

Appendix Q

Example of NYSDOS Mediation Findings

FINDINGS AND RECOMMENDATIONS OF
THE NEW YORK DEPARTMENT OF STATE
REGARDING THE
CITY OF OSWEGO'S APPROVED LOCAL WATERFRONT
REVITALIZATION PROGRAM AND THE
PORT OF OSWEGO AUTHORITY'S PROPOSED
POTASH STORAGE FACILITY

January 19, 1990

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Background

Article 42 of the New York Executive Law requires that State agency actions be consistent, to the maximum extent practicable, with approved Local Waterfront Revitalization Programs (LWRPs). This Article also requires State agencies to notify local governments when the proposed actions would occur within the area covered by an approved LWRP. Article 42 further authorizes the Secretary of State to "confer with the affected State agency and the local government to modify the proposed action to be consistent with the local plan," when notified by a local government that a conflict exists between its approved LWRP and a proposed State agency action. In order to implement Article 42 requirements, the Department of State (DOS) has established "Guidelines for Notification and Review of State Agency Actions Where Local Waterfront Revitalization Programs are in Effect." Similar Guidelines are set forth in Section V of the approved City of Oswego LWRP.

Pursuant to these Guidelines, Secretary of State Gail S. Shaffer was requested by Oswego Mayor John T. Sullivan, Jr., in a letter dated July 12, 1989, to intervene in a matter involving potential conflicts between the Port of Oswego Authority's proposal to construct a potash storage facility at the Port of Oswego and the City of Oswego's approved LWRP.

In an effort to expeditiously resolve the potential conflicts, DOS convened a meeting on August 2, 1989 in Syracuse. The meeting was conducted by Secretarial designee George R. Stafford, Director of the Department of State's Division of Coastal Resources and Waterfront Revitalization. In addition to representatives of the City and the Port Authority, the meeting was attended by representatives of the New York State Department of Transportation (DOT), the Office of Parks, Recreation and Historic Preservation (OPRHP), and the St. Lawrence-Eastern Ontario Commission (SLEOC).

At the August 2nd meeting, a number of questions were raised concerning the siting, design, and operation of the proposed storage facility. In addition, the Port Authority was asked whether construction of the project could be delayed until these questions could be answered and the conflict resolved. The Port Authority notified DOS the following day that it was not feasible to stop construction without incurring additional costs. The Port Authority did agree, however, to provide additional information within one week to DOS to answer the identified questions. As provided by the Guidelines, and as agreed at the meeting, if the City and Port Authority could not agree to resolve their differences regarding this project, DOS would issue findings and recommendations within fifteen days of receiving the additional information from the Port Authority. Subsequently, DOS was asked by the parties to delay issuance of findings and recommendations pending further discussion between the parties.

On August 23, 1989 DOS received some of the information the Port Authority agreed to provide. By letter dated August 25, 1989, DOS notified the Port Authority that they had until August 30, 1989 to

supplement the August 23rd information submission. Additional information was provided to DOS on September 1, 1989.

Project Description

The Port of Oswego Authority's current proposal is to construct a cigar-shaped fertilizer storage building approximately 320 feet long, 160 feet wide, and 56 feet high, for the purpose of storing 32,000 tons of bulk fertilizer chemicals, specifically, potash and urea. The \$1.9 million project is being financed with 1983 Rebuild New York Transportation Bond Act funds through a grant agreement between the Port Authority and the New York State DOT. The Project is expected to generate approximately \$330,000 in additional annual revenue for the Port Authority. When fully operational, it is anticipated that two or three full-time longshoremen and one or two maintenance personnel will be employed. The products will be delivered to Oswego via self-unloading ships which will use a partially open conveyor system to unload into a hopper. From the hopper, the products will travel through a totally enclosed conveyor system to the storage facility. Approximately 1500 truckloads weighing 25 tons each will be necessary to empty the storage facility when it is filled to capacity. The products in the storage building will be turned over two or three times annually.

The project is situated at the Port of Oswego Authority's Eastside Terminal. The site proposed for construction is near the southeast corner of the property in an area labeled "marshalling yard" on Figure 6 of Section Four of the Oswego LWRP. The Port Authority's Eastside Terminal is located on the east side and at the mouth of the Oswego River, a tributary to Lake Ontario. The Port Authority's Eastside Terminal abuts Fort Ontario, a State historic site listed on the National Register of Historic Places and operated and maintained by OPRHP.

The Port Authority's potash storage facility is proposed to be approximately 70 to 80 feet west of the Fort Ontario property and approximately 450 feet from the closest bastion of the Fort. Fort Ontario is situated on a bluff which is approximately 40 feet high.

Currently, there are three domeshaped bulk storage buildings at the Eastside Terminal. These dome buildings are located directly west of the site for the proposed building and are approximately 54 feet high.

Originally, the need for the proposed fertilizer storage facility was identified within the Port Authority's Port Masterplan which was completed in September, 1984. As stated in the Masterplan, the timing of the project was to be determined by market demands. In addition, the proposed potash fertilizer storage facility was identified as a conceptual project in Section Four of the City's approved LWRP as a component of a number of port improvement projects. In June, 1987, the Port received commitments from potential users that justified the construction of a fertilizer storage facility. The New York State Department of Transportation concurred with the need for such a

facility, and the Authority's consulting engineers, Calocerinos and Spinos, began preparation of designs for the project.

