



U.S. Department
of Transportation

THE ADMINISTRATOR



Saint Lawrence
Seaway Development
Corporation

April 20, 2010

Ms. Jennifer J. Caddick
Executive Director
Save The River
409 Riverside Drive
Clayton, New York 13624

Dear Ms. Caddick:

I received your February 5, 2010 petition on behalf of Save The River (STR) "for issuance or amendment of a rule under the Administrative Procedure Act, 5 U.S.C. § 553(e) and 5 U.S.C. § 555(e)" in my Washington, D.C. office on February 12, 2010 (Petition). Specifically, STR seeks a notice and comment rulemaking on the process and criteria the Saint Lawrence Seaway Development Corporation (SLSDC) uses to set the season opening date for the St. Lawrence Seaway. For the reasons set out below, I am denying the Petition. However, we value input from stakeholders and would welcome the receipt of any information pertaining to issues associated with setting the opening date of the Seaway navigation season. Any relevant data submitted to us by February 1 will be considered during the decision-making process for each calendar year opening. This letter will serve as my final decision on the Petition.

As you know, the St. Lawrence Seaway is a binational waterway extending from Montreal to mid-Lake Erie, consisting of 13 Canadian and 2 U.S. locks. The Seaway is jointly managed by Canada through the St. Lawrence Seaway Management Corporation (SLSMC) and by the United States through the SLSDC. All decisions related to the joint management of the Seaway, such as when to open the navigation season, are subject to the joint deliberations of the SLSDC and the SLSMC as the representatives of the U.S. and Canadian Governments. The SLSDC is a wholly owned government corporation created by statute May 13, 1954, whose mission is to serve the U.S. intermodal and international transportation system by operating and maintaining a safe, reliable, environmentally responsible deep-draft waterway, in cooperation with its Canadian counterpart.

In terms of addressing this petition, it is important to understand the history of the creation of the Seaway and the terms of the international agreements signed by Canada and the United States that govern this jointly managed waterway.

Creation of the St. Lawrence Seaway

Cooperation and consultation between Canada and the United States regarding a deep water navigation channel from Montreal to Lake Ontario began over 100 years ago. In 1895, the first joint United States - Canadian Deep Waterway Commission was formed to study the feasibility of a Seaway. By 1904, Canada had completed, entirely on the Canadian side of the river, a system of locks and canals that provided minimum depth of 14 feet from Montreal to

Lake Ontario. It was the 114-mile stretch of river from Ogdensburg, N.Y. to Montreal, including the 46 miles of the International Rapids Section that constituted a bottle-neck to ocean-shipping. In 1909, the United States and Canada signed the *Boundary Waters Treaty of 1909*, which created the International Joint Commission (IJC). While negotiations and interest continued, resulting in the signing of the 1932 Great Lakes-St. Lawrence Deep Waterway Treaty and the Great Lakes-St. Lawrence Basin Agreement in 1941, two world wars and the opposition of influential rail and other private industrial sectors in the U.S. had prevented the start of any joint projects. In 1949, public interest in a deeper waterway on the St. Lawrence River led to a joint Canadian-United States Deep Waterways Commission to again study the feasibility of building a Seaway.

Canada and the United States submitted concurrent applications to the IJC to construct the St. Lawrence Seaway Project. In 1952, the IJC approved the applications¹ in accordance with the United States-Canada *Boundary Waters Treaty of 1909*, thus binding the operation of the Seaway to the provisions of the *Boundary Waters Treaty*, specifically to Article I, which obligates both Canada and the United States to ensure that all navigable waters are forever equally free and open for the purposes of commerce to inhabitants and vessels of both countries.

In an Exchange of Notes executed between 1952 and 1954, Canada and the United States established the terms of constructing, managing and operating the Seaway jointly. These diplomatic notes established the fundamental framework for joint U.S. and Canadian oversight of the Seaway. These diplomatic notes, which have the full force and effect of a treaty between the two countries, have remained in effect since their official exchange. Subsequent to the Exchange of Notes in 1954, both Canada and the United States passed legislation to authorize and construct the Seaway. In Canada, an Act of Parliament established the St. Lawrence Seaway Authority, with the mandate to acquire lands to construct, operate and maintain a deep draft waterway between the Port of Montreal and Lake Erie, along with the international bridges that cross it.² In the United States, the passage of the *Wiley Dondero Act* (68 Stat. 93) on May 13, 1954, created the Saint-Lawrence-Seaway-Development-Corporation. Pursuant to its enabling statute, the SLSDC was authorized and directed to construct, in United States territory, deep-water navigation works substantially in accordance with the "controlled single stage project, 238-242" . . . and to operate and maintain such works in coordination with the Saint Lawrence Seaway Authority of Canada. . ."

