



U.S. Department
of Transportation

Office of the Secretary
of Transportation

Assistant Secretary

AUG 30 2013

1200 New Jersey Avenue, SE
Washington, DC 20590

International Joint Commission
U.S. Section
2000 L Street, N.W.
Washington, D.C. 20440

Dear Commissioners:

The U.S. Department of Transportation (DOT), which includes the Saint Lawrence Seaway Development Corporation (SLSDC), welcomes this opportunity to provide comments on the proposed International Joint Commission (IJC) Plan 2014 (Plan) and the implementing documents, including the draft Order of Approval.

The DOT cannot support the proposed Plan. As a threshold matter, we question the IJC's authority to change the current plan without reference or other communications from the U.S. and Canadian governments. The IJC is an international organization created under the 1909 Boundary Waters Treaty, with limited authority to approve changes to the boundary waters. Under Article III of the Treaty, further "uses or obstructions or diversions" of boundary waters require the authority of each country with jurisdiction, as well as the approval of the IJC. The IJC may be an independent entity, but actions it approves may not be taken independently of the two governments that created it.

Moreover, the Treaty restricts the IJC's authority by establishing an order of precedence under Article VIII. The order of precedence provides a specific list of uses with navigation second in priority only to domestic and sanitary uses. Article VIII states that "no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of preference." The IJC has previously respected the enumerated order of precedence when prioritizing or specifying a use or interest other than those listed. In contrast, the draft Order of Approval includes specific interests or uses that could negatively affect commercial navigation. The DOT does not oppose including new specific interests or uses, and agrees that environmental considerations deserve careful consideration; such additional interests cannot, however, be accommodated to the detriment of commercial navigation in violation of the Treaty.

When we have previously posed questions on this matter, IJC staff has responded that their intent is to comply with the Treaty provisions, but at the same time they explain that the Order of Approval is drafted to allow changes to be made in the future without needing to make changes to the Order. It is our concern that a new regulation plan could be developed and implemented in the future that would comply with the proposed new Order, yet violate the Treaty by allowing a new use/interest to materially conflict with or restrain the use of commercial navigation.

Moreover, the proposed adaptive management process raises concerns that the IJC may make changes to the regulation plan without interested users having an opportunity to participate in the process established by the Treaty for public comments.

DOT has additional, more specific concerns and questions regarding the documents submitted for review, and look forward to working with the IJC to address these issues.

In conclusion, the preservation of navigation remains a critical goal in managing the boundary waters. DOT is concerned with the IJC's intention to change regulation plans on its own initiative. Its actions run afoul of the Boundary Waters Treaty, which specifically limits the authority and jurisdiction of the international organization. Also, the draft Order of Approval does not take into account the order of precedence, as required under the Treaty; it needs to provide specific language regarding the criteria used for users/interests of the Great Lakes-St. Lawrence Seaway System and to make the criteria "subject to the Treaty's Order of Precedence."

Thank you for providing us the opportunity to comment.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Susan L. Kurland". The signature is fluid and cursive, with a large initial "S" and a long, sweeping tail.

Susan L. Kurland
Assistant Secretary for Aviation
and International Affairs