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*Thousand Island Park Corporation  
42822 St. Lawrence Avenue Unit #1103  
Thousand Island Park, NY 13692*



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March 3, 2022

John P. Petrilla  
Environmental Branch Chief, Acting  
Border Patrol & Air and Marine PMO  
U.S. Customs and Border Protection

BPAM NEPA  
U.S. Customs and Border Protection  
24000 Avila Road, Suite 5020  
Laguna Niguel, CA 92677  
Via email: [BPAMNEPA@cbp.dhs.gov](mailto:BPAMNEPA@cbp.dhs.gov)

Dear Mr. Petrilla,


The Thousand Island Park Corporation is opposed to the siting of the proposed “New Wellesley Island Border Patrol Station” at Blind Bay, in the Town of Orleans. Blind Bay is directly across the St. Lawrence River from Thousand Island Park. The site is not appropriate for this facility for a variety of reasons, all of which would negatively impact the quality of life for our residents.

The Thousand Island Park Corporation owns Thousand Island Park’s 270 acres, including over two miles of waterfront on Wellesley Island among the famous Thousand Islands. Its mission is “to exercise community stewardship over our safe, secure, family-oriented environment, unique architectural heritage, and priceless riverfront resources; to protect, preserve, and enhance these assets, and ensure their long-term sustainability and accessibility for the enjoyment of all our present and future residents and guests”. Founded in 1875, the Park’s Victorian Age architecture has been carefully preserved and is listed on the National Register of Historic Places. It is a world class tourist destination where visitors can step back in time to experience a simpler way of life of days gone by.

Please find attached to this letter TIPC’s detailed comments on The Draft Environmental Assessment. It has been prepared for us by Mr. Nicholas Yost, a Thousand Island Park Resident who is well versed in the field of environmental law.

On behalf of the Thousand Island Park Corporation, I urge you to abandon plans for a Border Patrol Station at Blind Bay in favor of an alternative site suitable for this type of development. I am available to discuss this matter with you at your convenience.

Respectfully,

A handwritten signature in black ink, appearing to read "Lloyd M. Withers". The signature is fluid and cursive, with a large initial "L" and "W".

Lloyd M. Withers, GM  
Thousand Island Park Corporation

cc

Senator Charles Schumer  
Senator Kirsten Gillibrand  
Representative Elise Stefanik  
Senator Patty Ritchie  
Assemblyman Mark Walczyk  
Councilman Philip Reed  
Supervisor Kevin Rarick  
John Peach, Save the River Upper St. Lawrence Riverkeeper  
Jake Tibbles, Thousand Islands Land Trust

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# LEGAL DEFICIENCIES OF WELLESLEY ISLAND BORDER PATROL STATION DRAFT ENVIRONMENTAL ASSESSMENT

SUBMITTED BY NICHOLAS C YOST

ON BEHALF OF THE THOUSAND ISLAND PARK CORPORATION I HAVE REVIEWED THE WELLESLEY ISLAND BORDER PATROL (BP) STATION DRAFT ENVIRONMENTAL ASSESSMENT (DEA) FOR ITS COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) AND ASSOCIATED LAWS. I HAVE ALSO BEEN INFORMED BY THE SUBMISSIONS TO THE BP OF SAVE THE RIVER AND THE THOUSAND ISLANDS LAND TRUST. IN SHORT, THE DOCUMENT IS LEGALLY DEFICIENT.

BY WAY OF BACKGROUND I WAS THE ORIGINAL DRAFTSPERSON OF THE FEDERAL GOVERNMENT'S NEPA REGULATIONS (40 CFR PARTS 1501-1508) IN MY THEN CAPACITY AS GENERAL COUNSEL OF THE WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY IN THE CARTER ADMINISTRATION. SINCE THAT TIME I HAVE PRACTICED UNDER NEPA AS A PUBLIC INTEREST LAWYER AND AS A PRIVATE PRACTITIONER, BOTH ADMINISTRATIVELY AND IN LITIGATION. I HAVE LECTURED AND WRITTEN WIDELY ON NEPA, INCLUDING AUTHORIZING THE ENVIRONMENTAL LAW INSTITUTE'S NEPA DESKBOOK (4<sup>TH</sup> ED 2014). MY WIFE AND I ARE ALSO COTTAGE OWNERS IN THOUSAND ISLAND PARK (TIP).

MY COMMENTS FOLLOW:

1. ALTERNATIVES UNDER NEPA. MOST BASICALLY, THE DEA SLIGHTS THE BASIC NEPA REQUIREMENT TO CONSIDER ALTERNATIVES. SECTION 102(2)(E), 42 USC 4332(2)(E), OF NEPA, THE FOUNDATION FOR ENVIRONMENTAL ASSESSMENTS, REQUIRES THAT “ALL AGENCIES OF THE FEDERAL GOVERNMENT SHALL . . . STUDY, DEVELOP, AND DESCRIBE APPROPRIATE ALTERNATIVES TO RECOMMENDED COURSES OF ACTION IN ANY PROPOSAL . . .” WHILE THE REGULATIONS SPECIFY THAT THE “NO ACTION” ALTERNATIVE IS TO BE AMONG THE ALTERNATIVES CONSIDERED, DOING SO (AS THE BORDER PATROL DID) DOES NOT EXHAUST THE REQUIREMENT TO CONSIDER ALTERNATIVES. BASICALLY THE BORDER PATROL HAS SAID BUILD IT OR DON’T BUILD IT. THAT DOES NOT SATISFY THE OBLIGATION TO CONSIDER ALTERNATIVES. IN FACT THE DEA STATES (AT P 1-8), ALMOST IN PASSING, THAT THE AGENCY LOOKED AT 10 SITES AND APPARENTLY DISCARDED 9 OF THEM. NO INFORMATION IS GIVEN REGARDING THOSE SITES. THE DEA DOES NOT “STUDY, DEVELOP, AND DESCRIBE” THE SITES THE AGENCY ALLEGEDLY LOOKED AT. EVERYBODY – FEDERAL, STATE, AND LOCAL AGENCIES AND THE PUBLIC – GETS TO EVALUATE AND WEIGH IN ON THE VARIOUS ALTERNATIVE SITES (AND INDEED TO PROPOSE ADDITIONAL ALTERNATIVE SITES). THE DEA PROVIDES ZERO OPPORTUNITY TO DO SO. THIS VIOLATES THE SINGLE MOST IMPORTANT REQUIREMENT OF NEPA – THAT THE DOCUMENT EVALUATE ALTERNATIVES IN SUCH A WAY THAT ALL THOSE INTERESTED MY WEIGH IN. PARENTHETICALLY I MIGHT NOTE THAT JUDGES RELATE AFFIRMATIVELY TO THE ALTERNATIVES REQUIREMENT. INDIVIDUAL JUDGES MAY HAVE AFFIRMATIVE OR NEGATIVE VIEWS ON THE ENVIRONMENT, BUT ALL JUDGES RELATE TO PROCEDURE – YOU HAVE TO DO X BEFORE YOU CAN PROCEED TO Y. YOU HAVE TO PREPARE AN ADEQUATE DEA BEFORE PROCEEDING WITH THE PROPOSAL. THAT HAS NOT HAPPENED HERE. IT WILL NOT BE ENOUGH FOR THE BORDER PATROL TO SAY THAT IS ONLY A DRAFT EA AND THAT THEY WILL CURE ANY DEFICIENCIES IN THE FINAL EA. IT IS ON THE DRAFT’S EXAMINATION OF ALTERNATIVES THAT THE PUBLIC (AND GOVERNMENT

AGENCIES) WILL COMMENT. IF THE ALTERNATIVES ARE NOT SET OUT IN THE DRAFT, THE PUBLIC AND AGENCIES WILL BE PRECLUDED FROM THE OPPORTUNITY TO COMMENT ON THE MERITS OR DEMERITS OF EACH OF THEM. WHILE THE DEA PRESENTS A CURSORY EXAMINATION OF THE “NO ACTION” ALTERNATIVE, IT FAILS TO EXAMINE THE ALTERNATIVE OF EXPANSION OF THE CURRENT SITE, WHERE, AFTER ALL, MUCH BASIC INFRASTRUCTURE ALREADY EXISTS. INFORMATION ON THIS – AS WELL AS ON ALL OTHER POTENTIAL ALTERNATIVES, PRESUMABLY INCLUDING THE 10 SITES THE BORDER PATROL ASSERTS IT LOOKED AT, IS ESSENTIAL TO A LEGALLY ADEQUATE DEA.

2. ALTERNATIVES UNDER CORPS OF ENGINEERS JURISDICTION. THE US ARMY CORPS OF ENGINEERS (COE), ASSERTING LIKELY JURISDICTION UNDER BOTH SEC 404 OF THE CLEAN WATER ACT AND SEC 10 OF THE RIVERS AND HARBORS ACT OF 1899, STATES THAT NO DREDGING IN A WATER OF THE UNITED STATES CAN BE PERMITTED IF THERE IS A PRACTICABLE ALTERNATIVE TO THE PROPOSED DEVELOPMENT WHICH WOULD HAVE LESS IMPACT ON THE AQUATIC ECOSYSTEM. THE COE CONCLUDES THAT THE PROPOSED PROJECT DOES NOT APPEAR TO FULLY COMPLY WITH APPLICABLE REQUIREMENTS BECAUSE THE INTENDED PURPOSE CAN BE FULFILLED WITHOUT PLACING A FILL IN A WATER OF THE UNITED STATES, WHICH HERE IS A SPECIAL AQUATIC SITE – A WETLAND. ALTERNATIVES, STATES THE CORPS, ARE PRESUMED TO EXIST WHICH WOULD ALLOW THE BORDER PATROL TO FULFILL ITS PROJECT PURPOSE WITHOUT FILLING A WETLAND. SUGGESTED ALTERNATIVES, ASSERTS THE CORPS, WHICH THE BORDER PATROL SHOULD CONSIDER INCLUDE BUT ARE NOT LIMITED TO ALTERNATIVE SITES.