Thus, the various international agreements between Canada and the United States were approved through legislative action creating the entities to construct, manage and operate the Seaway jointly on behalf of their respective governments. Construction on the Seaway began in late 1954. On June 26, 1959, Queen Elizabeth and President Eisenhower officially opened the St. Lawrence Seaway.

¹ The applications were amended in 1956.

² The Saint Lawrence Seaway Authority (SLSA) was the predecessor to the SLSMC, which was established in 1998 and has the authority to fulfill Her Majesty's obligation to manage, operate and maintain the Seaway by the Government of Canada. The SLSA's mandate was transferred to the SLSMC, pursuant to the power of the Minister of Transport (Canada), as established in the *Canada Marine Act* and a Framework Agreement entered into between her Majesty the Queen in Right of Canada, represented by the Minister of Transport, and the SLSMC. Under the *Canada Marine Act* and the Framework Agreement, the SLSMC has the mandate to fulfill all obligations undertaken by Canada pursuant to any existing and future agreement between Canada and the United States.

Management and Operation of the Seaway

Due to the binational nature of the waterway, the Seaway requires 24-hour, year-round coordination between the two Seaway entities. Thus, for the past 50 years, the two Seaway entities have continually coordinated operational activities, particularly with respect to rules and regulations, overall day-to-day operations, traffic management, navigation aids, safety, environmental programs, operating dates, and trade development programs, pursuant to the terms of international agreements, i.e., the *Boundary Waters Treaty* and Exchange of Notes from 1952 through 1959, as well as parallel national legislation.

Collectively, the agreements provide the SLSDC and SLSMC with significant discretion to make decisions jointly in managing and operating the Seaway. Such discretion was required “because there is no single organism charged with the construction and operation of the waterway.” Therefore, “matters affecting the Seaway as a whole must be coordinated at the governmental level or by the St. Lawrence Seaway Authority on the part of Canada and the Saint Lawrence Seaway Development Corporation on that of the United States.”³

In terms of enacting regulations and rules affecting the binational Seaway, Canada and the U.S. specifically agreed to the following provision (item number 6) in the August 17, 1954 Exchange of Notes:

“It is further agreed that each Government will consult with the other before it enacts any new law or promulgates any new regulation, applicable in the respective national parts of the international section of the St. Lawrence River, which might affect Canadian or United States shipping, or shipping of third-country registry proceeding to or from Canada or the United States respectively.”

“The foregoing undertakings are in addition to the treaty obligations now in force between Canada and the United States affecting shipping in the St. Lawrence River and canals, particularly Article I of the *Boundary Waters Treaty* of 1909.”

The first set of joint regulations regarding vessel transits of the Seaway were negotiated and agreed to jointly by the two governments, through the Saint Lawrence Seaway Authority (SLSA) (the predecessor to the SLSMC) and the SLSDC in 1959.⁴ The regulations can only be amended after negotiations between the two entities, who annually meet and review the regulations that pertain to the vessels from over 90 countries of register that transit the Seaway. These regulations are only then implemented and published upon agreement by both entities. This collaborative negotiation process has been in place for over 50 years.

Thus, in making laws, rules or regulations, each country is obligated to consult with the other regarding any such action that would affect shipping in the international waters of the Seaway. Pursuant to these requirements, I am required to consult with my Canadian counterpart

³ *Documents on The St. Lawrence Seaway* at 4 (R.R. Baxter, ed., The British Institute of International and Comparative Law 1961).

⁴ *Documents on The St. Lawrence Seaway* at 69 (R.R. Baxter, ed., The British Institute of International and Comparative Law 1961).

regarding your request for a rulemaking. In consulting with the SLSMC, I received the attached March 2, 2010 letter opposing the Petition from the President and CEO of the SLSMC, Richard Corfe, who had received a copy of the Petition directly from STR.⁵

Regarding the annual establishment of an opening date, Mr. Corfe described the process that the two entities have followed:⁶

“There is already a process in place to determine the opening date which involves coordination between SLSDC and SLSMC. Among the significant factors considered in establishing an opening date for the navigation season are weather and water (i.e., ice) conditions, the completion of lock infrastructure maintenance, and the anticipated demand for Seaway services. Water and air temperatures are closely tracked for the St. Lawrence River and Lake Ontario and there is a long historical record to draw upon.

