

February 5, 2010

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

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

Dear Mr. Johnson,

This is a petition for issuance or amendment of a rule under the Administrative Procedure Act (“APA”), 5 U.S.C. §553(e) and 5 U.S.C. §555(e). Petitioner Save The River (“STR”) seeks 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”). STR’s petition rests on legal and public policy grounds.

I. Introduction

A. About the Petitioner

Save The River is a non-profit, member-based environmental organization whose mission is to preserve and protect the ecological integrity of the Upper St. Lawrence River through advocacy, education, and research.¹ STR was founded in 1978 by a group of citizens opposed to winter navigation on the St. Lawrence Seaway, and this issue remains of pivotal importance to its members. STR has approximately 1,400 members who use or have an interest in the resources of the St. Lawrence River.

STR runs programs focusing on healthy fisheries, water quality, wildlife conservation, and environmental education, as well as on protection against threats from commercial navigation, improper sewage disposal, poor shoreline management, and inadequate spill response measures. STR holds annual environmental education events, works for protective legislation, serves as a resource center on environmental issues, sends out speakers, educates the public, and advocates for the St. Lawrence River.

B. History of the St. Lawrence Seaway Opening Controversy

¹ This petition was prepared with the assistance of the Conservation Law Center, Inc. (www.conservationlawcenter.org).

The opening of the navigation season on the St. Lawrence Seaway System is set by the SLSDC, in coordination with the Canadian St. Lawrence Seaway Management Corporation, through a “Seaway Notice” issued approximately one month in advance of the scheduled opening date at the start of each shipping season.

Over the years, the Seaway’s navigation season has undeniably lengthened. Since 1959, the opening date has moved, generally, from April to March and the season has been extended from approximately 230 to over 280 days of navigation in the Montreal-Lake Ontario section.²

As the Seaway elected to open earlier, concerns have emerged related to the environmental impacts of vessel passage in ice conditions. Ship generated wave energy from large ocean-going vessels traveling through the Seaway can result in premature ice break up and cause scouring damage in wetland habitats adjacent to the shipping channel. Premature ice break up can also result in physical damage to shoreline structures that would not have occurred under natural conditions.³ Additionally, even after the initial ice breaking, refreezing may require the Seaway to request the Coast Guard to re-break the ice.

II. Notice and Comment Rulemaking is Required by Law and Policy

A. The SLSDC’s Action Determining the Opening Date of the St. Lawrence Seaway is the Type of Agency Action That Requires Notice and Comment Under APA § 553(b)-(c)

The SLSDC’s process for determining the opening date of the St. Lawrence Seaway should be promulgated in adherence to APA § 553(b)-(c) notice and comment because it is a rule, is legislative or substantive in nature, and is not exempted by § 553(b)(A), i.e. the action is not an interpretive rule, a procedural rule, nor a general statement of policy.⁴

² The St. Lawrence Seaway Traffic Report Historical Tables 1959-1992, 9, *available at*: http://www.greatlakes-seaway.com/en/pdf/traffic_report_hist.pdf. The Saint Lawrence Seaway Development Corporation, “The St. Lawrence Seaway 2008 Traffic Report,” Table S3, *available at* http://www.greatlakes-seaway.com/en/pdf/traffic_report_2008_en.pdf (See Appendix 1).

³ Environmental Assessment of the FY 1979 Winter Navigation Demonstration on the St. Lawrence River, Technical Report at H-69 (1978). (See Appendix 2 for excerpts).

⁴ The binding nature of the SLSDC’s action determining the Seaway opening date (discussed *infra*) excludes the action from classification as an interpretive or procedural rule, or statement of policy. See *Manufactured Housing Institute v. U.S. E.P.A.*, 467 F.3d 391, 397-99 (4th Cir. 2006). Additionally, “[e]xceptions to the notice and comment provisions of section 553 are to be recognized ‘only reluctantly.’ Otherwise, the salutary purposes behind the provisions would be defeated. The notice and comment requirements were included in the APA for two main reasons. First, ‘to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.’ And second, to ‘assure () that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.’” *National Ass’n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 1193 (1983) (internal citations omitted). See also *American Hospital Ass’n v Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987).