The project was originally designed as a three dome storage facility 105 feet high connected by conveyors. On April 15, 1988, the OPRHP alerted the Port Authority and DOT that it had concerns with the height of the proposed facility and its negative visual impacts upon adjacent Fort Ontario. Bids were opened on this design in May, 1988. Since the bids exceeded the \$1.9 million budgeted for the project, the Port Authority rejected all bids and had the project redesigned. The revised design enclosed the conveying system within a single barrel-shaped building 70 feet high.

Both OPRHP and the City expressed their concerns about the visual impact of the redesigned facility. The Port Authority agreed to explore a plan to lower the project height.

In June, 1988, the Mayor of Oswego objected to the type of expansion on the Port Authority property and pressed for commercial/recreational uses of that land. (See History of Fertilizer Storage Project at Port of Oswego, by John Fitzgibbons attached to Consistency Statement of October 2, 1988).

In an attempt to lessen the visual impact, the project was redesigned to the facility's current configuration, with a height of 56 feet. The New York State DOT stated that "any additional reduction in height of the building would seriously limit the storage capacity of the facility." The Port Authority did, however, ask for bids on a 42 foot high facility. No contractor provided a bid for this option. Bids were opened on the current redesigned facility on May 15, 1989.

By letter dated June 19, 1989, the Mayor of the City of Oswego notified the Port Authority that the project was in conflict with the Oswego LWRP.

On June 28, 1989, the New York State DOT concurred with the Port Authority's request to award the contract for construction of a 56 foot high fertilizer storage facility. The contract was awarded to Diment Construction Company on June 29, 1989 and was signed by both parties on July 21, 1989.

Position and Claims of Each Party

A. Summary of City of Oswego's Claims Regarding Conflicts of the Proposed Project With the City's LWRP

It was stated in a letter from Oswego Mayor John Sullivan to Secretary Shaffer on July 12th, "The Oswego City Planning Board in a decision rendered July 11, 1989, ... has determined that the proposed construction of a 32,000 ton potash storage facility at the Port of Oswego Authority eastside facility is not in conformity with the LWRP." The Mayor also stated in his letter that he "previously notified the Director of the Port of the potentiality that this project was inconsistent with the LWRP by letter dated

June 19, 1989" (ten days before the Port Authority appears to have awarded the construction contract).

As instructed by Mayor Sullivan, the official with overall responsibility for implementation of the LWRP, the City of Oswego Planning Board held a public hearing as part of their review of the project, on July 6, 1989. The Planning Board met again on July 11th and determined that the proposed project conflicted with LWRP policies 1A, 2A, 2B, 3, 21B, 21C, 23 and 25A. This determination and the relevant policies are set forth below:

Policy 2B - Facilitate appropriate active and passive recreational uses and cultural uses in the Oswego Waterfront Area which require or can benefit substantially from a waterfront location and which will increase the number of jobs and the use of Oswego's waterfront.

Policy 23 - Protect, enhance and restore structures, districts, areas or sites that are of significance in the history, architecture, archeology or culture of the State, its communities or the nation.

Policy 25A - Protect and enhance scenic resources in Oswego, both natural and man-made, having local and statewide significance as identified in Section II, Figure 2.

With regard to the above three policies, the Planning Board made the following determinations:

1. Inadequate information was available to assess the impact of storage and handling of the proposed fertilizer chemicals on the environment. Questions were raised by both the Planning Board and the public, about the effects of air borne, chemical spills into the harbor and a shore, and ship propwash disturbing polluted sediment in Oswego harbor.

2. Pollution of the aesthetic environment:

- a. The proposed structure would be located adjacent to a designated historic site (Fort Ontario) and one with an appealing scenic vista of the City.
- b. The proposed storage facility, in the eyes of many, will fail to contribute to the enhancement of that vista and will have an adverse impact on the historic nature of Fort Ontario.

3. The proposed storage facility would exceed the height limits as currently prescribed in the City of Oswego's Zoning Ordinance. (The site in question is zoned industrial. This zoning district has a 50 foot height limit.)

* * *

Policy 1A - Restore, revitalize, and redevelop opportunity sites in the Oswego Waterfront Area and utilize available public and private resources to achieve a mixture of compatible waterfront uses.

Policy 21B - Provide for the integration of recreational and other water-dependent or water-enhanced activities in the Oswego Waterfront Area.

Policy 21C - Continue to maintain adequate transportation facilities serving water-related recreational needs.

With regard to the above three policies, the Planning Board made the following determination:

4. In view of the Port Authority's extensive land holdings, the great demand for certain properties, the uncertain future of these properties, and the lack of a current development plan (referring to the Port Masterplan), the Planning Board finds this project to be inconsistent with those policies addressing achievement of balanced and integrated port usage.

