

**APPENDIX B**

**COMMENTS FROM AGENCIES AND  
LEAD AGENCY CONSULTANTS**

**Final Environmental Impact Statement**

**WAL-MART EXPANSION**

**2348 NYS Route 19  
Town of Warsaw  
Wyoming County, NY**

## MEMORANDUM

**TO:** Town of Warsaw Planning Board

**FROM:** Wendel Duchscherer, Dana R. Braun

**DATE:** May 19, 2009

**SUBJECT:** Substantive Comments for Applicant to Address

The Town of Warsaw Planning Board, as Lead Agency, is charged with establishing a list of comments from Involved and Interested Agencies and the public regarding the Wal-Mart Supercenter DEIS that are deemed to be substantive and that must be addressed in the FEIS. The Substantive Comments include any questions or concerns that the Planning Board has regarding the DEIS and would like to see addressed further in the Final Environmental Impact Statement (FEIS). At the May 18, 2009 Planning Board meeting, the Board determined that all Substantive Comments have been identified as per this memo and directed the applicant to complete a draft FEIS.

The Lead Agency is responsible for the content of the FEIS, although typically the applicant prepares an initial draft of the document and the Lead Agency then amends it as necessary.

The FEIS is the final assessment of the potential impacts and the recommended mitigation strategies that will be taken to remove or reduce negative impacts associated with the project. The FEIS must document all procedures, address substantive changes made to the DEIS as a result of public and agency comments, and answer all outstanding questions regarding the impact of development. A draft of the FEIS will be provided to the Town by the applicant in hard copy and electronic copy. The Town and its consultants will review and modify the document to accurately represent their opinion. Once the Town has determined the FEIS is complete (by resolution), then there is a minimum 10 day required time period before a decision can be made. While there is no formal public hearing on the FEIS, during this time period, agencies and the public can make comments to the Planning Board for their consideration in making their determination of impact and findings. After this minimum 10 days, the Town as Lead Agency will complete the Findings for the project.

The FEIS and Findings statement are coordinated with the involved agencies to ensure that any impact of concern has been mitigated and minimized to the greatest extent practicable (and that the approval agencies are "on the same page"). Once the FEIS and Findings have been completed and adopted by the Planning Board, the SEQR process is complete and the project can move to site plan approval.

### **Project Summary**

The proposed project involves the expansion of the existing Wal-Mart retail store. The 27.3 acre project site is located at 2348 NYS Route 19 in the Town of Warsaw. The applicant proposes

## MEMORANDUM

expanding the existing 76,000 square foot Wal-Mart into a 148,000 square foot Wal-Mart Super center, with expanded merchandise and grocery components of the store such as a food center, garden center, vision center, bakery, deli and recycling center. Proposed operating hours of the Wal-Mart Supercenter will be 24 hours. The building expansion will primarily occur on the south side and rear (west side) of the existing building. Parking lot facilities will be expanded to the north and east of the building. Stormwater management ponds will be located to the rear (west side) of the property. Primary access to the site will remain unchanged.

### **Substantive Comments**

The following draft substantive comments have been developed through our review and discussions with the Planning Board. They represent the substantive issues raised regarding the project. In our opinion, these comments address the range of environmental impacts associated with the site. These comments are based on our review of the DEIS, the comments at the Public Hearing and the agency comments received to date.

### Land

1. The applicant estimates approximately 25,000 cubic yards of fill will be needed. An estimated 50 to 100 trucks (16 cy each) per day will come to the site over a 4 to 6 week period to bring fill to the site. The applicant has agreed that earthen fill brought to the site will be brought in from the north and south only via Route 19. The FEIS should address how this routing system will be ensured during construction period. Impacts that should also be addressed include hours of operation, dust control, vibration and similar impacts. Potential impacts to the Village will need to be clarified based on the percentage of trucks that will be reaching the site from the south and traveling through the Village of Warsaw.
2. A retaining wall will accommodate grade change from the parking lot north to the existing pond. A segmental wall is expected with a maximum reveal height of 16 feet. The base of the wall will be kept a minimum of 10 feet from the limits of the wetlands surrounding the pond. Discussion needs to be provided regarding how no impact to the pond/wetland will be ensured during construction periods.
3. Mitigation measures regarding truck idling cited in the DEIS are sufficient to address impacts from idling. Construction period should include hourly restrictions for on-site activities to minimize adverse impacts.