The APA defines a “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency”⁵ Such “rules” can be broadly classified as legislative/substantive or non-legislative. The former create law, grant rights, impose obligations, or produce other significant binding effects on private interests, and must adhere to APA § 553(b)-(c) notice and comment requirements. The latter, non-legislative rules, are not legally binding and are thus exempt from notice and comment under § 553(b)(3)(A).⁶

As a statement of “general or particularly applicability and future effect designed to . . . implement [or] prescribe law,” the SLSDC’s process and action determining the opening of the Seaway falls within the APA definition of a rule. Furthermore, because the SLSDC’s rule implements or prescribes binding law, the rule is legislative/substantive in nature and requires adherence to § 553(b)-(c) notice and comment procedures.

1. The SLSDC’s Action is of “Future Effect”

The SLSDC’s process for determining the Seaway opening date is of “future effect.” The term “future effect” is used to clarify the difference between adjudication (defined as “an agency process for the formulation of an order”), which is not subject to notice and comment, and rulemaking.⁷

The SLSDC’s process addresses what the law will be. The SLSDC regulates the opening and closing of the Seaway in order to prevent navigation when conditions are unsafe. To this end, the SLSDC determines the Seaway opening date prospectively, i.e. it makes a determination using some process and provides notice to regulated parties that the Seaway will be open for navigation as of a specific future date. The opening date determination is essentially a statement from the SLSDC that, as of the predetermined future date, regulated parties can engage in conduct that was previously unlawful. The process for setting this date is not a determination of past and present rights or liabilities but rather is the regulation of future conduct consistent with rulemaking under the APA.⁸

2. The SLSDC’s Action Implements or Prescribes Binding Law

⁵ 5 U.S.C. § 551(4).

⁶ *Sorenson Communications, Inc. v. FCC*, 567 F.3d 1215, 1222 (10th Cir. 2009); *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980).

⁷ *Bowen v. Georgetown Univ. Hosp.*, 109 S.Ct. 468, 475-76 (1988)(Scalia, J., concurring); 5 U.S.C. § 551(7).

⁸ *See* 1947 Attorney General's Manual on the Administrative Procedure Act at 14, “[r]ule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. . . . Conversely, adjudication is concerned with the determination of past and present rights and liabilities.”).

Because of its binding nature, the SLSDC's action is not only a rule, as defined by the APA, but is furthermore a legislative/substantive rule. The focus of the inquiry into whether a particular agency action is subject to §553(b) notice and comment is whether the agency action has the force of law.⁹ In other words, if an agency action appears on its face to be binding or is applied by the agency in such a way that indicates it is binding, the action must adhere to § 553(b) notice and comment procedures.¹⁰ An action will have a practical binding effect if the private parties affected by the action are "reasonably led to believe that failure to conform will bring adverse consequences . . ."¹¹

The process by which the SLSDC determines the opening date of the Seaway has the force of law because it is binding and is administered by SLSDC with binding effect. Each year the SLSDC closes the navigation season by setting a "closing date."¹² An attempted Seaway transit while closed would be a violation of Seaway regulations and would subject the violator to civil and potentially criminal penalties.¹³ Vessels planning transit on the Seaway must await the SLSDC's decision to open the Seaway, or else risk enforcement action. As indicated above, when a reasonable belief exists that failure to conform will bring adverse consequences there is a practical binding effect. Once the SLSDC determines the opening date and that date arrives, transit is permitted. Private parties operating on the Seaway are thus legally bound by the SLSDC's process and the resulting decision to open or close the Seaway.

The binding nature of the SLSDC's action is also evidenced by the language used to close the navigation season, for example: "all vessels *must* be clear of this section at 23:59 hours on December 29th."¹⁴ Although this language refers to the closing date of the Seaway, it implicates the opening of the Seaway in that the Seaway is closed for navigation until and except for when it is open. Any party seeking to navigate the Seaway "must" not do so when closed and thus "must" await the opening. In other words, a vessel's navigation of the Seaway is made legal or illegal based on SLSDC's actions. Courts give great weight to the language actually used by the agency and have found the choice between the words "will" and "may" to be decisive: "will" is indicative of a binding norm, whereas "may" indicates a general statement of policy.¹⁵ Here, the term employed by SLSDC, "must," is equal in its force and binding nature to the term "will" and is indicative of the binding nature of SLSDC's process regulating when the Seaway will be open.