Furthermore, the process for opening and closing the Seaway involves continuous gathering of information, development of strategies, planning, implementation and monitoring, all supported by a detailed communication plan. There is ongoing discussion and information dissemination between industry stakeholders, First Nations, [U.S. and Canadian] Coast Guards, and the SLSDC and SLSMC Operations staff.”

Three of these criteria are specifically listed in the Seaway’s joint regulations at 33 C.F.R. § 401.2. In that regulation, “navigation season” is defined as “the annual period designated by the Corporation and the Manager, that is appropriate to weather and ice conditions or vessel traffic demands, during which the Seaway is open for navigation.” *See also, Seaway Handbook* at http://www.media-seaway.com/seaway_handbook/seaway-handbook-en/practices_and_procedures.pdf.

In addition, the Assistant Deputy Minister for Policy at Transport Canada sent a letter (attached) dated April 9, 2010 also expressing the Canadian government’s strong belief that the international agreements require joint decision-making on when to open and close the Seaway. Specifically, the Assistant Deputy Minister stated that

“Transport Canada is of the view that any formal regulations imposing conditions on the two countries regarding the opening date of the Seaway would seriously impede the ability of the SLSMC and the SLSDC to jointly operate the Seaway and would be contrary to the numerous international treaties and agreements between the two countries.”

In conclusion, the SLSMC President and CEO stated that “effective procedures are already in place to determine the opening date for the St. Lawrence Seaway, that International Agreements preclude you [the SLSDC] from considering this rulemaking without our approval and that, consequently, the petitioner’s request must be denied.”

⁵ Letter from Richard J. Corfe, President and C.E.O., St. Lawrence Seaway Development Corporation, to Collister Johnson, Jr., Administrator, Saint Lawrence Seaway Development Corporation (March 2, 2010)(on file with the SLSDC).

⁶ On several occasions over the past 3 years, I have personally described this process to STR officials as well.

Foreign Affairs Function Exemption under the APA

The Petition seeks a notice and comment rulemaking on the process and criteria the SLSDC uses to set the opening date for the St. Lawrence Seaway pursuant to APA, 5 U.S.C. § 553(e) and 5 U.S.C. § 555(e).

The rulemaking provisions of the APA do not apply to a rule involving a foreign affairs function of the United States 5 U.S.C. § 553(a)(1). The exemption applies if the subject matter in question is clearly and directly involved in a foreign affairs function, *Mast Industries, Inc. v. Regan*, 8 Ct. Int'l Trade, 596 F. Supp 1567 (1984) such as matters which so affect relations with other governments that public rulemaking would clearly provoke definitively undesirable international consequences. *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983), on reh'g, 727 F.2d 957 (11th Cir. 1984), judgment *aff'd*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed. 2d 664 (1985).

A "foreign affairs function" has been defined as "an activity specially fitted for, appropriate to, or expected of international relations" – i.e., the "interests of this country in foreign countries." A. Bonfield, *Military and Foreign Affairs Function Rule-making Under the APA*, 71 Mich. L. Rev. 221, 258-70 (1972). The *Attorney General's Manual on the Administrative Procedure Act* itself notes that the phrase is "broad" and "generic" such that the exception would apply "to most functions of the State Department and the foreign affairs functions of any other agency." *Attorney General's Manual on the Administrative Procedure Act*, at 26-27 (1947).⁷

Courts have applied the "foreign affairs" function exception in analogous circumstances. See *International Brotherhood of Teamsters v. Pena*, 17 F.3d 1478 (D.C. Cir. 1994) (tying Department of Transportation action to memorandum with Mexico pursuant to NAFTA agreements); *American Ass'n of Exporters & Importers v. U.S.* 751 F.2d at 1249 (regulations pursuant to international agreement concerning textile products); *Helms v. Secretary of the Treasury*, 721 F. Supp. At 1361-62; *Mast Indust., Inc. v. Regan*, 596 F. Supp. 1567 (1984) (upholding agency action based upon international textile treaty); *WBEN, Inc. v. United States*, 396 F.2d 601, 614-16 (2d Cir. 1968) (regulation to conform to international agreement with Canada), *cert denied*, 393 U.S. 914 (1968). In each of these decisions, the courts found a foreign-affairs function to exist where an international agreement established obligations and responsibilities on the part of the United States (and the other country) to fulfill the terms of the agreement. Such functions could not be amended through unilateral legislative or administrative actions that did not adhere to the international agreement that established the obligations and responsibilities.