### Comments from the NYS DEC

## MEMORANDUM

4. It must be ensured the fill be kept within the project boundary limits identified in the DEIS to prevent 100 year flood plain impacts. Project boundary limits for "toe" of fill should be marked by construction fencing and appropriate silt fencing to ensure construction equipment does not push fill into the flood plain and to reduce unnecessary damage to existing flood plain vegetation.
5. Since the possibility of 500 year flood impacts will affect the toe and edge of project fill, it is extremely important that the entire edge of fill be stabilized by planting ground covering vegetation as soon as possible to prevent possible erosion from flood waters. DEC recommends that the ground vegetation should include plantings that provide good erosion protection, (avoid a grass only coverage).

### Water

1. Mitigation cited in the DEIS are sufficient to address the adverse impacts to surface water and wetlands and will be included in the Findings.

### Stormwater and Detention

1. In the DEIS, the applicant states that NYSDEC does not require stormwater quantity control when discharging to a 4th order stream (Page 29, Appendix G - Page 2). This is only partially correct. NYSDEC does not require stormwater quantity control when discharging directly to a 4th order stream. While we agree that Oatka Creek is a 4th order stream, we do not agree that this project discharges directly to Oatka Creek. The applicant will be required to show that the sheet flow from the water quality ponds does not adversely impact the area between the water quality ponds and Oatka Creek.
2. As shown on the drawings and described in Appendix G, there is not enough detail provided to confirm that the wet ponds will work as designed. Please provide additional detail on:
  - The area near the end section of pipe entering the first pond. Will stabilization methods be used to keep the pond from eroding?
  - The area between the first and second pond. What type of connection exists between these two areas?
  - Location and construction of the proposed broad crested weir. Where will this be located and how will it be constructed to provide sheet flow?
3. In Appendix F, the Floodplain Evaluation Study, Figures 1 through 4 shows the 100yr Water Surface Elevations as modeled within HEC-RAS. In each of the figures, the text presented

## MEMORANDUM

does not match the water elevation shown in the figure. For example, the proposed water surface elevation in Figure 1 is given in the text as 974.44. If you look at the figure, the water surface elevation presented by the model looks to be under 974. Please correct these figures to provide the correct water surface elevations.

### On-Site Facilities

1. The FEIS must provide a discussion on proposed snow storage. Snow storage needs to be provided in such a manner that runoff does not impact the accessibility and safety of the main parking field.
2. The amount of parking that will be lost to snow storage must be shown. The impact that snow storage has on total parking capacity on site versus the busiest times on site needs to be illustrated and discussed.
3. Parking to be located between the 5 Star Bank and the McDonald's, adjacent to NYS Route 19, should be further justified as to need by Wal-mart. A minimal reduction equivalent to the width of two parking spaces from Route 19 needs to be provided. The FEIS must articulate how the parking area is needed for the site operation and balance the need for parking with green space. A justification of meeting parking requirements of the Town Zoning code is not an adequate justification.
4. If the parking area is to be used as snow storage during the peak store utilization time, are there 'greener' options than standard asphalt pavement, such as utilizing pervious materials.
5. The FEIS should address whether replacing the 22 painted (striped) islands within the parking field with planted islands will better address the aesthetics, landscaping and green elements of the site. The replacement elements could consist of grass and tree or shrub components to enhance the overall site.
6. The FEIS needs to address impacts to trees on the site. All trees on-site that are currently located within areas where store expansion, parking expansion, or sidewalk expansion will be lost. Will these trees be replanted or replaced on the site? The replacement of the existing trees should be in addition to the required landscaping. Below illustrates the number of trees that are shown to be removed to accommodate the current site plan layout.

