

APPENDIX D

U.S. Army Corps of Engineers Jurisdictional Determination



DEPARTMENT OF THE ARMY
BUFFALO DISTRICT, CORPS OF ENGINEERS
1776 NIAGARA STREET
BUFFALO, NEW YORK 14207-3199

REPLY TO

December 17, 2008

Regulatory Branch

SUBJECT: Jurisdictional Determination, Department of the Army Application No. 2007-01449.

Mr. John L. DiMarco
President
The DiMarco Group
1950 Brighton-Henrietta Townline Road
Rochester, New York 14623

Dear Mr. DiMarco:

I am writing to you in regard to your request for a jurisdictional determination for 4 wetland areas (wetland A and wetlands WA, WB, and WC). Wetland A is located on a 60-acre parcel of land that is being proposed as a commercial development site and wetlands WA, WB, and WC are located within a 60-foot wide proposed sewer line right-of-way. The proposed sewer line right-of-way is located immediately north of the 60-acre parcel and is linked to any proposed development of the 60-acre parcel. The subject parcel, for which a wetland survey was completed, is located at 4320 West Ridge Road, in the Town of Greece, Monroe County, New York.

Section 404 of the Clean Water Act establishes Corps of Engineers jurisdiction over the discharge of dredged or fill material into waters of the United States, including wetlands, as defined in 33 CFR Part 328.3.

I am hereby verifying the Federal wetland boundaries as shown on the attached wetland delineation map dated March 24, 2007. This verification was confirmed on **December 17, 2008, 2008** and will remain valid for a period of **five (5) years** from the date of this correspondence unless new information warrants revision of the delineation before the expiration. At the end of this period, a new wetland delineation will be required if a project has not been completed on this property and additional impacts are proposed for waters of the United States. Further, this delineation/determination has been conducted to identify the limits of the Corps Clean Water Act jurisdiction for the particular site identified in this request. This delineation/determination may not be valid for the wetland conservation provisions of the Food Security Act of 1985, as amended. If you or your tenant are USDA program participants, or anticipate participation in USDA programs, you should request a certified wetland determination from the local office of the Natural Resource Conservation Service prior to starting work.

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Based upon my review of the submitted delineation and on-site observations, I have determined that wetland areas WA (0.07-acre), WB (0.08-acre) and WC (0.32-acre) on the subject parcel are part of a surface water tributary system to a navigable water of the United States as noted on the attached Jurisdictional Determination form. Therefore, these wetlands are regulated under Section 404 of the Clean Water Act. Department of the Army authorization is required if you propose a discharge of dredged or fill material in these areas.

In addition, I have determined that there is no clear surface water connection or ecological continuum between wetland area A on the parcel and a surface tributary system to a navigable water of the United States. Therefore, this water is considered an isolated, non-navigable, intrastate water and is not regulated under Section 404 of the Clean Water Act. Accordingly, you do not need Department of the Army authorization to commence work in this area.

I encourage you to contact the appropriate state and local governmental officials to ensure that the proposed work complies with their requirements.

Finally, this letter contains an approved jurisdictional determination for the subject parcel. If you object to this determination, you may request an administrative appeal under Corps regulations at 33 CFR Part 331. Enclosed you will find a Notification of Appeal Process (NAP) fact sheet and Request for Appeal (RFA) form. If you request to appeal the above determination, you must submit a completed RFA form within 60 days of the date on this letter to the Great Lakes/Ohio River Division Office at the following address:

Mr. Mike Montone, Regulatory Review Officer
Great Lakes and Ohio River Division
CELRD-PDS-O
550 Main Street, Room 10032
Cincinnati, OH 45202-3222
Phone: 513-684-6212

In order for an RFA to be accepted by the Corps, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 C.F.R. part 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP. Should you decide to submit an RFA form, it must be received at the above address by **February 15, 2008**.

It is not necessary to submit an RFA to the Division office if you do not object to the determination in this letter.

A copy of this correspondence has been forwarded to Mr. Bernie Carr, of Terrestrial Environmental Specialists, Incorporated.

Regulatory Branch

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Questions pertaining to this matter should be directed to me at (716) 879-4186, by writing to the following address: U.S. Army Corps of Engineers, 1776 Niagara Street, Buffalo, New York 14207, or by e-mail at: joseph.w.krawczyk@usace.army.mil

Sincerely,

SIGNED

Joseph W. Krawczyk
Biologist

Enclosures

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: The DiMarco Group		File Number: 2007-01449	Date: 12/17/08
Attached is:		See Section below	
	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)	A	
	PROFFERED PERMIT (Standard Permit or Letter of permission)	B	
	PERMIT DENIAL	C	
X	APPROVED JURISDICTIONAL DETERMINATION	D	
	PRELIMINARY JURISDICTIONAL DETERMINATION	E	

SECTION I - The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at <http://usace.army.mil/inet/functions/cw/cccw/reg> or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or object to the permit.

● **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.

● **OBJECT:** If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Your objections must be received by the district engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit

● **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.

● **APPEAL:** If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information.

● **ACCEPT:** You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.

● **APPEAL:** If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II - REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact:

(Project Manager)
U.S. Army Corps of Engineers
1776 Niagara Street
Buffalo, New York 14207
(716) 879-4186
joseph.w.krawczyk@usace.army.mil

If you only have questions regarding the appeal process you may also contact:

Mr. Michael Montone
U.S. Army Corps of Engineers
Great Lakes and Ohio River Division
550 Main Street, Room 10032
Cincinnati, OH 45202-3222
(513) 684-6212; FAX(513) 684-2460
michael.g.montone@lrdor.usace.army.mil

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

Signature of appellant or agent.