* * *

Policy 2A - Facilitate appropriate industrial and commercial uses in the Oswego Waterfront Area which require or can benefit substantially from a waterfront location and which will provide additional employment opportunities to strengthen the local Oswego economy.

Policy 3 - Encourage the development of State's existing major ports of Albany, Buffalo, New York, Ogdensburg, and Oswego as centers of commerce and industry, and encourage the siting, in these port areas, including those under the jurisdiction of State public authorities, of land use and development which is essential to or in support of waterborne transportation of cargo and people.

With regard to the above two policies, the Planning Board made the following determinations:

5. The proposed project is expected to provide three to four additional full time jobs and significantly enhance the Port Authority's revenue. At the surface this may appear consistent with those policies supporting local economic development, however, upon closer inspection the economic benefits are an illusion. In a city of 20,000 residents, four jobs is rather insignificant, especially when compared to construction of a local hotel for \$4 million which will create an additional 40 jobs; thus investment in the recreational segment with a two fold increase in project costs creates a ten fold increase in jobs.

6. While the Port expects revenues in excess of \$300,000 they fail to note the increased expenses which this project will incur. Costs such as wages sharply erode the Port's expected return on investment.

7. Processing of the stored chemicals will take place in other areas in excess of 50 miles from Oswego, resulting in little or no additional economic benefit to the community.

8. This project appears inconsistent with the Port Authority's development plan (Section 1.2.11 Phasing of Development and Section 5.2 Required New Construction) which clearly states that "None of these facilities (potash storage, etc.) should be built on a speculative basis." The Planning Board thus finds this project to be inconsistent with the goal of enhanced economic development.

10. We are willing to reconsider the project's consistency, if the Port Authority takes certain actions. These actions are wholly consistent with the LWRP and thus beneficial to the Port, the City and the region.

The Port and the City should cooperate in the development of a comprehensive plan for the development of the City's waterfront. As part of this plan, and in light of the recent trade agreement with Canada, the Port is encouraged to update its forecasts for waterborne commerce. (Current projections are based on data nearly a decade old.) The Port is further encouraged to actively explore the prospects for enhancing and further developing passenger ship service in Oswego. At present, the City is visited 24 times

annually by [passenger] cruise ships. Additional opportunities may exist for day and overnight lake and river cruises to emanate from Oswego.

The Port Authority is strongly encouraged to address the decaying state of several of its prime properties, specifically, the old Fitzgibbons boiler plant and the Flexowire building. Razing of these hazardous buildings will provide for more attractive waterfront area.

Greater initiative in the development of recreational facilities by the Port is desired. In addition to the development of the coal trestle as a marina, there is great need for increased parking in the Wright's Landing area and the eastside marina area [which is owned by the Port Authority but leased and operated privately]. The eastside marina is also in need of improved maintenance and infrastructure improvements.

The repair and restoration of the Port Authority's eastside terminal facilities will enhance the appearance of the harbor and help to offset the unattractive aspects of an industrial port, thus contributing to the growth of tourism and recreational use of the harbor. This recommendation is consistent with the Port Authority development plan as well, which requires the Port to "Ensure continued efficient service..." (Section 2.0 paragraph A).

In view of the prospects for future development of the Port Authority's properties, both the City and the Port Authority are encouraged to establish mutually acceptable procedures for the review of projects for consistency with LWRP.

[We] recognize the regional responsibilities Oswego has as the only American industrial port on Lake Ontario. The Board also recognizes Oswego's importance as a regional recreational center. For these reasons, the Planning Board is committed to fostering appropriate, balanced, and integrated development of industrial, commercial and recreational uses of Oswego's waterfront.

Discussion of the City's Position

In addition to scenic and environmental conflicts the City contends that the proposed storage facility is not consistent with the LWRP because it does not further the City's goals of attracting tourism and encouraging recreational uses of the waterfront. However, these latter goals are not reflected in the LWRP document for this

site; nor are they implemented by local zoning laws which, without a doubt, allow the potash storage facility at the chosen site as a matter of right.

B. Summary of the Port of Oswego Authority's Position and Claims Regarding their Proposed Project in Relation to the City's LWRP

The following consistency statement was prepared by John E. Fitzgibbons, Executive Director of the Port of Oswego Authority on October 2, 1988:

The proposed fertilizer storage facility was identified in an approved December, 1986 Local Waterfront Revitalization Program for Oswego. Due to the interest shown in the project by the Office of Parks, Recreation and Historic Preservation, and the City of Oswego, the Port of Oswego Authority feels it is in the best interest of all parties concerned to file an updated Coastal Assessment Form.

The OPRHP indicated that the siting of this project, as originally proposed, would have reduced certain views from an historic site (Fort Ontario). The Port has demonstrated that the view from the Fort has already been compromised by other structures in the area with similar or higher elevations. In recognition of OPRHP's perception of the project, the Port has requested that its consultant lower the height of the storage facility to make it less obtrusive. Preliminary project sketches have been sent to the OPRHP showing a project height reduction of approximately 35 feet from the original 105 foot height. The revised project is considerably lower than the original proposal and should minimize the visual impact on Fort Ontario. The City has also been kept abreast of the development of the project, as well as other Authority activities. The City's main concern appears to be that the Authority place more emphasis on recreational activities in the Oswego Harbor. At this time the Port is exploring recreational uses of its coal pier.