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- a. Store expansion area = 6 trees
  - b. Parking expansion area = 16 trees
  - c. Sidewalk expansion area = 5 trees, 6 shrubs
  - d. Front parking lot area = 15 trees, 1 shrub
7. The expansion of the store will bring the parking lot to a distance of 300 feet from the property line and the store will be 600 feet from the property line. Truck deliveries are noted to occur anytime during the 24 hour operation of the store.
  8. The FEIS must specify truck delivery hours and address potential negative impacts to the ambient noise levels of the site.
  9. The FEIS must address the need for screening at the northern property line and articulate how this will be accomplished. It must address what will happen to existing vegetation/screening at the northern property line. The screening is necessary to provide shielding from debris that may be generated from the site. It will also serve as a noise buffer from the site.

### Pedestrian Facilities

1. FEIS needs to include a discussion of pedestrian facilities.
2. Pedestrian access to the site must be clearly provided with ADA compliant designs. Access should originate from the existing sidewalk on Route 19 at the main site drive intersection and connect into the sidewalk proposed around the building's perimeter. How this will be achieved and the impact it will have on both the vehicle and pedestrian traffic on site needs to be addressed, as discussed at several Planning Board meetings.
3. Areas where pedestrian crosswalks are provided should be treated with traffic calming designs to provide the safest environment for the pedestrian to move within. This can be accomplished with additional signage, elevated crosswalks or a similar combination.

### Air Quality

1. Truck routing patterns will be critical to minimization of air quality impacts, and should be illustrated in the FEIS.

### Aesthetics

The applicant has presented an updated rendering of the architectural design of the Walmart building. This design incorporates peaked roofs, cornices, brick elements and a more

## MEMORANDUM

natural, muted color scheme. This rendering must be included in the FEIS. To ensure the colors of materials is accurately represented samples should be presented. The final design will be determined during site plan review.

The following comments were developed during the course of a special meeting held by the Planning Board, with the applicant, to discuss the aesthetic design of the building. However, most have been addressed by the updates rendering. The applicant will need to discuss how their revised rendering has addressed these concerns.

1. The Town is rural and traditional; the building façade should reflect that in the design.
2. The Wyoming County Courthouse is a building the town is proud of and feels represents this rural tradition. The architecture of the building should take this into consideration.
3. The Town feels the current proposed façade design is too modern and not within the context of their town characteristics.
4. The architectural design of the building should incorporate the following elements, as discussed at the Planning Board meeting with Wal-Mart architects:
  - a. Classic roof lines (peaked) rather than the radiussed roofs
  - b. Brick or brick like material. Consider corbelling in certain areas.
  - c. Pillars near entrances
  - d. Copper (faux) standing seam roof
  - e. Precast concrete panels - change color (or provide optional color samples)
  - f. Trespa - provide sample
  - g. Autumn color palette (reds, oranges, natural colors - samples should be provided)
  - h. Windows are a desirable feature
  - i. Bike racks
  - j. Roofed pedestrian area
  - k. Plantings in front of building
  - l. Use the Wyoming County Courthouse as a reference to good rural architecture
  - m. The covered sidewalk areas are desirable but snow loading needs to be considered in the design
5. If all utilities on site are not placed underground, address potential visual impacts of these uses. This includes the pump station and required electrical boxes. If components must remain above ground, what visual screening will be provided?
6. There are no gas pumps proposed for the Wal-Mart site. If gas pumps are ever proposed on-site a new, separate review process will be required.