Date:

Telephone number:

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): December 17, 2008

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: Buffalo District; DiMarco Group; File #2007-01449

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: New York County/parish/borough: Monroe City: Greece
Center coordinates of site (lat/long in degree decimal format): Lat. 43.22° N, Long. 77.74° W
Universal Transverse Mercator:

Name of nearest waterbody: Smith Creek

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: Lake Ontario

Name of watershed or Hydrologic Unit Code (HUC): Oak Orchard, Twelvemile (4130001)

☒ Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.

☒ Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

☒ Office (Desk) Determination. Date:

☒ Field Determination. Date(s): October 25, 2007

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There ☒ "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [Required]

☒ Waters subject to the ebb and flow of the tide.

☒ Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.
Explain:

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There ☒ "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [Required]

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area (check all that apply):¹

- ☒ TNWs, including territorial seas
- ☒ Wetlands adjacent to TNWs
- ☒ Relatively permanent waters² (RPWs) that flow directly or indirectly into TNWs
- ☒ Non-RPWs that flow directly or indirectly into TNWs
- ☒ Wetlands directly abutting RPWs that flow directly or indirectly into TNWs
- ☒ Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
- ☒ Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs
- ☒ Impoundments of jurisdictional waters
- ☒ Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:

Non-wetland waters: ~2,600 linear feet: ~5-8 width (ft) and/or acres.

Wetlands: 0.47- acres.

c. Limits (boundaries) of jurisdiction based on: ☒

Elevation of established OHWM (if known):

2. Non-regulated waters/wetlands (check if applicable):³

- ☒ Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.
Explain: An approximately 0.38-acre wetland (Wetland area A) located on the southern portion of the project site was determined to be isolated and non jurisdictional, as no surface water hydrological connections were present and the wetland had no potential to affect interstate commerce as defined under 328.3(a)(3)(i-iii) (See Section IV B).

¹ Boxes checked below shall be supported by completing the appropriate sections in Section III below.

² For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

³ Supporting documentation is presented in Section III.F.

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. TNW

Identify TNW:

Summarize rationale supporting determination:

2. Wetland adjacent to TNW

Summarize rationale supporting conclusion that wetland is "adjacent":

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapans* have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody⁴ is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. Characteristics of non-TNWs that flow directly or indirectly into TNW

(i) General Area Conditions:

Watershed size: 40+

Drainage area: ~35

Average annual rainfall: 2.83 inches

Average annual snowfall: inches

(ii) Physical Characteristics:

(a) Relationship with TNW:

☐ Tributary flows directly into TNW.

☒ Tributary flows through tributaries before entering TNW.

Project waters are river miles from TNW.

Project waters are river miles from RPW.

Project waters are aerial (straight) miles from TNW.

Project waters are aerial (straight) miles from RPW.

Project waters cross or serve as state boundaries. Explain:

Identify flow route to TNW⁵: The on-site seasonal RPW (unnamed drainage which is directly abutted by Wetlands WA, WB, and WC) flows directly north for approximately 480 feet from the northern end of Wetland WA and drains into a

⁴ Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.

⁵ Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

perennial RPW which flows immediately west of the existing "Images West" subdivision. The perennial RPW flows north for approximately 2,000 feet, where it then flows into Smith Creek. Smith Creek, another perennial RPW flows in a northeast direction for approximately 1.6 miles, where it then converges with Larkin Creek. Larkin Creek then continues in a northeast direction for approximately another 3 miles, where it then drains directly into Buck Pond and Lake Ontario. Tributary stream order, if known:

(b) General Tributary Characteristics (check all that apply):

Tributary is:

☐ Natural

☐ Artificial (man-made). Explain:

☒ Manipulated (man-altered). Explain: The parcel on which Wetlands WA, WB, and WC are

located were previously farmed and contained previously straightened and altered drainages. The seasonal RPW which flows north through Wetlands WA, WB, and WC and connect these wetlands to the perennial RPW along the west side of the "Images West" subdivision, was located parallel to and east of an old stone farm field fence. Additionally, the perennial RPW located immediately west of the "Images West" subdivision has been straightened and deepened, in order to accomidated drainage from the existing subdivision.

Tributary properties with respect to top of bank (estimate):

Average width: 3-4 feet

Average depth: 4-5 feet

Average side slopes: **2:1**

Primary tributary substrate composition (check all that apply):

☒ Silts

☐ Sands

☐ Concrete

☐ Cobbles

☐ Gravel

☐ Muck

☐ Bedrock

☐ Vegetation. Type/% cover:

☐ Other. Explain:

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain: stable.

Presence of run/riffle/pool complexes. Explain: man-altered channel on-site. Therefore, no stream structure complexities.

Tributary geometry: **Relatively straight**

Tributary gradient (approximate average slope): 1-2 %

(c) Flow:

Tributary provides for: **Seasonal flow**

Estimate average number of flow events in review area/year: **11-20**

Describe flow regime: The unnamed, seasonal RPW (approximate 600 feet in length) had flowing water during a May 5, 2005 site visit by Buffalo District Biologist, Stever Metivier. The same channel did not have flow during an October 25, 2007 site visit by District Biologist Joe Krawczyk. This seasonal RPW receives flow during storm events and drains directly into the perennial RPW located immediately west of the "Images West" subdivision. This is especially true in the spring after seasonal snow melt.