⁹ *General Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002).

¹⁰ *Id.* at 383.

¹¹ *Id.* (quoting Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 *Duke L.J.* 1311, 1328-29 (1992)).

¹² 33 C.F.R. § 401.96(b) (2009) (defining "closing date" as "the date designated in each year by the Corporation and the Manager as the date on which the Seaway is closed to vessels at the end of the navigation season;").

¹³ 33 C.F.R. §§ 401.97; 33 CFR §401 Subparts B and C.

¹⁴ SLSDC, *The St. Lawrence Seaway Management Corporation, Seaway Notice No. 9-2007* (emphasis added) (available at <http://www.greatlakes-seaway.com/en/pdf/navigation/notice20071115.pdf>).

¹⁵ *Community Nutrition Institute v. Young*, 818 F.2d 943, 947 (D.C. Cir. 1987) (indicating that "mandatory, definitive language is a powerful, even potentially dispositive, factor," and finding that an agency's self-described interpretive rule was actually a legislative rule subject to notice and comment.).

3. The SLSDC's Action is Not Exempt from § 553(b) Notice and Comment

The SLSDC's action is not exempt from notice and comment as an interpretive or procedural rule or as a general statement of policy because the action has binding legal effect. An interpretive rule is a statement of what the agency thinks a statute or regulation means and has no binding legal effect.¹⁶ Likewise, the critical feature of a procedural rule is that it "covers agency actions that do not themselves alter the rights or interests of parties," i.e. it is not binding.¹⁷ Finally, a policy statement announces what the agency intends to establish as policy, and cannot be relied upon as a statement of law.¹⁸ Put simply, the binding nature of the SLSDC's action in establishing the Seaway opening date disqualifies the action from the § 553(b)(A) exemptions.

B. The SLSDC Should Conduct a Notice and Comment Rulemaking on the Opening Date Process Based on Policy Considerations

In addition to the APA requirement that the process for setting the opening date of the Seaway must be promulgated in a notice and comment rulemaking, public policy obligates the SLSDC to begin a notice and comment rulemaking because there is significant, ongoing public concern about this issue. Even interpretive rules, if of general applicability and likely to have substantial impact on the public, should be promulgated through notice and comment.¹⁹

The notice and comment requirements of § 553 of the APA promote public participation and fairness to affected parties and assures agency consideration of facts and information relevant to a particular administrative problem. Public participation also increases the likelihood of administrative responsiveness to the needs and concerns of those affected.²⁰

The public has vigorously expressed its concern about the opening date's effects on safety and the environment and has repeatedly asked for information on and participation in the process for setting the date. The SLSDC has not been genuinely responsive to these concerns. The SLSDC can, by contrast, demonstrate a commitment to governmental responsiveness and fairness by allowing the process of setting the Seaway opening date to be one in which the public is informed and involved.

¹⁶ *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (citing *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952)).

¹⁷ *JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (quoting *Batterton*, 648 F.2d at 707).

¹⁸ *Cohen v. U.S.*, 578 F.3d 1, 7 (D.C. Cir. 2009); *Pacific Gas & Elec. Co. v. Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974).

¹⁹ Administrative Conference Recommendation 76-5, 1 C.F.R. § 305.76-5 (1984), available at <http://www.law.fsu.edu/library/admin/acus/305765.html>.

²⁰ *American Hospital Ass'n*, 834 F.2d at 1044 (citing *Batterton*, 648 F.2d at 703; *Guardian Federal Sav. And Loan Ass'n v. FSLIC*, 589 F.2d 658, 662 (D.C. Cir. 1978)).

III. Environmental and Safety Concerns Regarding Setting the Opening Date

STR is concerned with both the environmental and safety implications of setting the Seaway's opening date. If the Seaway is opened before natural ice break up has occurred, the Saint Lawrence River may suffer from physical, hydrologic, and ecological damage associated both with winter shipping and with ice breaking activities. An early opening date for navigation, when ice is still present in the channel, also may pose a safety risk for nearby communities.