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## Transportation

1. The increase in traffic volume impacts the nearby traffic operations at the NYS Route 19 at Buffalo Road and Doody Road unsignalized intersection. The Doody Road eastbound left/through/right movement experiences the largest increase in delay for both the Friday PM peak hour and the Saturday Midday peak hour. The delay increases by a minimum of one minute up to two and half minutes. This delay needs to be reviewed and addressed in the FEIS.
2. The Buffalo Road westbound approach to the Route 19 at Buffalo Road and Doody Road unsignalized intersection is projected to operate at a LOS F for the Friday PM peak hour. This is a 13.5 second increase from the existing conditions, but given that it pushes the LOS to an F it is a serious impact. This delay needs to be reviewed and addressed in the FEIS.

NYS DOT concurs with the applicants proposed mitigations, as they are stated in the January 2009 TIS. The mitigation is for the addition of a traffic signal at the intersection of the main site driveway and NYS Route 19. The January 2009 TIS is included in the DEIS as an appendix.

## Public Comments

This represents all questions revised at the public hearing. Some of these questions repeat issues raised by others.

1. What property tax incentives are being provided? How will taxes be utilized and split between agencies? It appears this question was answered in the DEIS.
2. Will traffic make it more difficult to turn onto Route 19 from side streets?
3. The general architecture of the building is very modern. It should be modified to reflect the historical architecture that exists within the Village of Warsaw.
4. Larger size parking spaces may be desirable for this Walmart provided the population that it serves.
5. Will the addition of the traffic signal impact traffic in the Village of Warsaw?
6. What are the plans for snow removal? Where will snow storage occur on site?
7. What are the plans for accommodating pedestrians?

# MEMORANDUM

To be addressed by Wendel Duchscherer:

8. What are the extent/boundaries of the sewer district? When is it expected to be completed? Where will facilities, such as the pump station, be located on site? Will the pump station be located underground? What will the visual impact of the new pump station be?
9. How much additional sewage will be sent to the Village system, and is the sewage treatment plant able to handle the additional flow?

# New York State Department of Environmental Conservation

## Division of Environmental Permits, Region 9

270 Michigan Avenue, Buffalo, New York, 14203-2915

Phone: (716) 851-7165 · Fax: (716) 851-7168

Website: [www.dec.ny.gov](http://www.dec.ny.gov)



Alexander B. Grannis  
Commissioner

May 15, 2009

Mr. W. Jerome Smith  
Zoning Officer  
Town of Warsaw  
27 North Main Street  
Warsaw, New York 14569

Proj. No. 6956.00  
Org. J. Buholtz  
Eno. \_\_\_\_\_  
Full Copy \_\_\_\_\_  
Copies to \_\_\_\_\_

Dear Mr. Smith:

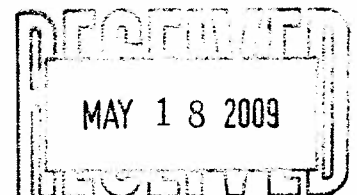
### WALMART DEIS 2348 STATE ROUTE 19 NORTH TOWN OF WARSAW, WYOMING COUNTY

The Draft Environmental Impact Statement (DEIS) for the proposed expansion of the WalMart located in the Town of Warsaw has been reviewed by this office. We have the following comments:

After reviewing the pre-DEIS, our letter of February 12, 2009 expressed this Department's concerns. This current DEIS that was just reviewed has included some of these concerns. It is reiterated, however, that the review of the newly created Sewer District and any sewer extension that may be necessary, must satisfy the Department's Division of Water. That review will be conducted by Mr. Daniel Judd. Once this review is complete and the Division of Water is satisfied with what is proposed, the permitting process can move forward.