Other information on duration and volume:

Surface flow is: **Discrete and confined**. Characteristics:

Subsurface flow: **Pick List**. Explain findings:

☐ Dye (or other) test performed:

Tributary has (check all that apply):

☐ Bed and banks

☒ OHWM⁶ (check all indicators that apply):

☐ clear, natural line impressed on the bank

☒ the presence of litter and debris

☐ changes in the character of soil

☐ destruction of terrestrial vegetation

☐ shelving

☒ the presence of wrack line

☒ vegetation matted down, bent, or absent

☒ sediment sorting

☒ leaf litter disturbed or washed away

☐ scour

☒ sediment deposition

☐ multiple observed or predicted flow events

☒ water staining

☐ abrupt change in plant community

☐ other (list):

☐ Discontinuous OHWM.⁷ Explain:

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

⁶A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

⁷Ibid.

- | | |
|--|--|
| <p><input checked="" type="checkbox"/> High Tide Line indicated by:</p> <ul style="list-style-type: none"> <input type="checkbox"/> oil or scum line along shore objects <input type="checkbox"/> fine shell or debris deposits (foreshore) <input type="checkbox"/> physical markings/characteristics <input type="checkbox"/> tidal gauges <input type="checkbox"/> other (list): | <p><input checked="" type="checkbox"/> Mean High Water Mark indicated by:</p> <ul style="list-style-type: none"> <input type="checkbox"/> survey to available datum; <input type="checkbox"/> physical markings; <input type="checkbox"/> vegetation lines/changes in vegetation types. |
|--|--|

(iii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Explain: The approximately 2,000 linear foot section of perennial RPW, located north of the seasonal RPW and immediately west of the "Images West" subdivision, had an oily sheen on the water surface. This is likely a result of water inputs from hardened surfaces from the existing subdivision.

Identify specific pollutants, if known:

(iv) **Biological Characteristics. Channel supports (check all that apply):**

☒ Riparian corridor. Characteristics (type, average width): The seasonal RPW channel flows through Wetland areas WA, WB, and WC. The extent of these wooded wetland areas, as identified in the TES wetland delineation (August 29, 2007) is 60 feet wide. However, TES only identified wetlands within the designated 60-foot wide right-of-way and each of the designated wetland areas actually extends beyond the 60-foot right-of-way. Wetland area WA extends an additional 450 feet east of the right-of-way; Wetland area WB extends an additional 50 feet west of the the proposed right of way; and Wetland WC extends and additioanl 170 feet east of the right-of-way.

☐ Wetland fringe. Characteristics:

☒ Habitat for:

☐ Federally Listed species. Explain findings:

☐ Fish/spawn areas. Explain findings:

☐ Other environmentally-sensitive species. Explain findings:

☒ Aquatic/wildlife diversity. Explain findings: a) The season RPW channel runs directly through mature wooded wetland areas WA, WB and WC, which provide desirable habitat for amphibian reproduction. b) The mature wooded wetland area in combination with the surrounding wooded upland area provides desirable habitat for a moderate number of passerine bird species.

2. **Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW**

(i) **Physical Characteristics:**

(a) General Wetland Characteristics:

Properties:

Wetland size: (Wetland WA, WB, and WC) 0.47 acres

Wetland type. Explain: Wooded Wetland.

Wetland quality. Explain: High Quality, mature wooded wetland area.

Project wetlands cross or serve as state boundaries. Explain: NA.

(b) General Flow Relationship with Non-TNW:

Flow is: **Intermittent flow**. Explain: Water flows from Wetlands WA, WB, and WC and into the seasonal RPW, following storm events and after the spring snow melt.

Surface flow is: **Discrete and confined**

Characteristics: Water flows from Wetlands WA, WB, and WC into the confined channel of the seasonal RPW. This flow occurs during discreet storm events and after spring snow melt.

Subsurface flow: **Pick List**. Explain findings:

☐ Dye (or other) test performed:

(c) Wetland Adjacency Determination with Non-TNW:

☒ Directly abutting

☐ Not directly abutting

☐ Discrete wetland hydrologic connection. Explain:

☐ Ecological connection. Explain:

☐ Separated by berm/barrier. Explain:

(d) Proximity (Relationship) to TNW

Project wetlands are **2-5** river miles from TNW.

Project waters are **2-5** aerial (straight) miles from TNW.

Flow is from: **Wetland to navigable waters**.

Estimate approximate location of wetland as within the **50 - 100-year** floodplain.

(ii) **Chemical Characteristics:**

Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain:

Identify specific pollutants, if known:

(iii) **Biological Characteristics. Wetland supports (check all that apply):**

☐ Riparian buffer. Characteristics (type, average width):

☐ Vegetation type/percent cover. Explain:

☒ Habitat for:

☐ Federally Listed species. Explain findings:

☐ Fish/spawn areas. Explain findings:

☐ Other environmentally-sensitive species. Explain findings:

☒ Aquatic/wildlife diversity. Explain findings: a) Mature wooded wetland areas WA, WB and WC, provide desirable habitat for amphibian reproduction. b) The mature wooded wetland area in combination with the surrounding wooded upland area provides desirable habitat for a moderate number of passerine bird species.