A. Environmental Considerations

The decision to set an early opening date on the Seaway can have environmental impacts on the St. Lawrence River, and surrounding areas. As summarized by the New York Department of Environmental Conservation, the impacts of premature Seaway opening include damage to sensitive shoreline habitats, disruption of spawning by fish species of considerable local economic value (such as yellow perch and northern pike), and damage to shoreline structures.²¹

The *1978 Environmental Assessment* specifically addressed potential impacts of early winter (November, December, and early January) and early spring ship passage—not just shipping through winter ice cover.²² In fact, the *Environmental Assessment* notes that these are periods when the ice cover is especially “inherently unstable and subject to physical impact from ship passage.”²³ Ice breaker and ship movements during the time in which the winter ice canopy is beginning to erode (early spring) could result in abnormal erosion patterns, brash flows, and ice avalanches, which could stress structures and critical shoreline habitats.²⁴ Without ship passage, ice cover breaks up gradually, forming short-term brash flows and avalanches that are usually dispersed by the current. In its conclusion of potential impacts on St. Lawrence River ice, the *Environmental Assessment* states:

the St. Lawrence River ice cover is inherently unstable during the early winter, *early spring*, and throughout mild winters. These instabilities could result in significant impacts to critical shoreline environments Impacts from ship passage can be anticipated on shoals and islands (scouring and the formation of new ice covers on above-water surfaces), the shallow water littoral zone (due to the disruption from pressure waves), and annually formed open water ponds in the ice cover. In addition, water level fluctuations could result in disruptions to the shallow water littoral system (freeze down and the intensification of natural

²¹ Letter from Denise Sheehan, Acting Commissioner for the State of New York Department of Environmental Conservation, to Albert Jacquez, Administrator, Saint Lawrence Seaway Development Corporation (February 14, 2005). (See Appendix 3).

²² Environmental Assessment of the FY 1979 Winter Navigation Demonstration on the St. Lawrence River, Technical Report at H-69 *supra* note 3.

²³ *Id.*

²⁴ *Id.*

benthic disturbance) and wetlands (major changes in the wetland snow/ice cover).²⁵

While the exact impacts of the current shipping season are unknown, we do know that during periods of ice, propeller wash and drawdown can be increased and that newer, larger vessels generate increased propeller wash effects.²⁶ Significant drawdown from a ship's passage could also increase damage to shore structures during ice conditions.²⁷

B. Safety Considerations

STR believes there are two types of safety risks associated with an early opening date for navigation on the St. Lawrence Seaway: delayed and ineffective emergency response activities; and the danger of travel through the Seaway without lighted navigation buoys.

1. Emergency Response

An early opening for navigation on the Seaway may result in greater risks associated with catastrophic oil or other pollutant spills because icy conditions complicate cleanup efforts. As the U.S. Army Corps of Engineers states, “the presence of ice and cold weather may seriously hamper all major phases of oil spill mitigation.”²⁸ Little is known of oil spills on ice, which could be very difficult to respond to, and measures to contain such spills are similarly ill understood.²⁹ For example, the U.S. Army Corps of Engineers suggests that burning an oil spill on ice “has been proposed.”³⁰ While this may be an option in the Arctic, it is an impractical and unsafe proposal for the sometimes narrow St. Lawrence River, which is located in a populated region. Additionally, even a spill on water with only floating ice could interfere with cleanup.³¹ If there is a spill of hazardous materials when ice is present the pollutant may settle under ice before it can be cleaned up, and a spilled pollutant could travel downstream under the ice where it cannot be contained, extending the negative effects of the spill.

STR believes that criteria for setting an opening date for navigation on the St. Lawrence Seaway must include the ability of emergency responders to access the resources outlined in the existing US Coast Guard Area Contingency Plan. “Access” includes full access to all boat ramps (which may be rendered in icy conditions) and other response assets.

²⁵ *Id.* at H-74 (emphasis added).

²⁶ James L. Wuebben ed. *Winter Navigation on the Great Lakes*, U.S. Army Cold Regions Research and Engineering Laboratory, Report No. 95-10, at 8, 11 (May 1995). (See Appendix 4).

²⁷ *Id.* at 15.