If project activities will involve land disturbance of over 1 acre, the project sponsor is required to obtain a State Pollutant Discharge Elimination System General Permit (GP-0-08-001) for Stormwater Discharge from Construction Activities. A Notice of Intent (NOI) is required to be sent to NOTICE OF INTENT, NYSDEC, Bureau of Water Permits, 625 Broadway, 4<sup>TH</sup> Floor, Albany, New York 12233-3505, telephone: 518/402-8111 and approved before construction commences. The General Permit GP-0-08-001 and NOI form are available on the Department's website at [www.dec.ny.gov](http://www.dec.ny.gov). We have included the NOI form with a copy of this letter to the project owner. This General Permit requires the project owner or operator to control stormwater runoff according to the Stormwater Pollution Prevention Plan, which is to be developed prior to filing NOI and prior to commencement of the project. The stormwater issue must also be addressed. The applicant must apply for a Construction Activity Permit from the Division of Water to answer the stormwater concerns.

Once the U.S. Army Corps of Engineers, Buffalo District has completed their review and if it is deemed that Water Quality Certification will be needed from this Department, this Office will review that need and issue Water Quality if it is determined necessary.

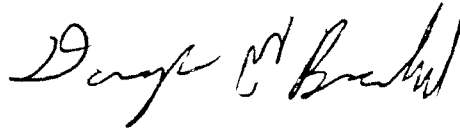


Mr. W. Jerome Smith  
May 15, 2009  
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Thank you for letting us review this DEIS.

If you have any questions, please contact this office at 716/851-7165.

Sincerely,



Douglas E. Borschel  
Deputy Permit Administrator

LEJ:jrf

cc: Mr. Daniel Judd, NYSDEC Division of Water  
Mr. Damianos Skaros, NYSDEC Division of Water  
U.S. Department of the Army, Corps of Engineers, Buffalo District Office  
Mr. Warren Barker, Wyoming County Health Department  
David DiMatteo, Esq., Town of Warsaw Attorney  
**Bergmann Associates**

**New York State Department of Environmental Conservation**  
**Division of Environmental Permits, Region 9**  
270 Michigan Avenue, Buffalo, New York, 14203-2915  
**Phone:** (716) 851-7165 · **Fax:** (716) 851-7168  
**Website:** www.dec.ny.gov



Alexander B. Grannis  
Commissioner

February 12, 2009

Mr. F. Jack Buholtz, P.E.  
Bergmann Associates  
28 East Main Street  
200 First Federal Plaza  
Rochester, New York 14614-1909

Dear Mr. Buholtz:

**WAL-MART SUPERCENTER EXPANSION  
NORTH MAIN STREET  
TOWN OF WARSAW, WYOMING COUNTY  
WAL-MART STORE #2043-04**

In response to your January 26, 2009 submission of an updated Draft Environmental Impact Statement (DEIS) for the above noted, I am providing comments designed to address the items brought up in your transmittal letter and which should be taken into consideration by Town and Village of Warsaw officials. Appropriate Department staff and I have reviewed the DEIS and are providing the following comments:

In respect to numbered items 1, 2 and 3 in your correspondence, the Department has determined that there are no state regulated wetlands that will be affected by the Wal-Mart Expansion Project, including necessary infrastructure installations. We agree that the 100 year floodplain elevation and configuration of that floodplain boundary appears accurate and that the plans confirm that the proposed site layout will not involve any work within the 100 year floodplain. Moreover, based on the plans provided, no work will be proposed within 50 feet of Oatka Creek, which is a protected stream under Environmental Conservation Law.

We are also pleased to note that the proposed DEIS contains information on the potential archaeological sensitivity of the property and that an archaeological review/investigation was performed. Moreover, the New York State Office of Parks, Recreation and Historic Preservation has provided a concurrence letter in Appendix K, which states that it is that agency's belief that the Wal-Mart project will not result in any significant negative historic or archaeological impacts.

We believe that the proposed formation of the new sewer district is a very positive element of the project and should eliminate some existing on-site sewage treatment facilities that may have failed and if so, surface and groundwater water quality should be improved and better protected for the future. As you are aware, the Town and Village of Warsaw will have to enter into an inter-municipal agreement to form the sewer district, which will then be reviewed by the New York State Department of State in that agency's approval process. An important element of the submission that this Department will review will be the establishment of who (which municipality) will operate and maintain the new sewer line and pump station and this must be documented in the sewer district formation inter-municipal agreement.