3. Characteristics of all wetlands adjacent to the tributary (if any)

All wetland(s) being considered in the cumulative analysis: ■

Approximately (2.87) acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

<u>Directly abuts? (Y/N)</u>	<u>Size (in acres)</u>	<u>Directly abuts? (Y/N)</u>	<u>Size (in acres)</u>
Wetland WA (TES) - Y	0.07-acre		
Wetland WB (TES) - Y	0.08-acre		
Wetland WC (TES) - Y	0.32-acre		
Wetland C (Gene Pellett) - Y	1.55-acres		
Wetland B (Gene Pellett) - Y	0.85-acre		

Summarize overall biological, chemical and physical functions being performed: Wetlands WA, WB, and WC are mature, wooded wetland areas that perform some of the following functions: a) creation of wildlife habitat areas for both semi-aquatic amphibians and for passerine bird species; the surface retention of water, which allows runoff and snowmelt to percolate more slowly into the soil and to be filtered in the process (water quality); and c) nutrient cycling - the retention and recycling of dead organic matter within the wetland areas.

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D:
2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: See Section IV(B) below.
3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:
☐ TNWs: linear feet width (ft), Or, acres.
☐ Wetlands adjacent to TNWs: acres.

2. **RPWs that flow directly or indirectly into TNWs.**

- ☐ Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial:
- ☒ Tributaries of TNW where tributaries have continuous flow "seasonally" (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally: The seasonal RPW channel (approximately 600 feet in length), which connects Wetlands WA, WB, and WC to a perennial RPW, was observed to be flowing during a May 5, 2005 site visit by Buffalo District Biologist, Steve Metivier. The seasonal RPW channel is approximately 3 to 4 feet in width and 4 to 5 feet in depth. This channel had signs of previous flow (i.e., debris whacking, bent vegetation, and water marks). This channel likely contains water on a seasonal basis (>3 months during the spring season, following snow melt - March through late May). Additionally, this channel likely receives flow during discrete storm events throughout the remainder of the season. Those flows are conveyed directly north and into the perennial RPW.

Provide estimates for jurisdictional waters in the review area (check all that apply):

☒ Tributary waters: ~2,600 linear feet ~5-8 width (ft).

☐ Other non-wetland waters: acres.

Identify type(s) of waters: .

3. **Non-RPWs⁸ that flow directly or indirectly into TNWs.**

- ☐ Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):

☐ Tributary waters: linear feet width (ft).

☐ Other non-wetland waters: acres.

Identify type(s) of waters: .

4. **Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.**

- ☐ Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.
- ☐ Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: .
- ☒ Wetlands directly abutting an RPW where tributaries typically flow "seasonally." Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: The seasonal RPW channel flows directly through Wetland areas WA, WB, and WC.

Provide acreage estimates for jurisdictional wetlands in the review area: 0.47 acres.

5. **Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**

- ☐ Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

6. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.**

- ☐ Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: acres.

7. **Impoundments of jurisdictional waters.⁹**

As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.

- ☐ Demonstrate that impoundment was created from "waters of the U.S.," or
- ☐ Demonstrate that water meets the criteria for one of the categories presented above (1-6), or
- ☐ Demonstrate that water is isolated with a nexus to commerce (see E below).

⁸See Footnote # 3.

⁹To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):¹⁰

- ☒ which are or could be used by interstate or foreign travelers for recreational or other purposes.
- ☒ from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
- ☒ which are or could be used for industrial purposes by industries in interstate commerce.
- ☒ Interstate isolated waters. Explain:
- ☒ Other factors. Explain:

Identify water body and summarize rationale supporting determination:

Provide estimates for jurisdictional waters in the review area (check all that apply):

- ☒ Tributary waters: linear feet width (ft).
- ☒ Other non-wetland waters: acres.
- Identify type(s) of waters:
- ☒ Wetlands: acres.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

- ☒ If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
- ☒ Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
 - ☒ Prior to the Jan 2001 Supreme Court decision in "SWANCC," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
- ☒ Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain:
- ☒ Other: (explain, if not covered above): **0.38-acre Wetland area A, located on the southern portion of the project site was determined to be isolated and non jurisdictional, as no surface water hydrological connections were present and the wetland had no potential to affect interstate commerce as defined under 328.3(a)(3)(i-iii) (See Section IV B).**

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

- ☒ Non-wetland waters (i.e., rivers, streams): linear feet width (ft).
- ☒ Lakes/ponds: acres.
- ☒ Other non-wetland waters: acres. List type of aquatic resource:
- ☒ Wetlands: acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

- ☒ Non-wetland waters (i.e., rivers, streams): linear feet, width (ft).
- ☒ Lakes/ponds: acres.
- ☒ Other non-wetland waters: acres. List type of aquatic resource:
- ☒ Wetlands: acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

- ☒ Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: Wetland Delineation Report prepared by Terrestrial Specialists, Incorporated (data sheets dated October 23, 2003 with boundaries updated on March 24, 2007).
- ☒ Data sheets prepared/submitted by or on behalf of the applicant/consultant.
 - ☒ Office concurs with data sheets/delineation report.
 - ☐ Office does not concur with data sheets/delineation report.
- ☒ Data sheets prepared by the Corps:
- ☒ Corps navigable waters' study:
- ☒ U.S. Geological Survey Hydrologic Atlas:
- ☐ USGS NHD data.

¹⁰ Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos.

