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January 8, 2009

VIA FACSIMILE AND U.S. MAIL

The Honorable Chris Gregoire
Office of the Governor
PO Box 40002
Olympia, WA 98504-0002

The Honorable Rob McKenna
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100

Re: *Northwest Aggregates Aquatic Lands Lease No. 20-A12778*

Dear Governor Gregoire and Attorney General McKenna:

On behalf of our client Glacier Northwest, we write in response to the letter you received on January 6, 2009, which asks the Governor to request that the Attorney General take the unprecedented step of unilaterally rescinding a binding lease agreement between Glacier and the State of Washington. The alleged basis for the request is the false claim that the Department of Natural Resources ("DNR") failed to protect the state's interest in issuing the lease.

The truth is that the Glacier dock project has been scrutinized for nearly ten years, and every local, state, and federal agency, administrative body, and court to review the project has *unanimously* concluded that the construction and operation of the barge-loading dock will *not* harm Puget Sound, nearshore habitat, or any endangered or threatened species. Additionally, the project will provide an easily accessible source of sand and gravel for the needed improvement of public and private infrastructure. This sand and gravel also can be brought to market by barges

which will eliminate the adverse consequences and costs associated with the transportation of sand and gravel by trucks from remote sites. As set forth below, DNR's lease decision occurred after years of careful study and review by multiple agencies. The state's interest has been thoroughly protected.

A. Local, State, and Federal Agencies Unanimously Conclude the Project Will Not Harm Puget Sound.

The history of the environmental review of this project by multiple local, state, and federal agencies, administrative bodies, and courts is unparalleled. Each agency has *without exception* rejected project opponents' claims of environmental harm. These agencies include King County, the Washington Department of Fish and Wildlife ("WDFW"), the Washington Department of Ecology, the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, the Army Corps of Engineers, and—finally—DNR. The January letter simply ignores all of these agencies' findings.

The letter suggests lease rescission is appropriate so that potential impacts to salmon, herring, and orcas can be evaluated. But multiple agencies have already exhaustively reviewed every possible environmental issue relating to this project. Those agencies include WDFW, DNR, and Ecology. These agencies reached their conclusions based on science and the objective evidence, not politics. The Attorney General's Office is currently defending separate legal challenges that opposition groups have filed against these state agencies. In all three actions the Attorney General's Office is defending each of these agencies' determinations—reached after years of review—that the project will simply *not* harm Puget Sound. The letter you have received asks the Attorney General's Office to suddenly reverse course, ignore the findings of all state agencies, and initiate a separate action to rescind the lease based on the myth that the project somehow "undermines the Legislature's commitment to the restoration of Puget Sound." We trust that you will decline this request based on the facts carefully developed by your state agencies (and others) over a decade-long process.

B. DNR Acted at the Appropriate Time in the Appropriate Manner.

In Washington State, aquatic lands include both "tidelands" (the area between the ordinary high water mark and extreme low tide) and "bedlands" (the area waterward of extreme low tide). See WAC 332-30-106(5), (9), (63). The mile-long stretch of *tidelands* adjacent to Glacier's upland mine are owned by Glacier. The *bedlands* are owned by the State. A lease is required from DNR because a portion of the existing (and proposed) barge-loading facility and barge-loading activities occur on bedlands.

Glacier obtained a lease from DNR in 1968 when the dock was first constructed, and DNR renewed the lease in 1978, and again in 1988. In 1999, a year before the 1988 lease's termination date, Glacier applied for a lease renewal. On November 17, 2000—on the same day that the lease expired—the then outgoing Commissioner of Public Lands created the Maury Island Aquatic

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Reserve without any prior environmental review or public comment. She then advised Glacier that the lease could not be issued until DNR had prepared a "Management Plan" for the Reserve.

Between 2001 and 2004, at Commissioner Sutherland's direction, DNR engaged in a deliberate and thoughtful process, with full public input and environmental review, before finalizing the Maury Island Aquatic Reserve designation and issuing a Management Plan in 2004. The Management Plan provided that various existing uses—including the Quartermaster Yacht Club, Quartermaster Harbor Marina, Dockton County Marina, and the Glacier facility—would be allowed to continue if rigorous management criteria were met.