To complete this Department's necessary approval of the required sewer extension, the future applicant must provide a detailed downstream routing of the proposed sewer lines to the location of the sewage treatment plant in the Village of Warsaw. An engineering report must be prepared to confirm that the sewer lines will have proper capacity for the anticipated volume of sewage, during normal and peak flows, including wet weather events, to insure that the proposed Wal-Mart development project and existing businesses and residences to be connected will not experience sanitary overflows or basement flooding.

The DEIS discusses in 4.5.2 Impacts on Surface and Ground Water (pg 5-6) that the applicant would run a detailed floodplain analysis based upon before-and-after criteria. The reason that floodplain impacts were identified as potentially important was because of the FEMA identified Zone A (approximate) flood hazard area that provided no detail. Since it was unknown how much of the Wal-Mart plaza expansion would encroach into the flood hazard area, and what affect those encroachments may have on flood elevations and impacts on other properties and, this Department stated that such a study would be required. The required study was to identify the impact that Wal-Mart would have on flood elevations of Oatka Creek, and identify mitigation if flood elevations would increase.

Wal-Mart did not do the proposed study. Fortunately for Wal-Mart, the Buffalo District Corps of Engineers produced a Draft Preliminary Flood Map and Flood Insurance Study, which analyzed the Oatka Creek corridor in its entirety within the Town and Village of Warsaw. Because the Corps study is considered the best available data, as compared to the earlier un-numbered A Zone approximate study provided by FEMA, it was used by the consultant to show that the actions proposed by Wal-Mart will not encroach into the 100-year flood hazard area. The plaza expansion will include a substantial amount of fill, some of which comes very close to the edge of the 100-year flood plain, and which would be in the 500-year flood plain. But because the consultant determined that none of the planned activities actually encroach into the 100-year flood plain, the DEIS has reasonably concluded that no further analysis is required because significant flood impacts from the project should not be expected.

**Municipal officials should recognize that it will be very important to ensure that all fill (especially the toe of fill) for this project must be kept within project boundary limits presently identified in the DEIS to prevent 100-year flood plain impacts. Project boundary limits for toe of fill should be marked by construction fencing and appropriate silt fencing to ensure construction equipment does not push fill into the flood plain and to reduce unnecessary damage to existing flood plain vegetation.**

Since the possibility of 500-year flood impacts will affect the toe and edge of project fill, it is extremely important that the entire edge of fill be stabilized by planting ground covering vegetation as soon as possible to prevent possible erosion from flood waters. While grass is commonly used for landscaping purposes, we recommend that other ground cover vegetation (that will afford greater erosion protection) be substituted for fill edge planting. Such substitute plantings will also likely require less maintenance in the future. Municipal building/site inspectors should ensure that contractors correctly conduct all the work just mentioned.

Department staff have reviewed the Stormwater Management Report for the Wal-Mart project and it seems that the proposed plan has an appropriate methodology. However, the presented information is only an outline of the overall plan, which only broadly explains the main components of the working system (i.e. water quantity, water quality, drainage, etc.). Additional information is needed when application for the construction stormwater general permit (i.e. erosion and sediment controls, long term operation and maintenance and more details on specific calculations) is submitted to this office for review by Mr. Damianos Skaros, Division of Water.

**However, for present purposes, the lack of specific details is not a problem. Further information, as noted, must be submitted with the stormwater pollution prevention plan/notice of intent, which will be reviewed at this office to ensure the project will meet all permit requirements. While having this information now, included in the DEIS, would make the document more complete for public and agency review purposes, we will leave this decision to the Town Board, Town of Warsaw, which has the role of SEQR Lead Agency.**

In respect to Water Quality Certification that the Buffalo District Corps of Engineers may request the project sponsor to obtain from this Department, please be advised that while this possible approval may or may not apply, we do not anticipate that Department issuance of that certification would be problematic.