The Port of Oswego Authority's fertilizer storage project is consistent with the Local Waterfront Revitalization Program; in that a similar project was included in the program. Every reasonable effort has been made to alleviate the impacts identified by the City and the OPRHP. All known reasonable alternatives for the storage of fertilizer at the Port have been considered. This project will give the Authority a marketing

advantage in the fertilizer industry as well as enhance the traditional maritime activities at the Port. Also, the agricultural interests in New York State will benefit from lower transportation costs for fertilizer products.

The final approved Oswego LWRP describes the proposed potash storage facility in Section Four on page 12 as follows:

Project #4: PORT OF OSWEGO IMPROVEMENT PROJECTS

Description: The Port of Oswego Development Study is intended to study port conditions and prepare a comprehensive plan for developing port facilities. The objectives of the plan include the identification of steps for maintaining and/or upgrading existing facilities and operating practices and the need for expanding facilities or services to meet the growing demands of current users or new regional shippers and consignees who would benefit from using the Port. The State Infrastructure Bond Act resulted in funding appropriations for several improvements at the Port including:

- f) Dock stabilization, additional bulk storage and improvement of grain elevator; cost \$2.0 million.

The "additional bulk storage" referred to in "f", above, is the potash fertilizer storage facility. This is the only reference to the proposed facility in the LWRP.

The Port of Oswego Authority did not provide written comment on the draft Oswego LWRP during the 60-day comment period.

In summary, the Port Authority maintains that the project is consistent with the LWRP because a conceptual fertilizer storage facility was included in Section Four of the program. The Port Authority further maintains that the project is essential for the economic vitality of the Port and that it has not only a local responsibility, but also a regional responsibility and that the benefits from this project will extend over a wide geographic area.

Discussion of the Port Authority's Position

While the Port Authority has taken the position that the proposed fertilizer storage facility was identified in the approved LWRP, the only reference to the facility was a statement concerning dock stabilization, additional bulk storage and improvement of a grain elevator, at a combined cost of 2 million dollars. However, the project is allowed by the City's implementing zoning and therefore, may be located at the site, provided it is consistent to the maximum extent practicable with the LWRP.

Relationship Between State Agencies and LWRP Communities

When a community complies with all of the requirements necessary to obtain approval of a LWRP, it is entitled to certain benefits enumerated in Article 42 of the Executive Law. One important benefit is consistency. Consistency under Article 42 is tantamount to a legislative waiver of State sovereign immunity for numerous State agency actions which otherwise could be undertaken without regard to local requirements. It is a close parallel to the Congressional waiver of Federal sovereign immunity under the Coastal Zone Management Act which allows for "...a substantial degree of participation by state and local governments in managing [coastal] resources." (Jack Archer, 12 Ocean and Shoreline Management pp 253-269 (1989))

Through consistency, an obligation is imposed upon State agencies to accommodate local concerns specified in the LWRP as they undertake certain actions identified by the LWRP in the coastal area. Specifically, paragraph 1. b. of section 916 of the Executive Law provides:

The state agency program actions so identified shall be undertaken in a manner which is consistent to the maximum extent practicable with the approved waterfront revitalization program. Reviews by state agencies of proposed actions to determine consistency with approved waterfront revitalization programs shall be coordinated with and made a part of other agency procedures, including reviews conducted under the state environmental quality review act as provided in article eight of the environmental conservation law.

In addition, the Department of State implementing regulations at 19 NYCRR part 601 require that identified State Agency actions where there is a LWRP in effect be consistent to the maximum extent practicable with the LWRP and the LWRP policies. (See 19 NYCRR §600.1 and 600.3).

Within each LWRP, the participating Local government is required to identify the federal and state programs likely to affect LWRP implementation. These actions are identified in Section VI of each LWRP document and it is these State actions which are subject to the consistency requirements of Article 42 of the Executive Law and the DOS implementing regulations.

On page seventeen of Section VI of the City of Oswego LWRP, the following activities are identified as likely to affect implementation:

Port of Oswego Authority

- 1.00 Acquisition, disposition, lease, grant of easement and other activities related to the

management of land under the jurisdiction of the Authority.

2.00 Facilities construction, rehabilitation, expansion, or demolition.

There is little difficulty in fitting the construction of a potash storage facility into either or both of the cited categories of activities. Thus, the Oswego Port Authority, as a State agency undertaking an identified action within the City of Oswego coastal area, is required to be consistent to the maximum extent practicable with the LWRP and the LWRP policies.

The consistency obligation imposed upon State agencies by Article 42 of the Executive Law and the DOS implementing regulations is two-fold.

First, State agencies are specifically required to be consistent to the maximum extent practicable with the policies and purposes of the approved LWRP. This means that State agencies must examine and seek to comply with the specifications of the applicable policies before a consistency certification pursuant to 19 N.Y.C.R.R. §600.4 can be made.