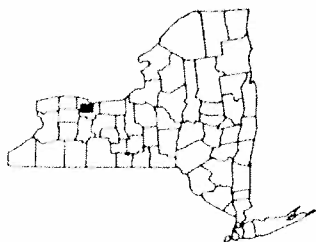
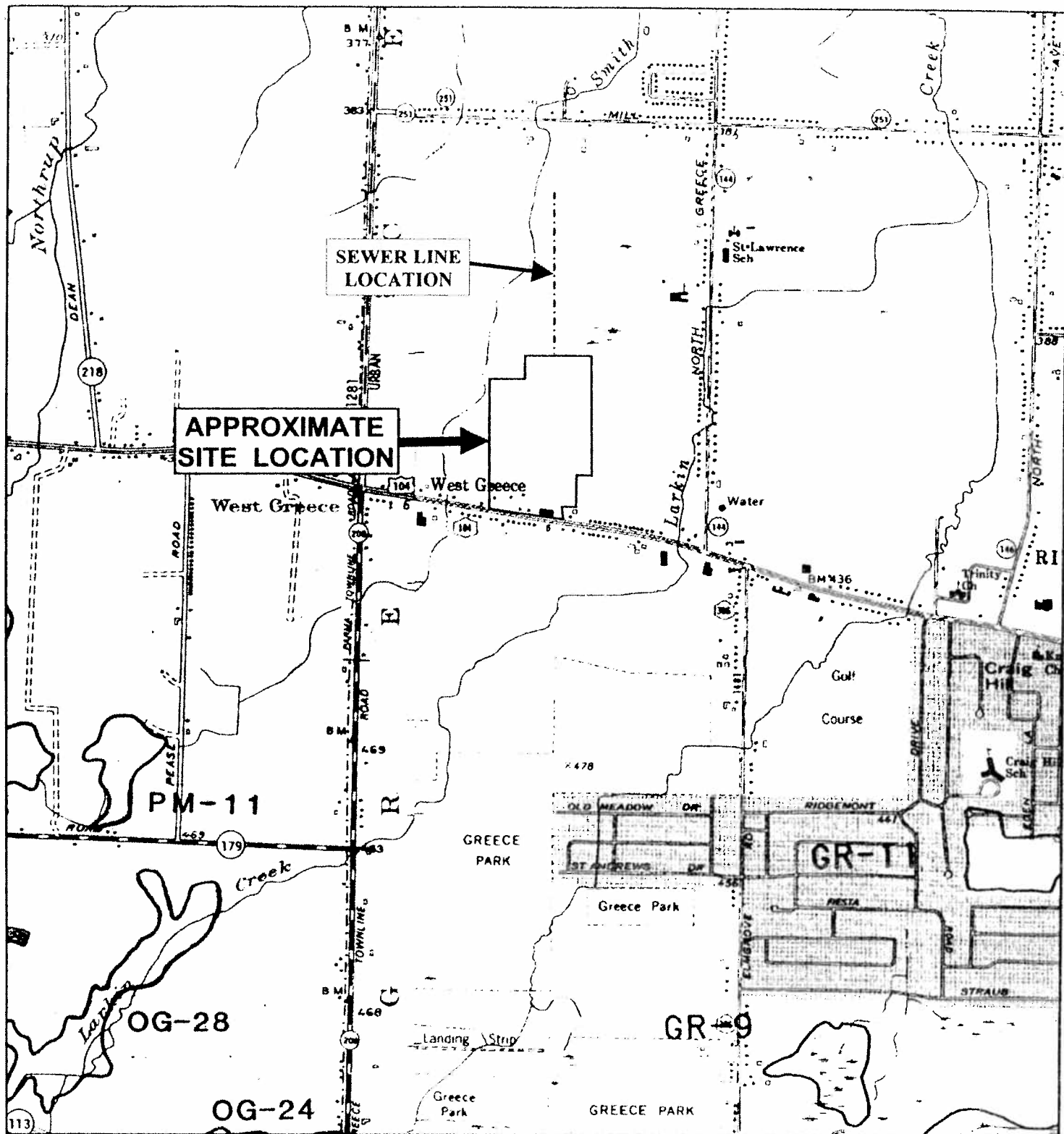
- ☐ USGS 8 and 12 digit HUC maps.
- ☒ U.S. Geological Survey map(s). Cite scale & quad name: NY-Rochester West; 1:24K scale.
- ☒ USDA Natural Resources Conservation Service Soil Survey. Citation: Soil Survey for Monroe County, New York.
- ☒ National wetlands inventory map(s). Cite name: NY-Rochester West; 1:24K scale.
- ☒ State/Local wetland inventory map(s):
- ☒ FEMA/FIRM maps:
- ☒ 100-year Floodplain Elevation is: (National Geodetic Vertical Datum of 1929)
- ☒ Photographs: ☐ Aerial (Name & Date):
- or ☒ Other (Name & Date): Photographs of the wetlands areas were provided in the October 23, 2003 wetland delineation report.
- ☒ Previous determination(s). File no. and date of response letter: 96-985-0088(3); Buffalo District Biologist, Steve Metivier sent a Jurisdictional Determination Letter, dated January 25, 2006 to Tra-Mac Associates Incorporated, for wetlands located on the proposed "Images West" subdivision site. The wetlands are located immediately east of the site being reviewed in this JD form and the wetlands were delineated by Gene Pellett of Environmental Resources, LLC.
- ☒ Applicable/supporting case law:
- ☒ Applicable/supporting scientific literature:
- ☒ Other information (please specify):