The decisions when to open and close the Seaway go directly to the purpose of the international agreements governing the Seaway between Canada and the United States. These agreements provided that the binational management and operation of the Seaway would rest with the SLSDC and the SLSMC (as the successor to the SLSA). Based on the collaborative

⁷ The *Attorney General's Manual on the Administrative Procedure Act* (1947) is a contemporaneous interpretation [of the APA] previously given some deference by the [Supreme] Court because of the role played by the Department of Justice in drafting the legislation. (quoting from *Mast Indust., Inc. v. Regan*, 596 F. Supp at 1581-82 (citations omitted).

framework called for in the agreements, the Canadian and U.S. Seaway entities established a deliberative, joint process for determining an opening date for the Seaway's navigation season. Over the last 50 years, the Seaway entities have not only enhanced this process through greater experience and expertise, they have repeatedly informed the public as to the criteria used to make an opening decision.

Establishing a U.S.-only rulemaking process would supercede the deliberative, binational process that currently exists between the SLSMC and the SLSDC. As noted above, such a unilateral process would be in conflict with the international agreements that directed a cooperative and deferential relationship between the United States and Canada concerning the regulation of the jointly managed waterway. Canada owns 13 of the 15 locks in the Seaway. If the U.S. were to implement a rulemaking that determined the opening date for the two U.S. locks, it could prevent Canada from utilizing the Seaway System if it decided on an earlier opening date. Thus, a sole U.S. decision would be in direct violation of the terms of the agreements which direct that such decisions are to be made jointly through a collaborative process.

For the reasons noted above, I have determined that the notice and comment provisions of the Administrative Procedure Act are neither required nor appropriate for determining the process and criteria for setting the opening date for the Seaway. As a result, your Petition is denied.

STR Environmental and Safety Concerns at Opening

In its petition, STR expresses several concerns regarding a March opening of the Seaway. The SLSDC and the SLSMC take their roles as stewards of this vital international waterway seriously and environmental concerns are factored into our decision to open as well as in our general day to day operations of the Seaway. I would like to take this opportunity to address the specific concerns raised in the Petition.

Environmental Concerns

Many of the environmental concerns stated in the Petition and attachments regarding a late March opening date are generally the same ones raised over 32-years ago by the New York State Department of Environmental Conservation (DEC) in their 1978 Environmental Assessment of a winter navigation demonstration project on the St. Lawrence River.⁸ This demonstration project was one phase of a larger U.S. Army Corps of Engineers' study to determine the environmental impact of winter navigation throughout the Great Lakes Seaway System.⁹ The environmental concerns regarding the demonstration project included damage to wetlands and shorelands; scouring; alterations to thermal profiles in the river; disruptions to fish and bird migrations; and the increased likelihood of spills. It is important to note that the study was focused on the potential challenges and consequences of winter navigation (late fall through

⁸ Environmental Assessment, FY 1979 Winter Navigation Demonstration on the St. Lawrence River, New York State Department of Environmental Conservation, June 1978.

⁹ Final Survey Study for Great Lakes and St. Lawrence Seaway Navigation Season Extension ("Study"), U.S. Army Corps of Engineers, Detroit District, August 1979.

early spring) not on the Seaway's normal season (late March to the end of December). In its report, the DEC raised these environmental concerns regarding winter navigation, unfortunately they were not scientifically substantiated. The U.S. Army Corps of Engineers stated in response to these concerns that: "A number of perceived, potential, and hypothetical adverse impacts had been suggested, but only limited evidence exists to support them."¹⁰

Additionally, numerous state and Federal transportation and environmental organizations, such as the U.S. Environmental Protection Agency (EPA), the U.S. Maritime Administration (MARAD), and the U.S. National Oceanic and Atmospheric Administration (NOAA), reviewed and provided comments on the DEC Environmental Assessment that were included in the Army Corps of Engineers' Final Environmental Statement.¹¹ Many of the Federal and state agencies noted in their comments significant discrepancies between the claims made in the summary and the actual data contained in the technical reports.

Significantly, the winter navigation study's environmental impact statement noted that while perceived, potential, and hypothetical adverse impacts had been suggested, only limited evidence existed to support them. These assertions have never been scientifically substantiated.

More recently, in 2009 the two Seaway entities, pursuant to a Memorandum of Understanding (MOU) with the U.S. and Canadian Akwesasne Mohawk tribes, completed a three-year observational study that was to observe and document, over a period of three years, within the area extending from Snell Lock to the middle of Lake St-Francis, the potential physical impacts arising from icebreaking activities in support of commercial navigation in the St. Lawrence Seaway. Specifically, the central questions to be studied were: "Do icebreaking activities and/or ship transits in ice conditions within the study area cause; 1) Shoreline ice scour and/or 2) Land-fast ice to break away from shore prematurely?"