Second, as an additional predicate to the requirement in 19 NYCRR §600.4(c) that State Agencies be consistent to the maximum extent practicable with the Local Waterfront Revitalization Program and its policies, State Agencies are subject to local standards and requirements which implement the LWRP and its policies. This conclusion is based upon the fundamental implementation structure required by the federal government for state coastal management program approval, and by the state for LWRP approval.

To be eligible for consistency benefits, State Coastal Management Programs are required to identify the State authorities for implementing its coastal policies. (16 USC §1454). The U.S. Department of Commerce regulations indicate that these identified authorities "...are the crucial underpinnings for enforcing the policies..." (15 CFR §923.40). It is implicit in this organizational structure that, to the extent State Coastal Management Programs are implemented by authority of a networking of Federal and State laws, the standards and criteria of these laws are binding on Federal agencies through consistency.

Just as networking of the Federal and State law achieves implementation of the State CMP, "networking" of Federal, State and local laws and regulations demonstrating adequate local authority and capability are crucial to implementation of LWRPs. (see Coordination and Consistency in State Water and Air Quality, Coastal Zone, and Land Use Planning, New York State DEC, pp 82-86, 1976). This recognizes and preserves municipal home rule guaranteed by the New York State Constitution while at the same time encouraging local governments to implement State land use goals.

It has been said that under the Coastal Zone Management Act:

"... the management of coastal resources is a federal and state responsibility, yet implementation was placed at the local level in most states. In many of these, coastal management was premised heavily on the use of local land use planning and regulation" (Brower, David J. Coastal Zone Management as Land Planning, National Planning Associates, 1984, p16).

Therefore, local governments in New York, in order to be eligible for Federal and State consistency benefits, must likewise specify adequate local authority and capability to implement their programs which must be consistent with the State Coastal Management policies to be approved. (15 CFR Part 923; Executive Law §915). The authority and capability required most often takes the form of local laws or ordinances containing development standards, which, when identified as an implementing mechanism in the LWRP, become applicable to State agencies through the consistency process.

Counsel for the Port Authority in a letter dated September 5, 1989 states:

Please be advised that the Port of Oswego Authority is not subject to the local City of Oswego zoning ordinance in any way, shape or form despite the wording of the LWRP. As an attorney, I am sure Mayor Sullivan can read the law just as well as we can. We suggest for your reading on this issue the case of City of Rochester v. Town of Rush 71 Misc. 2d 451 as well as the many cases stated in Anderson on Zoning, 3ed. §11.05.

The cited Town of Rush case was decided in 1972 based upon then prevalent conceptions of proprietary versus governmental functions, with the former being subject to local zoning requirements and the latter not. In 1988, the New York Court of Appeals in City of Rochester v. County of Monroe, 72 NY2d 338, 533 NYS2d 702, expressly overruled past precedent upholding such distinctions and instead adopted a balancing of public interest approach to resolve land use disputes between local zoning requirements and an arm of the State. Among the numerous factors which were identified as weighing into the process, the Court stated:

This balancing approach subjects the encroaching governmental unit in the first instance, in the absence of an expression of contrary legislative intent, to the zoning requirements of the host government where the extraterritorial land use would be applied (72 NY2d at 343).

There is no indication that either the City or the Port Authority has had the benefit of the Court's analysis as applied to the facts of

this case. However, whatever conclusion is reached in this regard, the Port Authority remains bound to local standards which implement the LWRP through consistency.

ANALYSIS

On September 8, 1986, the Secretary of State approved the City of Oswego Local Waterfront Revitalization Program and found that it is "a comprehensive coastal management program which is consistent with State Coastal Policies." The Secretary further found that the program satisfies the requirements of Section 915 of Executive Law Article 42 which provides, inter alia, that in order to be approvable, any LWRP shall include:

- a. Boundaries of the waterfront area;
- b. An inventory of natural and historic resources of the waterfront area to be protected;
- c. A statement of the goals and objectives of the program;
- d. Identification of the uses, public and private, to be accommodated in the waterfront area;
- e. Description of proposed means for long-term management and maintenance of waterfront development and activities including organizational structures and responsibilities and appropriate land use controls;
- f. Description of necessary and appropriate state actions for successful implementation of the program; and
- g. Specification of the adequate authority and capability of the local government to implement the program. (§915 subd. 4).

Subdivision 5 of Section 915 further provides that a LWRP may provide for:

- a. The facilitation of appropriate industrial and commercial uses which require or can benefit substantially from a waterfront location, such as but not limited to waterborne transportation facilities and services, and support facilities for commercial fishing and aquaculture;...

- ...c. The promotion and preservation of scenic, historic, cultural and natural resources as community amenities and tourist designations (sic);

d. The strengthening of the economic position of the State's major ports and small harbors;...

...f. The application of local aesthetic considerations in the design of new structures and the redevelopment of waterfront sites;

g. The protection of sensitive ecological areas, including but not limited to dunes, tidal and freshwater wetlands, fish and wildlife habitats, and the protective capability of coastal land features. Such protection will assure that land use or development will not affect such areas;...