Even after the Management Plan was finalized in 2004, DNR was unable to act on Glacier's pending lease application because DNR cannot issue a lease until the applicant has first secured all necessary local, state, and federal permits. *See* WAC 332-30-122(1)(c). Following an extraordinarily lengthy permit process—involving multiple public comment and appeal periods—Glacier ultimately obtained all of the necessary permits and approvals. The last of these permits was issued by the Corps of Engineers in July, 2008. At that point, DNR reviewed those permits and further evaluated the project under the criteria in DNR's Aquatic Land Management Regulations (Chapter 332-30 WAC) and the Maury Island Aquatic Reserve Final Management Plan. After several months of additional review, DNR then issued the lease on December 2, 2008.

The letter you have received neglects to mention that DNR staff subjected this project to intense review. It also ignores the fact that, in addition to the dozens of permit conditions already imposed by other governmental agencies, the DNR lease adds further requirements to protect and enhance the aquatic environment, including: additional monitoring requirements; additional studies to assess potential "drift cell" issues; further restrictions on dock lighting; restrictions on demolition to avoid any shading of even individual eelgrass shoots; specific requirement for eelgrass replacement in the event of unexpected impacts; and a requirement that Glacier provide two conservation easements to protect the shoreline area in perpetuity.

C. Construction Is Underway.

The allowed "work window" for in-water construction activities at the site is limited to August 15 to January 14 of any given year. Given this narrow window of time, Glacier immediately commenced construction once it received a Notice to Proceed from King County on December 5, 2008. Since December 5, Glacier has spent hundreds of thousands of dollars demolishing the old dock and constructing the new one in reliance on the lease agreement with the State. The letter fails to give the slightest acknowledgment to the fact that Glacier has expended these substantial costs. Nor does it explain why the letter comes to you over a month after the lease was issued and construction has started, and only after opponents have twice failed to obtain a court injunction to stop construction (as discussed below).

D. Courts Have Unanimously Rejected Opponents' Claims.

The project opponents have not hesitated to resort to the courts, but their claims have been uniformly rejected. The Washington State Shorelines Hearings Board, in a 5-0 decision, ruled in 2004 that the project is consistent with the State Shoreline Management Act and King County Shoreline Master Program. The Board further upheld the adequacy of King County's Final Environmental Impact Statement in all respects, and after an extensive 8-day evidentiary hearing, concluded that the project will not have any significant impacts on the nearshore environment or Puget Sound. The Court of Appeals upheld the Board's ruling in a 3-0 decision in 2007. *See Preserve Our Islands v. Shorelines Hearings Board*, 133 Wn. App. 503, 520, 538-42, 137 P.3d 31 (2007). In 2008, a five-member panel of the Washington Supreme Court declined to consider opponents' challenges to the Court of Appeals decision. *Preserve Our Islands v. Shorelines Hearings Board*, 162 Wn.2d 1008, 175 P.3d 1092 (2008).

In 2008, opponents then attempted to challenge Glacier's Hydraulic Project Approval from WDFW. An Administrative Law Judge of the Washington Administrative Hearings Office held a hearing, considered evidence presented by project opponents, and then issued a decision upholding the HPA in all respects. After further review of all of the project opponents' claims, the WDFW's Director then issued a Final Order earlier this year affirming that the HPA's current terms and conditions fully protect fish life and habitat.

Opponents also have failed in recent attempts in both state and federal court to obtain an injunction on construction activities. On December 11, 2008, the King County Superior Court denied Preserve Our Islands' request for a preliminary injunction on construction. Likewise, in a decision dated January 5, 2009, the U.S. Federal District Court declined to stop construction after concluding, among other things, that opponents failed to provide adequate evidence that construction activities will adversely impact orcas.

E. Charges of Impropriety Are Baseless.

Finally, we wish to respond to the opponents' charge that political contributions and favoritism were at the root of the DNR lease decision. This charge is demeaning to the Commissioner and to the professional, experienced DNR staff who reviewed the lease application and made recommendations after years of careful analysis of the project, the criteria in the Management Plan, and the numerous mitigation measures in place to protect Puget Sound. It should be noted that it was Commissioner Sutherland who has promoted and firmly established the DNR Aquatic Reserve Program. Project opponents, who now claim to seek a "non-political" review, fail to note their political efforts over the last two legislative sessions to interfere in the lease decision, and their ten year political campaign at the county level to sabotage a very valuable and needed project.

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It would be easy for businesses in our state to lose faith in our regulatory system given what Glacier Northwest has gone through for the last ten years. Glacier takes heart that the majority of legislators have taken the time to learn the facts and, in doing so, have not been taken in by opponents' false claims regarding the project.

Very truly yours,

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