Based on the three years of general observations including two years with icebreaking operations, the following conclusions are directly pertinent to the central questions of the JOS study:

1. Icebreaking operations are not required every year to open the Seaway. In fact, the icebreakers were only required during two of the three year study mandate.
2. Small scale, shallow water shoreline impacts occur for natural ice break-ups and clear-outs as was observed in the third year of the mandate. This is the baseline against which evaluations of the shoreline impacts resulting from ice breaking/clearing operations must be compared.
3. Ice-induced shoreline impacts, in comparison to the baseline for natural ice break-up and clear-out, were not observed for the two years of the study during which icebreakers were used to clear the Seaway. Furthermore, during the second year of the mandate, an analysis of the expected forces applied on the shoreline by the icebreaking operations indicated low contact pressures in relation to those at which ice failures tend to occur. Furthermore, the calculations showed that the icebreaking forces transmitted to the

¹⁰ See Study, Vol. I. p. II-2

¹¹ Final Environmental Statement on the FY 1979 Navigation Season Extension Demonstration Program, Army Corps of Engineers, Detroit District, August 1978, Vol. II, Appendix I).

- shoreline, under similar operations and observed ice conditions, were significantly less than those expected to be produced under high wind conditions.
4. The Freezing Degree Days (FDDs) method is not reliable as a standalone index to characterize the state of the ice cover or, to gauge the potential severity of shoreline impacts. Other important factors such as water levels and flows, air and ice temperatures as well as ice thickness must be considered.
 5. No shoreline physical impacts were reported by any landowners along the shoreline being studied during the three year study.

Based on the study team's experience and findings, the following set of recommendations was developed:

1. An inclusive process should continue to be used when setting the Seaway Opening Date, during which all stakeholders (involved in the original study) are consulted.
2. The current ice breaking operations should continue using the same diligence as was observed during the two years ice breakers were used.
3. The Freezing Degree Days (FDDs) index method should be augmented with other sources of information such as RADARSAT imagery, photographs from aerial fly-overs, water levels and flows and, ice thickness and temperature profiles in order to obtain a more comprehensive assessment of the local ice conditions. The data should continue to be collected in an effort to build local knowledge that would assist in identifying extreme conditions.
4. Efforts should be maintained in synthesizing these data with the aim of producing simple guidelines, so as to minimize the data collection that would be required in future years.

The final report of this study is available on the joint Seaway website, www.greatlakes-seaway.com under the Environment section.

Emergency Response

In 51 years of operation, the Seaway has never experienced a major vessel incident that has resulted in a spill or discharge into the St. Lawrence River or Lake Ontario at or near the date of the Seaway's opening. I would respectfully submit that this fact is not due to good fortune or coincidence. Our safety record at opening is due largely to the extensive operational planning, emergency response preparation, and careful implementation that go into the Seaway's opening procedures. For example, certain operational limitations are placed upon vessels at the beginning of the season, including prohibiting larger beam (width) vessels under certain conditions. In addition, all ice-management equipment must be certified to be in working order and positioned around the lock, including air compressors to protect the lock equipment as well as backhoes and similar equipment to remove ice from lock walls. The SLSDC's ice-reinforced tugboat, *Robinson Bay*, and the Canadian Coast Guard's (CCG) ice-breaking vessels are available to assist transiting ships.

While it is the U.S. Coast Guard (USCG) that has ultimate responsibility to respond to a ship incident, the SLSDC and the SLSMC have developed an Emergency Response Plan (ERP) that calls for the creation of a Seaway first-responders team. The ERP is continuously reviewed

and revised to incorporate the latest research and training protocols. The SLSDC initiates the ERP should an incident occur, and would oversee it until the USCG arrives and takes over the responsibility as the Federal On-Scene Coordinator. It is important to note that the Seaway ERP is designed to be a supplement to, not a replacement for, the USCG Area Contingency Plan (ACP). Under that plan it is the USCG, not the SLSDC, that has ultimate response authority. Moreover, the SLSDC is not a contractor for hazardous spill removal on the St. Lawrence River. Our efforts, like the USCG's, are focused on ensuring the "responsible party" (i.e., the polluting source) is taking immediate measures to reduce the impact of any incident by activating their vessel response plan.

Annually, the SLSDC trains its personnel on emergency response procedures and participates in emergency response exercises on a regular basis, many of which are attended by STR representatives. Several examples of the ERP exercises are described more fully below.