Preparation and development of the City of Oswego LWRP was a lengthy and thorough process, taking approximately three years to complete. All of the work in development of the program was under the auspices of the Local Waterfront Revitalization Program Advisory Committee. Sitting on this Committee were numerous individuals in both public and private capacities. The Advisory Committee input improved the data base, verified program information, evaluated various alternatives, expressed the values and concerns of the community and recommended adoption of the LWRP. Two of the individuals on the Advisory Committee represented the Port of Oswego Authority: Sherwood L. Hamilton, Executive Director of the Port Authority; and Donald French also of the Port Authority. The LWRP they helped develop contains the provisions discussed below:

Scenic Resources. With regard to the promotion and preservation of scenic resources, Policy 25A of the Oswego LWRP states "Protect and enhance scenic resources in Oswego, both natural and man-made having local significance as identified in Section II, Figure 2." The policy explanation further states that:

When considering a proposed action, which would affect these scenic resources, agencies shall ensure that the action would be undertaken so as to protect, restore or enhance the overall scenic quality of the coastal area. Activities which could impair or further degrade scenic quality are:

The addition of structures which because of siting or scale will reduce identified views or which because of scale, form, or materials, will diminish the scenic quality of an identified resource.

Important local scenic resources within the Oswego Waterfront Revitalization Area include scenic vistas, as shown on Figure 2, Section II,

and historic resources, as shown on Figure 5, Section II.

The scenic vistas and historic resources referred to in Policy 25A and its explanation are clearly depicted on Figure 2 and Figure 5 in Section II of the LWRP. The vista in question on Figure 2 of Section II clearly depicts a scenic vista of local significance from historic Fort Ontario directed in a southwest direction toward the Oswego River and City. This vista was drawn because it provides a view from a unique high bluff at Fort Ontario overlooking the City toward two of the City's most significant historic resources on the west bank of the Oswego River: the Cahill Fish Market and the Oswego Market House, both listed on the National Register of Historic Places.

The potash storage facility is proposed to be 56 feet high. The bluff upon which Fort Ontario sits is approximately 40 feet high. Based on Policy 25A and the policy explanation, and the fact that the project will block or significantly reduce the view, there is a conflict between the potash storage facility as proposed, and this Policy.

OPRHP and the City have expressed concern about the visual impact the proposed facility would have on adjacent historic Fort Ontario. Because of this concern, the Port of Oswego Authority has gone through an evolutionary design process in an effort to reduce the height of the facility and maintain a viable project. Originally, the facility was designed to be 105 feet high. Due to the cost of that facility and concern with its negative visual impact, the facility was redesigned and the height reduced to 70 feet. After OPRHP and the City continued to express concerns about the visual impact of the redesigned facility, the Port Authority agreed to explore a plan to lower further the facility height. The facility was redesigned to its current configuration of 56 feet. The Port Authority also asked for bids on a 42 foot high facility, but no contractor provided a bid for this option.

Although the Port Authority tried to lessen the visual impact of the facility by reducing its height and configuration, the current proposal still conflicts with Policy 25A. Beyond concern expressed by the OPRHP and the City regarding negative visual impact, there is no evidence that the Port Authority investigated additional ways to further reduce the negative visual impact.

Historic Resources. With regard to the promotion and preservation of historic resources, Policy 23 of the Oswego LWRP in the policy explanation states that:

All practicable means to protect structures, districts, areas or sites that are of significance in the history, architecture, archeology or culture of the State, its communities or the nation shall be deemed to include the consideration and adoption of any techniques, measures,

or controls to prevent a significant adverse change to such significant structures, district, areas or sites. A significant adverse change includes but is not limited to:

All proposed actions within 500 feet of the perimeter of the property boundary of the historic, architectural, cultural, or archeological resource and all actions...that would be incompatible with the objective of preserving the quality and integrity of the resource. Primary considerations to be used in making judgments about compatibility should focus on the visual and locational relationship between the proposed action and the special character of the historic, cultural, or archeological resource. Compatibility between the proposed action and the resource means that the general appearance of the resource should be reflected in the architectural style, design material, scale, proportion, composition, mass, line, color, texture, detail, setback, landscaping, and related items of the proposed actions. (Emphasis added)

Since the project is proposed within 500 feet of Fort Ontario, an identified historic resource, to comply with Policy 23, the proposed building should be visually and locationally compatible with Fort Ontario. As proposed, there is a conflict between the potash storage facility and Policy 23 with regard to Fort Ontario.

Natural Resources. With regard to the promotion and protection of natural resources, the project may conflict with a number of LWRP policies. There is however, insufficient information available with which to fully assess the possible environmental impacts of the proposed facility. Therefore, it is only possible to discuss areas of concern, but not conclusively resolve LWRP environmental policy conflicts. While it must be noted that the project does not require any federal or state permit or license for conformance with water or air quality standards, this does not mean that more restrictive standards in an LWRP are to be disregarded by a State agency.

The Oswego harbor was designated by the New York State Secretary of State as a Significant Coastal Fish and Wildlife Habitat on September 18, 1987. The impact assessment section of this habitat narrative states that "...any activity that substantially degrades water quality...in the Oswego River would affect the biological productivity of this area. Important species of fish and wildlife would be adversely affected by water pollution, such as chemical contamination (including food chain effects), oil spills, excessive turbidity or sedimentation, and waste disposal."