B. ADDITIONAL COMMENTS TO SUPPORT JD: As a matter of policy, Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law. As a result of this policy and because the unnamed tributary (non-navigable RPW) that the subject wetlands (WA, WB, and WC) abut is not a perennial waterbody, a significant nexus finding was also performed. The on-site wetlands were found to perform numerous wetland functions including runoff storage, pollutant trapping, water quality improvement, and creation of wildlife (amphibian and bird) habitat. The conclusion that the wetland performs flood attenuation/runoff storage functions was based on observations of waterlines and debris lines within the wooded wetland areas, which indicate that standing water is present for portions of the year within the wetland areas. Pollutant trapping aspects of wetlands such as the subject wetland are well documented and include removal of suspended solids, dissolved solids, and toxins and treatment of nitrogen, phosphorus, and trace metals. Wildlife habitat functions were also documented and were based on direct observations and the forested nature of the wetland. The water quality of the unnamed tributary is improved with the presence of the on-site wetland.

These on-site wetlands (WA, WB, and WC) directly abut the seasonal RPW channel. This approximately 600 foot length of channel then flows north directly into a perennial RPW channel which is located directly west of the existing "Images West" subdivision. The perennial RPW channel widens to approximately 8-10 feet in width and approximately 6-8 feet in depth. Water flowing through Wetlands WA, WB, and WC is filtered prior to entering the perennial RPW. Impacts to these waters of the US (discharges) would have a direct downstream impact on both the seasonal RPW and perennial RPW and then on subsequent perennial RPW's further downstream (Smith Creek, Larkin Creek and then Lake Ontario). The unnamed seasonal RPW tributary and its adjacent wetlands are therefore important to the quality of the water and the confluence of the seasonal RPW and perennial RPW (~480 feet north of wetland area A) and further downstream.

Based on the verified hydrological connection between the seasonal RPW channel with Smith Creek and the wetland functions being performed, the Buffalo District concludes that the unnamed tributary, in combination with adjacent wetlands (WA, WB, and WC), has a more than insignificant effect on the chemical, physical, and biological integrity of the downstream waters, including Lake Ontario (a TNW and Section 10 Water).

In addition to the seasonal RPW described above, an approximately 0.38-acre wetland (Wetland area A) located on the southern portion of the project site was determined to be isolated and non jurisdictional, as no surface water hydrological connections were present and the wetland had no potential to affect interstate commerce as defined under 328.3(a)(3)(i-iii).



QUADRANGLE LOCATION



SCALE 1" = 2000'