Since the 100-year flood plain should not be affected by the Wal-Mart project and since federal wetlands within the project area are unlikely to be affected (however, this must be determined and verified by applicant discussions with the Buffalo District Corps of Engineers), it is our belief that the Environmental Protection Agency (EPA) 50-year moratorium for sewer line installations that would cause flood plain or wetland impacts should not apply to this project. If it is determined by the Town and Village of Warsaw, after discussion with the Corps, that federal wetlands may be impacted, then the EPA moratorium would presumably apply. In that event, then the Town and Village of Warsaw would have to request and apply for a waiver of the moratorium from EPA for sewer line connection purposes. This is a matter that the municipalities must address, but, if applicable, this Department would favor such a moratorium waiver.

I anticipate (based on Wal-Mart's excellent environmental policy programs) that "green" building measures (to conserve energy) will be incorporated, as much as possible, into the design of the expansion project and other buildings that may be envisioned in the future for the referenced property in the Town of Warsaw. This Department certainly strongly encourages and recommends such green design, along with possible "deconstruction" procedures to maximize the reuse of building materials (from renovation activities) that would otherwise be disposed of as demolition debris.

Please be aware that if asbestos exists in the building to be demolished/renovated, the protection of workers is regulated by the New York State Department of Labor (716/847-7126) and Occupational Safety and Health Administration (OSHA) 716/684-3891. In addition, the disposal of friable (readily crumbled and brittle) asbestos is regulated by this Department under 6 NYCRR Part 360-2.17(p). For more information on the disposal of friable asbestos, please contact Mr. Mark Hans (716/851-7220) at this Department.

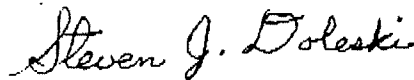
The presence of elemental mercury and/or lead in buildings being renovated/demolished is also a concern of the Department. Mercury is found in many different common items such as fluorescent lights and electrical switches, while lead is mainly found in older paints (pre-1980). For guidance on the proper handling and disposal of mercury and/or lead, please contact Mr. Thomas Corbett of this Department (716/851-7220) or email the Department's Mercury Task Force (dshmwrr@gw.dec.state.ny.us).

As a reminder, effective February 26, 2006, Chapter 641 of the NYS Laws of 2005 mandated the posting of Draft Environmental Impact Statements (DEIS) on a publicly accessible Internet website ([www.dec.ny.gov/permits/6197.html](http://www.dec.ny.gov/permits/6197.html)). The DEIS must remain posted on the website until one year after all final approvals have been evaluated and then issued for the project. This requirement is in addition to the distribution requirement described in 6NYCRR Part 617.12 of the SEQR regulation. Accordingly, please provide Department staff with the publicly accessible Internet website which will be stated in all legal notices that may be required by this Department.

Thank you for allowing us to review this pre-draft document before public distribution since it was very important for us to resolve possible regulatory problems before that occurred. Accordingly, I am pleased to state that this office does concur with the release of this pre-draft document as the official DEIS for public distribution. **Please ensure that this letter is included as an appendix item in the DEIS for public informational purposes.**

I am sure other Region 9 Department staff join with me in our appreciation of the planning and design efforts that the Wal-Mart officials required for this proposal. The Warsaw Wal-Mart proposal should now meet this Department's regulatory requirements, as long as there are no significant changes to the project design and all work is carried out in accordance with the plan submissions presently reviewed. Thank you for your cooperation in this matter and for a job well done.