SLSDC operational personnel participated in the USCG's full-scale emergency response exercise, September 22-23, 2008 in Alexandria Bay, N.Y., which simulated a terrorist attack on the St. Lawrence River. The exercise included a scenario where a cigarette boat would strike a local tour boat carrying summer-holiday passengers and were to cause major injuries, casualties, and vessel damage.

The objective of the exercise was to examine the various agency roles, responsibilities, jurisdictions, and capabilities in preventing and responding to a terrorist attack. The key elements of the exercise were to: (1) develop a pre-deployment organization chart in accordance with the Eastern Great Lakes Area Maritime Security Plan through the U.S. Department of Homeland Security's Incident Command System; (2) understand which agencies are involved in such an incident and the role of law enforcement and emergency management; and (3) create new or build upon existing relationships needed to ensure a successful response.

From September 6-8, 2006, the Corporation participated in the "Thousand Island Scramble"; a USCG-sponsored exercise designed to test the policies and procedures of the USCG's ACP, and other local and state plans brought into the exercise. In addition, oil boom deployment training was offered to participants. The SLSDC and USCG deployed boom in the local area (Alexandria Bay) and many participants elected to be onsite for this training. The full scale response activity was conducted along the St. Lawrence River on September 7. Federal, state, and local response agencies on both sides of the U.S. and Canadian border, as well as environmental stakeholders, tested notification, communication, and response duties within their individual plans, the ACP, and within the structure of the Incident Command System.

In early March 2005, the SLSDC successfully completed a tabletop review of emergency procedures and communication steps to be initiated in the event of an oil spill. The personnel in this exercise had benefited from the cold weather classroom training conducted in 2004 by Drs. Ed Owen and David Dickens, two internationally recognized specialists regarding oil spills in the Canadian Arctic. In 2003, SLSDC personnel along with representatives from the New York Power Authority (NYPA) and the USCG conducted a boom deployment exercise in Massena. In this exercise, boom was deployed in three sections (200 feet per section) in a cascade pattern to deflect the simulated spill to a convenient clean-up location.

Use of Navigation Aids

The SLSDC's policy for the placement of navigation aids involves placing the buoys in the water as ice moves out of areas that are to be commissioned. Until these buoys are commissioned, the Seaway can and has placed limitations on navigation during the opening and closing periods. During these periods, decisions about vessel transit are dependent on ice and weather conditions as well as other factors. If there is any doubt as to the safety of allowing a vessel to pass, the SLSDC does not permit it to transit.

The following procedure is used to determine whether a vessel should be permitted to transit prior to the placement of buoys in the U.S. sectors:

- The Master/Pilot requests to transit; there are two Pilots onboard ocean vessels,
- The vessel's navigational equipment must be in sound working order (Seaway agencies conduct an onboard inspection of all ocean vessels prior to transit),
- After joint daily discussions with the SLSMC and CCG, the SLSDC determines whether to allow transit without buoys following a review of current and projected weather reports (i.e., clear night, no predictions of fog or snow), and
- The SLSDC determines ice conditions are such to allow safe transit without buoys based on joint daily discussions with the SLSMC and CCG.

Summary

In response to your Petition, I find that:

- Existing international agreements with Canada, including an Exchange of Notes from 1952 through 1959, the *Boundary Waters Treaty of 1909*, as well as parallel national legislation, requires coordination with our Canadian counterpart, the Saint Lawrence Seaway Management Corporation (SLSMC) to jointly operate and manage the binational waterway.
- The agreements have fostered one of the most unique cooperative and consultative relationships between our two nations.
- The decisions when to open and close the Seaway go directly to the purpose of the international agreements governing the Seaway.
- There is already a process in place to determine the opening date which involves coordination between SLSDC and SLSMC. Among the significant factors considered in establishing an opening date for the navigation season are weather and water (i.e., ice) conditions, the completion of lock infrastructure maintenance, and the anticipated demand for Seaway services.
- Section 553 of the Procedure Act (APA) does not apply to a rulemaking involving a foreign affairs function of the United States.

- The foreign affairs exemption applies if the subject matter so affects relations with other governments that a public rulemaking would clearly provoke definitely undesirable international consequences.
- The President and CEO of the SLSMC and the Assistant Deputy Minister for Transport Canada opposed the Petition on the basis that that a U.S. only rulemaking would violate the international agreements between the two governments.
- Since a notice and comment rulemaking would violate the international agreements with Canada by impeding the abilities of the SLSDC and SLSMC to jointly manage and operate the binational waterway, the Petition is denied.