The potash that the Port Authority is proposing to store in the new facility is predominately Potassium Chloride (Muriate of Potash). The Port Authority submitted material safety data sheets for this

material and for Diammonium Phosphate (DAP) and urea. Presumably all three of these materials will be handled and stored in the proposed facility.

The material safety data sheets for DAP indicates that there are no toxicity values available, but do state that this material "[g]radually loses about 8% ammonia when exposed to air at room temperature. Decomposes to ammonia and monoammonia phosphate at around 70° C (158° F)." With regard to handling and storage precautions, the data sheets for DAP state: "[k]eep well closed. Use appropriate techniques to suppress dust generation." With regard to environmental protection concerns, the data sheets for DAP state: "Can be harmful to aquatic life at relatively high concentrations (96-hour LC₅₀ for the fathead minnow is 155 ppm). Phosphate can cause algal blooms."

The material safety data sheets that the Port Authority submitted for Potash (Potassium Chloride or KCl) are not as extensive as those for DAP. Under the category of "hazardous ingredients," the data sheets for KCl state: "Nuisance dust-maintain dust level below 10 mg/m³. Potash has a low order of toxicity similar to common salt." The data sheets for KCl also state that the dust "may cause irritation of lungs, mucous membranes. May irritate eyes or skin."

The material data sheet for urea that the Port Authority provided, does not identify any safety information.

With regard to the concern over air borne dust for handling DAP, KCl or Urea, the Port Authority did submit information from the Algoma Central Railway, Marine Division, from the Port of Colborne in Ontario, Canada. The information was apparently telefaxed to Ron Plank of the Port of Oswego Authority from H. McDowall of the Port of Colborne on August 31, 1989. The telefax transmission cover sheet states "Ron, Hope this meets your requirements. All ships (s/unloaders) have dust hoods with sprinkler systems in the hood and ACSO where cargo material first lands on unloading boom. H. McDowall." In the accompanying information that Mr. McDowall telefaxed, operating procedure #116 states:

"[c]ertain commodities handled by self-unloaders can become a source of airborne pollution. Under windy conditions these materials such as salt, potash, gypsum etc. will cover extensive areas. The spread of contaminants can be limited by the proper positioning of the boom and the use of water where permitted. Under extremely adverse wind conditions it may be necessary to stop unloading until the wind subsides."

Based upon the above cited information, the problems associated with air borne dust, runoff, and a potential spill of DAP, KCl and Urea, may be greater than the Port of Oswego Authority has indicated.

Verbal information regarding the effects of potash dust associated with the Port of Oswego Authority's current storing and handling activities has indicated that potash dust has blown onto the adjacent marina and has caused property damage to boats, an apparent result of the material's caustic properties.

The information submitted regarding the potential for negative environmental impacts associated with the proposed facility and the handling and storing of DAP, KCl and urea, is not sufficient to allow full analysis of the potential conflicts with the environmental and natural resource related policies of the LWRP. However, it is cause for concern that adverse effects of some of the materials to be stored have not, even as recently as late August 1989, been considered by the Port as evidenced by the telefaxed material from the Port of Colborne dated August 29, 1989.

The Port Authority was asked and agreed to provide, contingency plans for handling spills of the products handled when such spills occur on land and in the water. This information was not provided. The information the Port Authority did provide entitled, "Procedure for Handling Bulk Materials," is not a spill contingency plan, but a daily clean up procedure.

In summary, it is not possible to definitively assess the impact of the Port Authority's proposed project on the environment and on the environmental and natural resource related LWRP policies with the information provided. Although the submitted information is not conclusive, it does raise concerns that the proposed project may have negative impacts on the City's natural resources, and that the Port Authority may not have adequately addressed these issues at the appropriate stages of review.

Economic Impacts. With regard to strengthening the economic position of the State's major ports and small harbors, Policy 3 of the LWRP states:

Policy 3--Encourage the development of the State's existing major ports of Albany, Buffalo, New York, Ogdensburg, and Oswego as centers of commerce and industry, and encourage the siting, in these port areas, including those under the jurisdiction of the state public authorities, of land use and development which is essential to or in support of waterborne transportation of cargo and people.

The policy explanation further states that:

In implementing this policy, state agencies will recognize the legally established jurisdictional boundaries of the port authorities and will abide by the following guidelines:

1. In assessing proposed projects within or abutting a major port,

given that all other applicable policies are adhered to, the overriding consideration is the maintenance and enhancement of port activity, i.e., development related to waterborne transportation, which will have precedence over other non-port related activities.

Although this policy provides for the strengthening of the economic position of the State's major ports, it also states in the policy explanation that a proposed project within a major port must also adhere to all other applicable policies.

The Port Authority properly points out that the proposed potash fertilizer storage facility was included in Section IV of the LWRP as a conceptual project; one of a number of port improvement projects. The project originated from the Port Authority's 1984 Master Plan. Inclusion of a project in Section IV, while it establishes that use or activity as the preferred use of a given site, does not allow that proposed project or proposed land use to be pursued and developed without being consistent with the policies and purposes of the LWRP.