NORTH

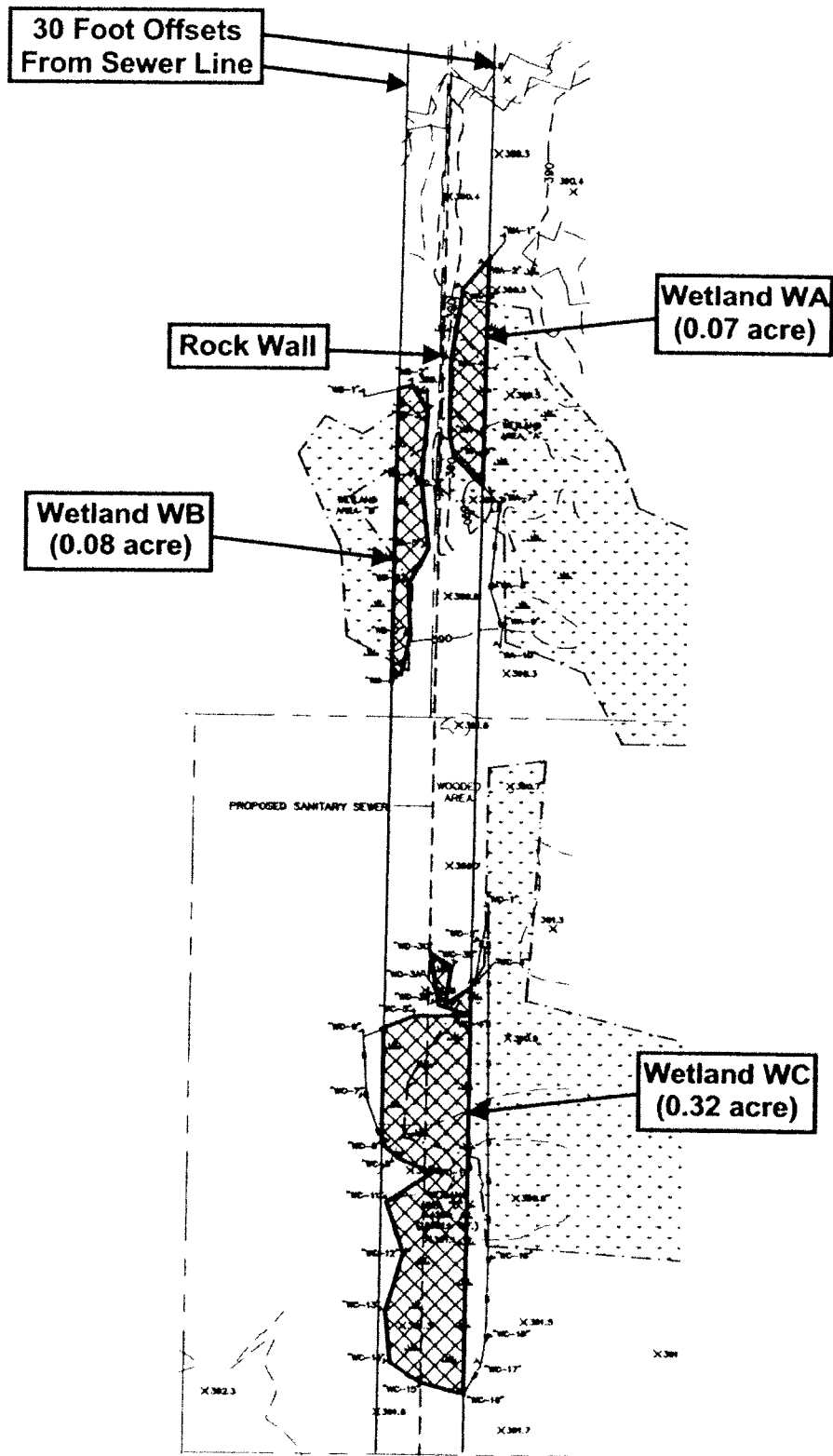


Figure 2. NYS Freshwater Wetlands Map

NYS Department of
Environmental Conservation

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Monroe County, New York
Quad: Rochester West
Sheet 1 of 5





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Quad: Rochester West
Sheet 2 of 5



Figure Prepared by
Terrestrial Environmental
Specialists, Inc.

Base Map Provided by
Bergmann Associates

Figure 8.
Wetland Area
Sewer Line
Right-of-Way

W/4
YOUNG J. THOMAS
12 E. 93rd St. - 17 DE

W/F
TOM J. THOMAS
T.M. 07301-1-2

Tel. 0248.03-2-1.8

[illegible]

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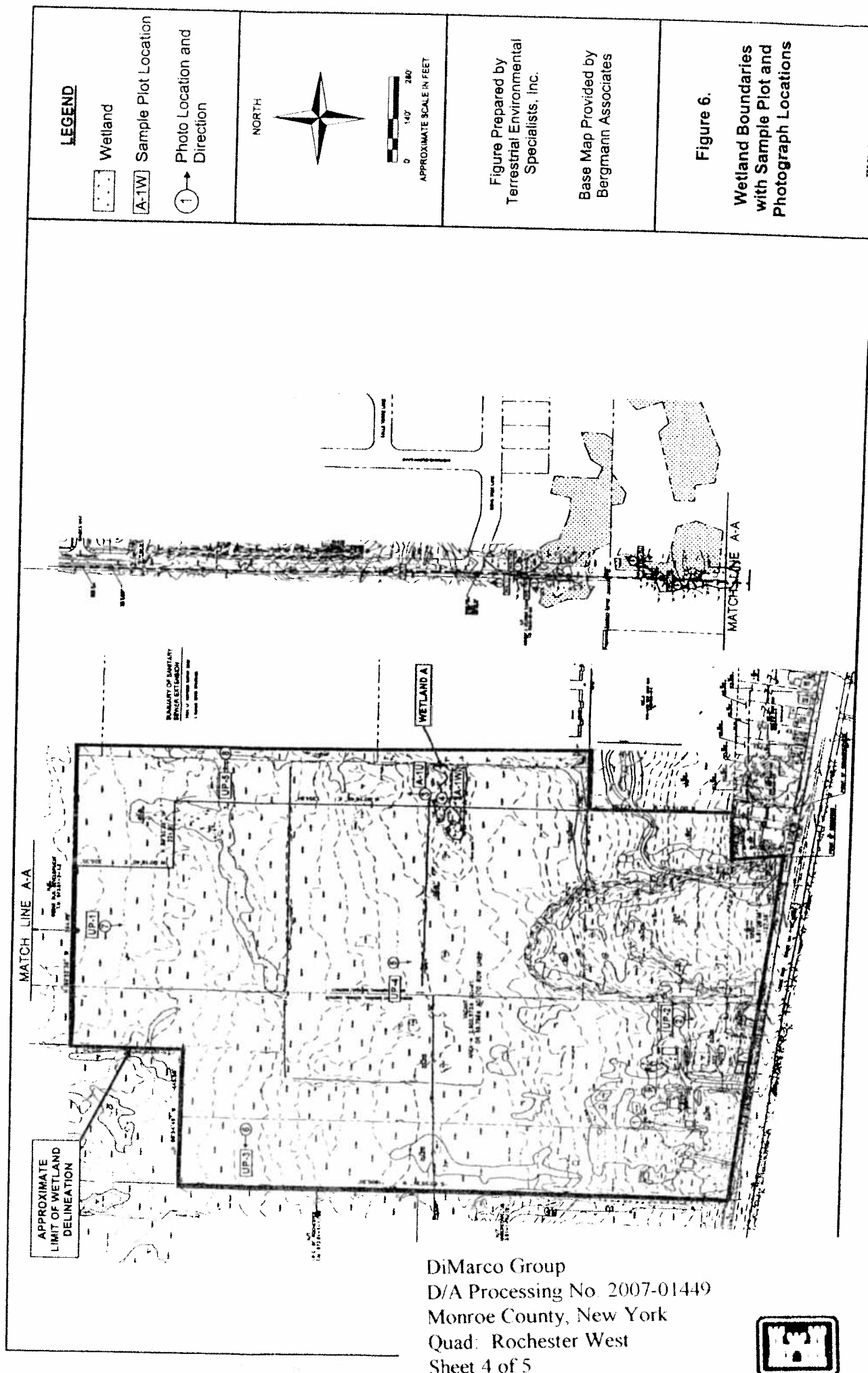
**PROPOSED
RETAIL
DEVELOPMENT**
NYS ROUTE 104
GREECE, NY