As is discussed in detail above, through international agreements, Canada and the United States created a joint process for their representative agencies to obtain and review the relevant scientific data, weather forecasts, and maintenance requirements of the lock structures. Again, we value input from stakeholders and would welcome the receipt of any relevant information related to setting the opening of the navigation season. Please be assured that pursuant to the joint binational process provided for by international agreement, the Seaway Corporations take considerable effort to represent the public interest by striking the appropriate balance between ensuring safety and protecting the environment while facilitating the transportation needs of commercial navigation.

Sincerely,



Collister Johnson, Jr.



The St. Lawrence
Seaway Management
Corporation

Corporation de Gestion
de la Voie Maritime
du Saint-Laurent

202 Pitt Street, Cornwall, ON K6J 3P7

March 2, 2010

Mr. Collister Johnson, Jr.
Administrator
Saint Lawrence Seaway Development Corporation
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Suite W32-300
Washington, D.C. 20590

Dear Mr. Johnson:

Re: Petition to promulgate a rule regarding the process and criteria for setting the annual opening date of the St. Lawrence Seaway

This is in response to the petition for issuance or amendment of a rule under the Administrative Procedure Act, 5 U.S.C. §553(e) and 5 U.S.C. §555(e) with respect to the Petitioner, Save The River, seeking a notice and comment rulemaking on the process and criteria the St. Lawrence Seaway Development Corporation ("SLSDC") uses to set the opening date for the St. Lawrence Seaway ("Seaway").

The St. Lawrence Seaway Management Corporation ("SLSMC") strongly opposes this rulemaking petition which would impede our ability to decide jointly, with the SLSDC, the opening or closing of the Seaway navigation season. Such rulemaking would be in violation of the various international agreements, treaties and letters between Canada and the United States ("International Agreements"), which have full force and effect.

Such rulemaking would impede our ability to establish the navigation season and operate the Seaway under the mandate given to the SLSMC by the Government of Canada and contrary to the provisions of the International Agreements. These International Agreements require Canada and the United States to fully collaborate before enacting any new law or promulgating any new regulations, applicable to the respective national parts of the international section of the St. Lawrence River and canals, which might affect Canadian or United States shipping.

The Seaway project was constructed pursuant to an application and approval process provided by the U.S.-Canada Boundary Waters Treaty Act of 1909. Article 1 requires that both Canada and the United States ensure that all navigable waters are forever equally free and open for the purposes of commerce to inhabitants and vessels of both countries.

.../2

The SLSMC, established in 1998, has the authority to fulfill Her Majesty's obligation to manage, operate and maintain the Seaway by the Government of Canada. This mandate was transferred to the SLSMC, pursuant to the power of the Minister of Transport (Canada), as established in the *Canada Marine Act* and a Framework Agreement entered into between her Majesty the Queen in Right of Canada, represented by the Minister of Transport, and the SLSMC.

Under the *Canada Marine Act* and the Framework Agreement, the SLSMC has the mandate to fulfill all obligations undertaken by Canada pursuant to any existing and future agreement between Canada and the United States.

The SLSMC manages, operates and maintains the Seaway in close collaboration with its U.S. counterpart, the SLSDC, as well as their stakeholders and other sovereign nations.

The SLSMC and SLSDC operate under joint regulations that are only changed through negotiations between the two entities, as authorized by their respective governments, in order to operate the Seaway pursuant to the terms of agreements. Any rulemaking that is undertaken in either country is only done with the agreement of both countries.

There is already a process in place to determine the opening date which involves coordination between SLSDC and SLSMC. Among the significant factors considered in establishing an opening date for the navigation season are weather and water (i.e. ice) conditions, the completion of lock infrastructure maintenance, and the anticipated demand for Seaway services. Water and air temperatures are closely tracked for the St. Lawrence River and Lake Ontario and there is a long historical record to draw upon.

Furthermore, the process for opening and closing of the Seaway involves continuous gathering of information, development of strategies, planning, implementation and monitoring, all supported by a detailed communication plan. There is ongoing discussion and information dissemination between industry stakeholders, First Nations, Coast Guards and the SLSDC and SLSMC Operations staff.

In conclusion, for the reasons cited above, the St. Lawrence Seaway Management Corporation is of the opinion that effective procedures are already in place to determine the opening date for the St. Lawrence Seaway, that International Agreements preclude you from considering this rulemaking without our approval and that, consequently, the petitioner's request must be denied.

Yours sincerely,


Richard J. Corfe
President and C.E.O.