LWRP Implementation Techniques. Application of local aesthetic considerations in the design of new structures and the redevelopment of waterfront sites, pursuant to the Executive Law and 19 NYCRR part 600, has been considered above for policies 25A, and 23. In addition, the LWRP states on page 1 of Section V that:

The City of Oswego Zoning Ordinance is an important element in the implementation of the LWRP since all development must conform with the regulations specified for the district in which the development is proposed. Therefore, no LWRP implementation actions involving new or modified existing physical facilities can be undertaken without meeting the requirements of the zoning ordinance.

The Port Authority land that the proposed fertilizer storage facility is located on is zoned Industrial-In by the City of Oswego's Zoning Ordinance. The Zoning Ordinance specifies a maximum height of 50 feet in the industrial zoning district. This height maximum was added by Resolution of the City Council on July 22, 1974. Prior to that date, there was no height maximum in the industrial zoning district. The 50 foot height maximum was added, according to city officials, because of City-wide concern for aesthetic considerations in the development and re-development of the City. Therefore, the establishment of the 50 foot height maximum in the industrial zoning district can be considered an example of a local regulatory standard that was established to provide local aesthetic considerations in the design of new structures and redevelopment of sites.

Further, the Port Authority is required to be consistent to the maximum extent practicable with the City's LWRP. Recognizing that the City's Zoning Ordinance is relied upon as a primary means of implementing the policies and purposes of the LWRP, then specific standards and limitations of the zoning Ordinance are applicable to the Port Authority, through consistency. Therefore, through the application of the City's 50 foot height maximum in the industrial district as a means of applying local aesthetic considerations in the design of new structures and the redevelopment of waterfront sites, the Port Authority's proposed storage facility should be no higher than 50 feet if it is not to conflict with the scenic, aesthetic and height standards of the LWRP.

FINDINGS AND RECOMMENDATIONS

1. The Oswego Port Authority had full knowledge of the scenic, historic and aesthetic concerns of the City.

The Port Authority was a full participant in development of the Oswego Local Waterfront Revitalization Program, and was advised numerous times by the City of Oswego and the NYS Office of Parks, Recreation and Historic Preservation that the proposed facility would have significant adverse impact upon the scenic features of Fort Ontario. It is recommended that the Port Authority re-analyze the consistency of its action with the policies and purposes of the Oswego Local Waterfront Revitalization Program in light of the preceding discussions.

2. The potash facility is an appropriate use at the site as reflected in the Oswego Local Waterfront Revitalization Program.

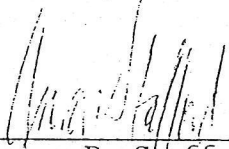
The City of Oswego unquestionably had knowledge of the Port Authority's intent to construct a potash storage facility, and identified as a conceptual project in the Local Waterfront Revitalization Program. The City's contention that the site could be used for a possible roll-on, roll-off facility, which is a possible use mentioned in the Local Waterfront Revitalization Program for the site, is unconvincing. There is little in the Local Waterfront Revitalization Program to indicate that this facility is more than a conceptual proposal. Having given the Port Authority notice through the Local Waterfront Revitalization Program and the zoning ordinance that a potash storage facility was an appropriate use in the Port site, provided the facility could be constructed in a manner consistent to the maximum extent practicable with the Local Waterfront Revitalization Program, there is nothing in Article 42 of the Executive Law nor the Local Waterfront Revitalization Program which gives the City of Oswego the authority to determine which uses identified in the Local Waterfront Revitalization Program and its zoning are appropriate for a given location. It is recommended that the City amend its Local Waterfront Revitalization Program and its zoning ordinance to reflect desired changes in developing Port property which may have occurred since the Local Waterfront Revitalization Program was approved.

3. As proposed, the potash storage facility is in conflict with Policies 25A and 23. Further, the proposed facility may be in conflict with the natural resource policies of the LWRP.

The City of Oswego Local Waterfront Revitalization Program is a comprehensive management plan developed in accordance with strict and specific statutory and regulatory standards, and was duly approved by the Secretary of State. This being the case, the Port of Oswego Authority is required under the Executive Law and 19 NYCRR Part 600 to be consistent to the maximum extent practicable with the Local Waterfront Revitalization Program and its policies. Therefore, the Oswego Port Authority should re-evaluate its project in light of the local historic, aesthetic, and resource protection policies and purposes expressed in the Local Program.

4. The Port Authority is bound to consistency to the maximum extent practicable with the Local Waterfront Revitalization Program. To the extent local enactments containing specific standards and limitations are relied upon to implement a Local Waterfront Revitalization Program, these local enactments and their standards and limitations are applicable to the Port Authority, through consistency. It is recommended, therefore, that the Port Authority re-evaluate the project with consideration of the local zoning standards and criteria which implement the Local Waterfront Revitalization Program policies.

January 19, 1990
Albany, New York



George R. Stafford
Director, Division of Coastal
Resources and Waterfront
Revitalization