²⁸ *Id.* at 23; supported by Jefferson County Board of Legislators, Resolution No. 106 Opposing Early Opening of the St. Lawrence Seaway and Demanding Appropriate Disaster Planning by the St. Lawrence Seaway Development Corporation (April 12, 2005) (See Appendix 5).

²⁹ *Id.* at 23-24.

³⁰ *Id.*

³¹ *Id.*

2. Navigational Aids

Another safety concern of early opening dates for navigation on the St. Lawrence Seaway is that, in recent years, the presence of ice in the Seaway has prevented the seasonal installation of navigational aides such as lighted floating buoys. STR believes that navigational aids and buoys should be installed *before* the Seaway is opened in the spring.

Before the freeze over, the SLSDC removes many of the navigational aids to protect them from ice damage and to perform annual maintenance. The buoys are then stored on the banks of the St. Lawrence River during the closed season and must be reinstalled and anchored every spring. However, if the opening date for navigation on the Seaway is set while there is still ice cover, the SLSDC may not be able to retrieve the buoys from shore or properly install them in the channel because of the ice along the shoreline, where the buoys are stored and anchored.

The SLSDC agrees with STR that aids to navigation are necessary: “Although there have been many technological advances in maritime navigation in recent years, none has been determined as a permanent replacement for aids to navigation.”³² The SLSDC finds navigational aids “necessary” because it believes “it is in the best interest of all concerned to preserve and safeguard all available resources to assist the Mariner in a safe and productive transit.”³³ However, recently the date for opening navigation of the St. Lawrence Seaway has preceded the complete seasonal installation of the buoys. Additionally, between 2003 and 2005 commercial transportation was observed in the Seaway at night, even in the absence of necessary lighted buoys.³⁴

The buoys are an essential navigational tool. Therefore, navigation should not begin until the buoys are in place.

IV. Concerns Raised by the Public to the SLSDC

STR and others have struggled to learn about and participate in the process by which the SLSDC sets the opening date. STR has resorted to Freedom of Information Act (“FOIA”) requests, including a FOIA appeal, to obtain information about the process for determining an opening date. Most recently, STR filed a FOIA request to receive minutes of the SLSDC’s Advisory Board meetings, which the SLSDC has refused to release in response to less formal requests. Even the results of the FOIA requests have not addressed STR’s underlying goal: knowing how the decision is made, and ensuring that

³² Letter from Albert Jacquez, Administrator, Saint Lawrence Seaway Development Corporation, to Clifford Schneider (August 29, 2005) (*See* Appendix 6).

³³ Letter from Christopher Ehrman, Operations Specialist, SLSDC, to Clifford Schneider (June 15, 2005) (*See* Appendix 7). The SLSDC admits the fallibility of “winter markers,” because their positions can be moved by ice. *See, e.g.* Radio Message No. 5 of 2003 (*See* Appendix 8).

³⁴ Letter from Clifford Schneider, to Albert Jacquez, Administrator, Saint Lawrence Seaway Development Corporation (September 20, 2005). (*See* Appendix 9).

environmental and safety issues are addressed in making the decision. Public concern about the early opening of the Seaway is based on both environmental and safety issues.

A. Letters from Legislators, the NYSDEC, and the Public

The SLSDC has received numerous letters from officials as well as concerned members of the public, including STR, regarding the Seaway opening date. The following are examples of such letters:

- Congressman John McHugh, representing the 23rd District, New York, January 24, 2005.³⁵ The Congressman requested the following: (1) SLSDC consultation with New York’s Department of Environmental Conservation (“NYSDEC”) when setting the opening date; (2) setting an April 1 opening date unless specific weather conditions allow an earlier opening; (3) making public the specific criteria used to determine if weather conditions allow the Seaway to open; and (4) not allowing shipping until access is available from the boat ramps listed in the SLSDC’s Emergency Response Plan.
- John Peach, STR President, January 31, 2005.³⁶ Mr. Peach requested the following: (1) SLSDC consultation with the NYSDEC when setting opening dates; and (2) setting an April 1 opening date and moving it earlier if weather conditions allow. He noted impacts of opening the Seaway too early: risk to public safety when people are able to cross the Seaway by snowmobile at the same time the icebreaking may occur; risks associated with an oil or chemical spill when most boat ramps are frozen; damage to shoreline due to drawdown and surge; altering the thermal profile; impacts on birds and mammals; and economic impacts of degradation and damage to structures.
- Denise M. Sheehan, NYSDEC Acting Commissioner, February 14, 2005.³⁷ Ms. Sheehan expressed concern about the “significant environmental damage to sensitive wetland and shoreline areas caused by premature breakup of the ice cover . . . [including] the significant impacts of an oil or chemical spill, alteration of the thermal profile in nearshore areas, and the potential of ice scouring prior to April 1.”
- Darrel J. Aubertine, New York Assembly Member, April 4, 2005.³⁸ Mr. Aubertine expressed concern about the public and environmental safety of operating the Seaway at night and in inclement weather.

