasis added].

Therefore, compliance with EO 11988 requires the following steps:

- First, EO 11988 creates a legal presumption that a "practicable alternative" to development in a floodplain exists. In light of that presumption NOAA must now re-evaluate its decision to award Newport the lease to determine whether a practicable alternative to that decision exists, including awarding the lease to the Port of Bellingham ("Bellingham") or the Lake Union private property owners in Seattle. We note that GAO

has specifically rejected the argument (as cited in the GAO decision) that the proposed pier at Newport would be somehow incidental to the overall project and therefore permissible without an EO 11988 analysis.

- Second, if, after completing the “practicable alternatives” analysis, NOAA still desires to proceed with construction of a large new pier within the floodplain, then Section 2 (a)(1) of EO 11988 explicitly requires (and did require prior to award) that NOAA prepare an environmental impact statement (“EIS”) to evaluate the significant environmental effects of its decision. GAO noted the likelihood of an environmental impact in its decision as follows:

Newport’s construction of a pier was a significant aspect of its offer in that the solicitation required offerors to provide a minimum of 1,560 linear feet of pier space. *Finally it is clear that the pier structure may have an environmental impact on the floodplain area within which it is to be located.* [emphasis added].

- Third, as part of the EO 11988 process, if NOAA determines that there is no “practical alternative” to awarding Newport the bid, and thus, to facilitating development in a floodplain, NOAA must seek public comment on that preliminary finding and any proposed mitigation. EO 11988 contemplates that this can occur as part of the EIS process. Simply stated, EO 11988 requires NOAA to fully explain its rationale and provide for meaningful public comment.

In addition, since the advent of NOAA’s initial bid decision, NOAA, through its National Marine Fisheries Service (“NMFS”), has designated the proposed Newport project area as critical habitat for the green sturgeon. This designation gives rise to an independent obligation for NOAA to conduct an EIS.¹ Also, because of that designation, NOAA cannot and should not move forward with any decision to reaffirm the lease to Newport without taking the following action.

- NOAA must complete an Endangered Species Act (“ESA”) section 7 consultation with NMFS to determine whether the planned development at Newport will adversely modify green sturgeon critical habitat.²

In our view, these are very important procedural steps designed to provide public input, to ensure a robust environmental review and prevent a legal challenge to the decision. We urge NOAA not to repeat the same errors by deciding to reaffirm the award of the lease to Newport based upon an inadequate EO 11988 “practicable alternative” analysis or an environmental assessment that failed to evaluate the environmental effects of building a new pier structure in the floodplain and in critical habitat. Simply stated, it is our view that again issuing a *pro-forma* finding of no significant environmental impact (“FONSI”) would not be proper or sufficient.

¹ 40 C.F.R. 1508.27(9).

² 16 U.S.C. §1536 (a)(2).

While the initially flawed decision involved only the MOC-P facility, we are concerned that personnel within NOAA now charged with this re-evaluation process take these responsibilities seriously and not allow the errors of the past to continue and compound to the detriment of the excellent and hard earned reputation of NOAA as one of our Nation's preeminent scientific agencies charged with protecting the environment.

In this regard, we are very concerned about comments made by Newport commission president, Ginny Goblirsch, in an article in the December 10, 2009 *Oregon Statesman Journal*. She was quoted that "[w]e are in full tilt. We have hired contractors and engineers. Nothing's changed although this is a bit frustrating." This seems to indicate that Newport intends to continue with a planned mid-January 2010 groundbreaking. We believe that such action is inconsistent with the GAO decision and the important environmental and public processes outline above. In light of these important issues we expect that NOAA will instruct Newport to stop spending public funds until the GAO recommended process is completed. Otherwise, a decision to locate the MOC-P facility elsewhere will result in increased costs to the taxpayers and damage to NOAA.

Respectfully,

Respectfully,



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



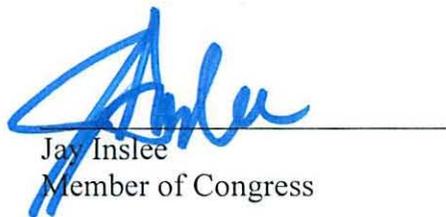
Patty Murray
United States Senator



Norm Dicks
Member of Congress



Jim McDermott
Member of Congress



Jay Inslee
Member of Congress



Brian Baird
Member of Congress

Rick Larsen

Rick Larsen
Member of Congress

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