4110 WEST RIDGE LLC
1980 BRIGHTON HENRIETTA
TOWN LINE ROAD
ROCHESTER, NY 14623




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Quad: Rochester West
Sheet 3 of 5



SEW-01



LEGEND

-  Wetland
-  Sample Plot Location
-  Photo Location and Direction

NORTH



0 140' 280'
APPROXIMATE SCALE IN FEET

Figure Prepared by
Terrestrial Environmental
Specialists, Inc.

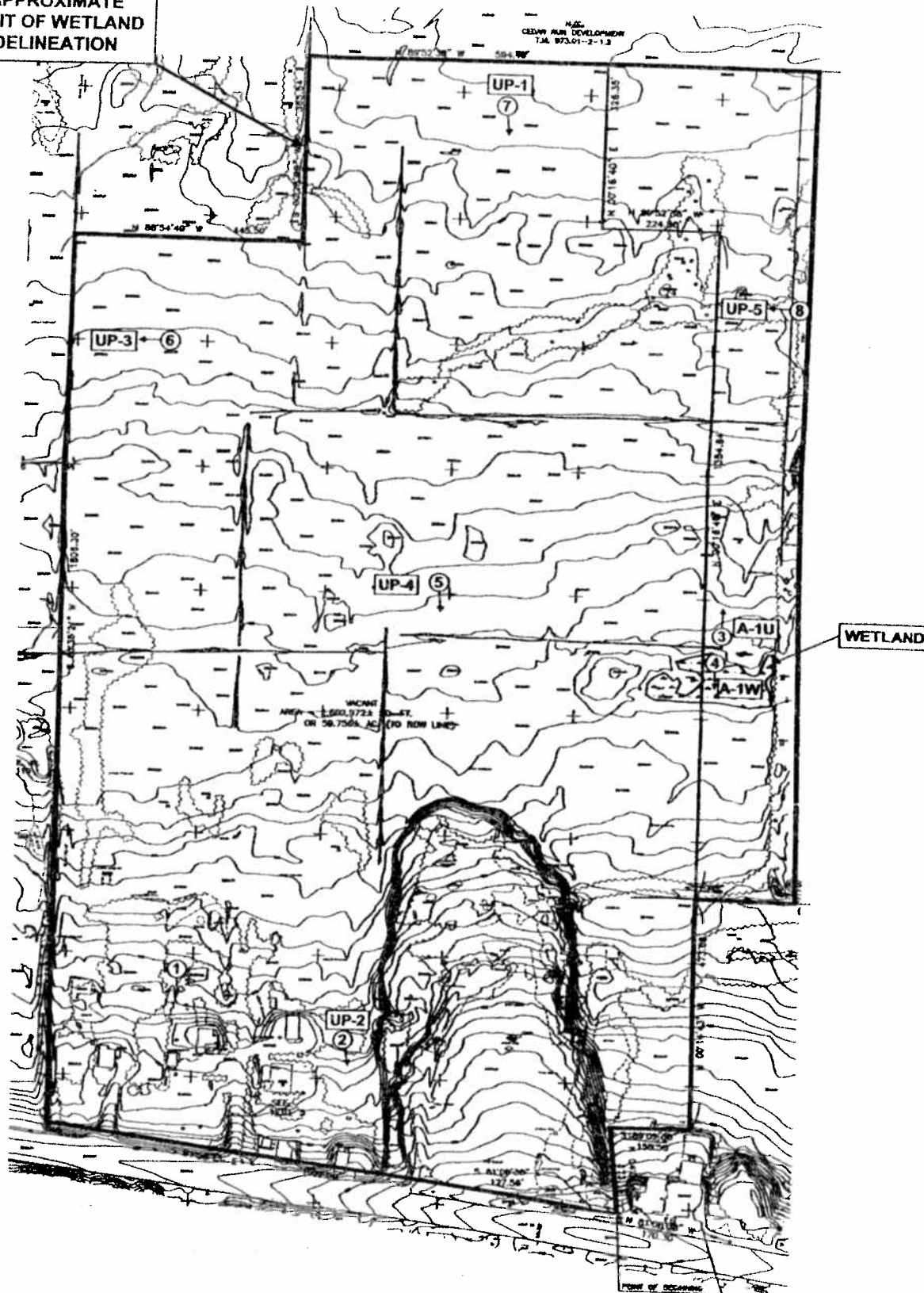
Base Map Provided by
Bergmann Associates

Figure 6.

**Wetland Boundaries
with Sample Plot and
Photograph Locations**



APPROXIMATE
LIMIT OF WETLAND
DELINEATION



LEGEND

UP-1 Plot Location



0 100 200
APPROXIMATE SCALE IN FEET

Figure 6. Wetland Boundary With
Plot and Photograph Locations

Base Map Provided by
Bergmann Associates

Figure Prepared by Terrestrial
Environmental Specialists, Inc.

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Sheet 5 of 5



NOTE: Wetland delineation included property outside
current property boundary