³⁵ Letter from John McHugh, U.S. Congress Member 23rd Dist. of New York, to Albert Jacquez, Administrator, Saint Lawrence Seaway Development Corporation (Jan. 24, 2005). (*See* Appendix 10).

³⁶ Letter from John Peach, President of Save the River to Albert Jacquez, Administrator, Saint Lawrence Seaway Development Corporation (January 31, 2005). (*See* Appendix 11).

³⁷ Letter from Denise Sheehan, Acting Commissioner for the State of New York Department of Environmental Conservation, to Albert Jacquez, Administrator, Saint Lawrence Seaway Development Corporation, *supra* note 21.

³⁸ Letter from Darrel Aubertine, State of New York Assembly Member 118th Dist., to Albert Jacquez, Administrator, Saint Lawrence Seaway Development Corporation (April 4, 2005). (*See* Appendix 12).

- Clifford P. Schneider, September 20, 2005.³⁹ Mr. Schneider expressed concern about early shipping without navigational aids and night transit during ice cover.
- Karen Nadder Lago, STR Assistant Director, March 9, 2006.⁴⁰ Ms. Lago inquired why the United States Coast Guard conducted an environmental assessment of icebreaking on the Great Lakes but the SLSDC has not conducted as assessment of icebreaking on the Seaway.
- Jennifer Caddick, STR Executive Director, March 12, 2007.⁴¹ Ms. Caddick expressed concern that the March 21 opening date was unsafe for shipping. She also detailed STR's position: (1) shipping should not occur until two inches of ice or less cover the St. Lawrence River and its embayments; (2) spill response assets must be accessible and usable when the Seaway opens; (3) no hazardous cargo can be transported until ice is completely gone; and (4) all lighted navigational aids must be in place prior to the Seaway opening.
- Senators Charles E. Schumer and Hillary Rodham Clinton, March 7, 2004.⁴² The Watertown Daily Times reported that Senators Clinton and Schumer both supported delaying the opening date of the Seaway. The newspaper reported that Senator Clinton wrote to the SLSDC Administrator asking for reconsideration of an early opening date in order to ensure that economic considerations do not override the environmental integrity of the Seaway. Senator Clinton was reportedly also concerned about the emergency response capabilities on the Seaway during winter ice conditions.

B. Other Expressions of Public Concern

The public, through means other than letters, has shown its frustration with the SLSDC and the way it sets the opening date. For example:

- In 2005, the Jefferson County, New York, Board of Legislators voted unanimously to oppose the early opening of the Seaway and demand appropriate disaster planning.⁴³ The Resolution stated that the SLSDC opened the Seaway to commercial traffic before the ice was melted, in opposition to the wishes of the New York State Department of Environmental Conservation, Save the River, U.S. Representative John M.

³⁹ Letter from Clifford Schneider, to Albert Jacquez, Administrator, Saint Lawrence Seaway Development Corporation (September 20, 2005), *supra* note 34.

⁴⁰ Letter from Karen Lago, Assistant Director of Save the River to Norman Mineta, Secretary of Transportation U.S. Department of Transportation, (March 9, 2006). (*See* Appendix 13).

⁴¹ Letter from Jennifer Caddick, Executive Director Saver the River, to Collister Johnson Jr., Administrator of the Saint Lawrence Seaway Development Corporation, (March 12, 2007). (*See* Appendix 14).

⁴² M.B. Pell, *Senators Urges Seaway To Delay Opening Season*, Watertown Daily Times, March 7, 2004, at B1. (*See* Appendix 15).