3. IMPACTS ON THOUSAND ISLAND PARK NATIONAL HISTORIC DISTRICT. THE DEA AVOIDS EXAMINATION OF THE VISUAL IMPACT ON THE THOUSAND ISLAND PARK NATIONAL HISTORIC DISTRICT (ON THE NATIONAL REGISTER OF HISTORIC

SITES). THE DEA ASSERTS THAT NO AESTHETIC OR VISUAL RESOURCES WILL BE AFFECTED. DEA AT 3-1. THE DEA COMES TO THIS CONCLUSION BY LIMITING ITS EXAMINATION OF VISUAL RESOURCES TO 1 MILE. DEA AT 3-19. THE DEA CONTAINS NO INFORMATION AS TO WHY A SEEMINGLY ARBITRARY LIMIT OF 1 MILE WAS SELECTED. (MY LAY ESTIMATE USING A BLOWN UP MAP IS THAT THE DISTANCE (ACROSS OPEN WATER) FROM THE SITE TO TIP IS BETWEEN 1 AND 2 MILES.) IN BRIEF, THE DEA'S LIMITATION TO A 1 MILE VIEWSCAPE HAS ITS EFFECT, CONSCIOUS OR UNCONSCIOUS, OF EXCLUDING TIP FROM ANALYSIS. A PARTICULAR ASPECT OF CONCERN IS THE IMPACT OF LIGHT AT NIGHT. THE DEA STATES THAT THE BORDER PATROL WILL LIMIT THE NUMBER OF STROBE LIGHT FLASHED PER MINUTE. WHAT DOES THAT ENTAIL? DETAILED ANALYSIS IS ESSENTIAL.

4. TOWN OF ORLEANS. THE DEA PURPORTS TO CONSIDER "APPROPRIATE ZONING." DEA AT 2-1. HOWEVER, THE TOWN OF ORLEANS, IN WHOSE JURISDICTION THE PROPOSED SITE LIES, HAS INFORMED THE BORDER PATROL THAT THE PROPOSED SITES IS IN A RURAL RESIDENTIAL ZONING DISTRICT WHERE THE ONLY PERMITTED USES ARE SINGLE AND TWO FAMILY DWELLINGS AND ACCESSORY USES. THE TOWN OF ORLEANS ADVISES THE BORDER PATROL TO "TRY FOR A USE VARIANCE FROM THE TOWN OF ORLEANS ZONING BOARD OF APPEALS." THERE IS SIMPLY NO DISCUSSION OF THIS ISSUE IN THE DEA.

5. FISHERIES. WHILE THE DEA LOOKS AT ANIMAL AND PLANT RESOURCES ON LAND, IT FAILS TOTALLY TO EXAMINE FISHERIES AND THE IMPACT OF THE PROPOSED DREDGING ON THEM. THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION ASSERTS THAT THE PUGNOSE SHINER, WHICH IS AN ENDANGERED SPECIES, HAS BEEN RECENTLY CONFIRMED, AS HAS THE LAKE STURGEON, WHICH IS THREATENED. THE NEW YORK NATURAL HERITAGE

PROGRAM STATES THAT THE BLACKCHIN SHINER, WHICH IS FEDERALLY LISTED AS IMPERILED IN NEW YORK STATE, HAS BEEN OBSERVED ADJACENT TO THE PROJECT SITE. SAVE THE RIVER HAS COMMENTED THAT “BLIND BAY HAS BEEN ONE OF THE MOST PROLIFIC MUSKELLUNGE SPAWNING AREAS IN THE REGION AND HAS BEEN MONITORED SINCE 1990.” THERE ARE, ASSERTS SAVE THE RIVER, 53 SPECIES OF FISH IN THIS LOCATION. THE DEA FAILS UTTERLY TO ADDRESS THESE ISSUES.

6. MISNOMER. WHILE LESS CONSEQUENTIAL THAN THE ISSUES DISCUSSED ABOVE, I CANNOT REFRAIN FROM OBSERVING THAT THE WHOLE PROPOSAL IS MISNAMED – NEW WELLESLEY ISLAND BORDER PATROL STATION. BUT THE PROPOSED STATION IS NOT ON WELLESLEY ISLAND. THIS COULD MISLEAD PEOPLE ON THE MAINLAND (WHERE THE PROPOSED SITE IS) AS TO WHETHER THEY MIGHT BE AFFECTED. THIS MISNOMER ILLUSTRATES THE LACK OF ATTENTION ON THE PART OF THE DEA PREPARERS TO THE ON THE GROUND (AND IN THE WATER) REALITY OF THIS PROPOSAL.

IN CONCLUSION, THE BORDER PATROL’S DEA IS LEGALLY FAULTY. THE DEFICIENCIES, SET OUT ABOVE, CANNOT BE CURED IN A FINAL EA BECAUSE THAT WOULD DEPRIVE THE PUBLIC AND OTHER AGENCIES FROM THE ABILITY TO COMMENT ON THE DRAFT DOCUMENT. WERE THE BORDER PATROL TO PROCEED WITH THIS DEFICIENT DOCUMENT, IT WOULD BE LEGALLY VULNERABLE AND POTENTIALLY SUBJECT TO SUCCESSFUL LITIGATION.

NICHOLAS C YOST

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