Transport
Canada

Transports
Canada

Assistant
Deputy Minister

Sous-ministre
adjoint

Policy

Politiques

Your file Votre référence

Our file Notre référence

Mr. Collister Johnson, Jr.
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Washington, D.C. 20590


Dear Mr. Johnson:

The following is in reply to the petition to promulgate a rule regarding the process and criteria for setting the annual opening date of the St. Lawrence Seaway (Petition for Rulemaking), recently filed with your corporation by the Save The River organization, pursuant to the *Administrative Procedure Act*.

The Canadian portion of the St. Lawrence Seaway and related assets are owned by Canada. The St. Lawrence Seaway Management Corporation (SLSMC), a not-for-profit corporation, manages, operates and maintains the Seaway and related assets on behalf of Canada under a series of commercial agreements between the two parties.

There exist numerous international treaties and agreements entered into between Canada and the United States that establish the relationship between the two countries regarding the original construction of the Seaway and its subsequent management and operation.

The key agreements and Canadian laws relating to the Seaway include:

- the 1909 *Boundary Waters Treaty*;
- the *International Boundary Waters Treaty Act* and associated regulations, which ratified the above treaty to make it binding in Canada;
- the *International Rapids Development Act* and the *St. Lawrence Seaway Authority Act* (the latter now repealed), which authorized the construction of the Seaway, and established the St. Lawrence Seaway Authority, a Canadian Crown corporation, that up until its dissolution in 1998, managed and operated the Seaway on behalf of Canada;

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- the *Canada Marine Act* and regulations, adopted in 1998, which served to commercialize the Seaway by transferring the management and operation to a private entity, now known as the SLSMC; and
- various and multiple diplomatic notes exchanged between Canada and the United States dealing with the construction of the Seaway, and various operational matters such as the setting of tolls, coordination of icebreaking activities, pilotage services, etc.

The bi-national nature of the Seaway and the intent of our two countries to manage and operate the Seaway jointly and in conjunction with the other are clearly set out in the abovementioned treaties, agreements and laws.

It was also intended by both countries that while respecting each country's sovereignty, that this joint administration not be unduly restricted. This is best exemplified in a diplomatic note from the Secretary of State for External Affairs for Canada, Lester B. Pearson to the Chargé d'Affaires ad interim of the United States Embassy in Canada, Don C. Bliss, dated August 17, 1954, which set out terms and conditions for the construction of the Seaway, that were accepted by the United States in a reply note bearing the same date.

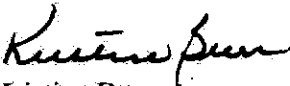
- "6. (a) It is recognized that it is of great importance to Canada and the United States that the St. Lawrence Seaway be used to the maximum extent required by the needs of commerce. It is understood therefore that both Governments will use their best endeavours to avoid placing unreasonable restrictions in the transit of passengers, shipping or trade in the international section of the St. Lawrence Seaway.
- (b) It is further agreed that each Government will consult the other before it enacts any new law or promulgates any new regulation, applicable in the respective national parts of the international section of the St. Lawrence River, which might affect Canadian or United States shipping, or shipping of third-country registry proceeding to or from Canada or the United States respectively.
- (c) Similarly, with respect to any laws or regulations now in force in either country which affect the shipping interests of the other country in the international section of the St. Lawrence River, the Government affected may request consultation concerning such laws or regulations and the other Government shall accede to requests for consultation.
- (d) The foregoing undertakings are in addition to the treaty obligations now in force between Canada and the United States affecting shipping in the St. Lawrence River and canals, particularly Article I of the *Boundary Waters Treaty* of 1909."

Currently, there exist no Canadian laws or regulations (and to our knowledge, no U.S. laws or regulations) that speak to or impose specific conditions or criteria respecting the opening date of the Seaway. We think that this fact should be interpreted as an intention of both countries to leave operational matters such as these to the discretion of the SLSMC and the Saint Lawrence Seaway Development Corporation (SLSDC), within the limits of their respective mandates.

This does not mean however that a process for determining an appropriate opening date does not exist, or that the considerations raised by the petitioner are not otherwise taken into account in the process that does exist. Consultation with stakeholders does take place, and the Memorandum of Understanding entered into with the Mohawks of Akwesasne in 2007 addresses many of the environmental concerns of the petitioner.

Transport Canada is of the view that any formal regulations imposing conditions on the two countries regarding the opening date of the Seaway would seriously impede the ability of the SLSMC and the SLSDC to jointly operate the Seaway and would be contrary to the numerous international treaties and agreements between the two countries.

Yours sincerely,


Kristine Burr