⁴³ Jefferson County Board of Legislators Resolution No. 106 Opposing Early Opening of the St. Lawrence Seaway and Demanding Appropriate Disaster Planning by the Saint Lawrence Seaway Development Corporation (April 12, 2005), *supra* note 28.

McHugh, and local residents. The Resolution expressed the frustration of the local government and its concerns regarding the inability to adequately respond to a shipping disaster on the Seaway when ice is present as well as damage done to the shoreline by ice-breaking. The Board of Legislators “opposes the opening of the Seaway before April 1 of any year, unless weather conditions are present that are proven to be environmentally sound prior to that date”

- In 2008, the Watertown Daily Times reported that both candidates for New York Senate office opposed winter shipping, pointing to the potential environmental disaster if a ship spilled fuel on the ice and in the water.⁴⁴ Darrel Aubertine, who won the election, was quoted as stating that the ice-breakers can create “strong, ice-filled wakes that can slam into shorelines ‘which does damage to docks, sea walls, fish nesting beds.’”
- In 2004, the St. Regis Mohawk Tribe filed suit against the SLSDC and the Department of Transportation for “failing to adequately analyze and mitigate the adverse environmental impacts . . . arising from its decisions to direct and cause the winter ice cover on the St. Lawrence River (“River”) to be broken in the spring of each year; and to direct and cause the opening of the River in the very early spring of each year that allows large ships to ply the River”⁴⁵ The complaint pointed to the findings of the programmatic Environmental Impact Statement performed in the 1970s that described the potential effects of ice breaking activities. This litigation resulted in a Memorandum of Understanding between the parties, which includes consultation with the Tribe on setting the opening date but not with any other members of the public.

C. The SLSDC’s Response to these Concerns

The SLSDC’s response to public concern about the early opening of the Seaway can be summarized as follows: (1) the adverse environmental effects have not been scientifically substantiated because earlier studies looked at “winter navigation (late fall through early spring) . . . which should not be compared to icebreaking or navigation in late March”; and (2) the Seaway has never experienced a major vessel incident at or near the date of the opening that resulted in a spill or discharge.⁴⁶

However, the goal of the U.S. Army Corps of Engineers *Final Survey Study for Great Lakes, and St. Lawrence Seaway Navigation Extension* was to consider the feasibility of extending the navigation season to “beyond the usual eight and one-half

⁴⁴ Jude Seymour, *Both Candidates Oppose Winter Shipping*, Watertown Daily Times, February 23, 2008, at B1. (See Appendix 16).

⁴⁵ *St. Regis Mohawk Tribe v. SLSDC*, (N.D. NY 2004) Complaint for Declaratory and Injunctive Relief at 1 (See Appendix 17).

⁴⁶ See, e.g., Letter from Albert S. Jacquez, Administrator, Saint Lawrence Seaway Development Corporation, to John McHugh, U.S. Congress Member 23rd Dist. of New York, (February 17, 2005); (See Appendix 18); Letter from Albert S. Jacquez, Administrator, Saint Lawrence Seaway Development Corporation to John Peach, President of Save The River, (February 18, 2005). (See Appendix 19).

month season, to *as much as year-round*⁴⁷ The attempt to lengthen the shipping season was rejected by the public and public officials and never officially put into place.

Currently, the navigation season (from the last week or two of March to late December) is certainly “beyond the usual eight and one-half month” season-- at 9 1/3 months. In fact, the Final Survey Study concluded that an up to 10 month season (very close to the current season) on the international section of the St. Lawrence River was feasible *with* an Environmental Plan of Action to “assure and to confirm the environmental and social feasibility of this program . . . [and the Plan would be] accomplished concurrently with implementation and execution of post-authorizing planning, engineering, construction and operations with provisions to modify or stop the program if unacceptable environmental impacts surface.”⁴⁸ The same report states that a “major concern” is “a lack of specific environmental data” and “uncertainties” on a “number of facets of the ecosystem,” including, the effects of navigation on breeding and migration of aquatic species.⁴⁹

Additionally, it is unclear why a study discussing the problems associated with “early spring” shipping is not comparable to shipping in “late March.” The season “spring” begins on the vernal equinox, which was March 20 in 2009. The *1978 Environmental Assessment, FY 1979 Winter Navigation Demonstration on the St. Lawrence River* specifically addresses problems associated with early spring ship passage.⁵⁰

Despite the fact that the season currently approaches an “extended” season, without the Final Report’s recommended steps or public participation, the SLSDC has refused to conduct a NEPA review of icebreaking and early shipping on the River and only agreed to the Joint Observational Study of impacts as the result of litigation with the St. Regis Mohawk Tribe. The SLSDC recommends that the opening date and ice-breaking operations “should continue to be an inclusive process for the current stakeholders,” but local environmental groups are apparently not included in the stakeholder group.⁵¹ Despite the SLSDC’s assertions, there is evidence that the icebreaking and early shipping does impact the Seaway, as discussed above.

Finally, the absence, to date, of a major vessel incident has little to say about the risk of an incident occurring in the future and even less relevance to the ability of the government to respond to a major accident should one occur.

⁴⁷ U.S. Army Corps of Engineers, *Final Survey Study for Great Lake, and St. Lawrence Seaway Navigation Season Extension*, U.S. Army Engineer District Detroit at I-1 (August 1979) (*See* Appendix 20)(emphasis added).

⁴⁸ *Id.* at Syllabus.

⁴⁹ *Id.* at 41.

⁵⁰ Environmental Assessment of the FY 1979 Winter Navigation Demonstration on the St. Lawrence River, Technical Report at H-69, *supra* note 3.

⁵¹ SLSDC Fiscal Year 2008 Annual Report at 9, *available at* <http://www.greatlakes-seaway.com/en/management/slsdc/reports/index.html>.

In response to requests for “specific criteria” used in establishing the opening date, the SLSDC stated that “[a]mong 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, and the anticipated demand for the Seaway’s services.”⁵² The SLSDC has also stated that the date selection “is the culmination of an elaborate process”⁵³ Yet the SLSDC has stated that it “does not possess any documents that provide a method for evaluating the relevant factors, their relative weights, and how the SLSDC accounts for weather and ice conditions on the opening date.”⁵⁴

Simply, STR, NYSDEC, and others have unsuccessfully sought answers to the following questions: how does the SLSDC make the decision about when to open the Seaway? How much ice leads to what result and why? How does demand affect the decision? What other factors (i.e., the SLSDC states “**among** the significant factors”) influence the decision? How is the environment considered? On what information is environmental consideration based?

STR, through this rulemaking, seeks the “elaborate process” explained and made open to the public. An agency process for making such an important decision should be transparent and open to public scrutiny.

V. Conclusion

STR respectfully requests that the SLSDC begin a notice and comment rulemaking to address and set forth the process and criteria for establishing the opening date of the St. Lawrence Seaway for shipping each spring. STR makes this request because this process of setting the Seaway opening date is a rule requiring notice and comment promulgation under the notice and comment procedures of the APA. The rule is of future effect and prescribes binding law, is legislative/substantive in nature because of the same binding effect, and is not exempt from § 553(b)-(c) notice and comment.

In addition, independent of the APA, STR makes this request to advance good public policy and to promote the operation of government in an open and responsive manner.

STR specifically requests that the SLSDC do the following:

- 1) Start a notice and comment rulemaking amending the St. Lawrence Seaway regulations, 33 C.F.R. §401 et seq., that sets forth the process and

⁵² Letter from Albert S. Jacquez, Administrator, Saint Lawrence Seaway Development Corporation to John Peach, President of Save The River, *supra* note 46.

⁵³ *St. Regis Mohawk Tribe*, Defendants’ Response in Opposition to Plaintiff’s Motion for a Preliminary Injunction and Temporary Restraining Order at 6. (*See* Appendix 21).

⁵⁴ Letter from Collister Johnson, Jr., Administrator of the Saint Lawrence Seaway Development Corporation, to Stephanie Weiss, Assistant Director Save the River, regarding FOIA appeal (July 9, 2008) (internal quotation omitted). (*See* Appendix 22).

criteria used in setting the opening date of the Seaway, including environmental and safety criteria as described above.

2) Promptly respond to this petition for rulemaking.

Sincerely,

Jennifer Caddick
Save The River Executive Director & Upper St. Lawrence Riverkeeper