Respectfully,



Steven J. Doleski  
Regional Permit Administrator

SJD:jrf

cc: Ms. Rebecca Anderson, NYSDEC Division of Water  
Mr. Daniel Judd, NYSDEC Division of Water  
Mr. Damianos Skaros, NYSDEC Division of Water  
Mr. Charles Rosenburg, NYSDEC Division of Fish, Wildlife and Marine Resources  
Mr. Warren Barber, Wyoming County Health Department  
Honorable Scott Tueutlein, Mayor, Village of Warsaw  
Ms. Linda Hoffmeister, Village Clerk, Village of Warsaw  
Honorable Ronald Smith, Supervisor, Town of Warsaw  
Ms. Abby Hyland, Town Clerk, Town of Warsaw  
David M. DiMatteo, Esq., Town of Warsaw Attorney  
Chairperson, Town Board, Town of Warsaw



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BY: .....

STATE OF NEW YORK  
DEPARTMENT OF TRANSPORTATION  
REGION FOUR  
1530 JEFFERSON ROAD  
ROCHESTER, NEW YORK 14623  
www.nysdot.gov

KEVIN B. O'BUCKLEY, P.E.  
REGIONAL DIRECTOR

ASTRID C. GLYNN  
COMMISSIONER

April 24, 2009

Ms. Dana Braun  
Wendel Companies  
140 John James Audobon Parkway  
Suite 201  
Amherst, NY 14228

Proj. No. \_\_\_\_\_  
Org. FLD  
Eno. \_\_\_\_\_  
Full Copy JFB  
Copies to JE

Re: Wal-Mart Expansion  
Route 19, Town of Warsaw  
Wyoming County

Dear Ms. Braun:

We have completed our review of the January, 2009 Traffic Impact Study for the 80,000(approximately) square foot expansion of the existing 75,167 square foot Wal-Mart. This study was revised from a February, 2007 Traffic Impact Study to expand the existing Wal-Mart by 105,000 square feet.

We conclude that since the scope of the proposed Wal-Mart Expansion has not changed appreciably, an 80,000 square foot expansion compared to the previously proposed 105,000 square foot expansion, our previous comment letter of February 28, 2007 is still applicable. Specifically, we agree with the recommended traffic mitigation to install a three color traffic signal at the intersection of Route 19 and the Wal-Mart Plaza/bank driveway. The developer/property owner is responsible for the installation of the traffic signal. Since the plaza is the primary generator of traffic from the plaza driveway, the state will maintain the traffic signal. However, this will be done by annual permit issued to the developer/owner. The developer/owner is responsible for the cost of maintenance.

We agree that the traffic signal should have three phases, including a northbound left turn arrow on Route 19 and an overlapping eastbound right turn arrow for right turns exiting the Wal-Mart Plaza. The existing through/left lane for the Wal-Mart driveway should be aligned with the entering lane at the bank driveway. Pedestrian crosswalks and phasing should be included on the north and west side of the intersection for pedestrians crossing Route 19 and the Wal-Mart plaza driveway. With the three color traffic signal in place, we agree that traffic impacts of the proposed Wal-Mart Expansion should be addressed.

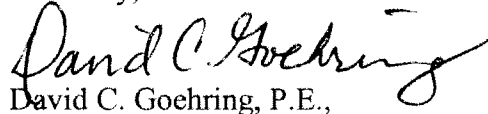
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A Highway Work Permit is required for all work within State right-of-way. Please submit detailed traffic signal plans prepared in accordance with the Region 4 Checklist for Highway Work Permits to Ms. Sue Erdle, Assistant Resident Engineer at the following address:

New York State Department of Transportation  
3879 Route 19, PO Box 370  
Warsaw, NY 14569

If there are any questions regarding our review please contact Mr. Robert Duennebacke at 272-3475.

Sincerely,

  
David C. Goehring, P.E.,  
Regional Traffic Engineer

DCG/RLD/

c: W. J. Smith, Town of Warsaw  
F. Dolan, Bergmann Associates  
→ S. Erdle, Assistant Resident Engineer, Wyoming County  
J. Frank, Permit Review  
W. Giles, EIC Signal Crew



RECEIVED  
MAR 02 2007

BY:.....

STATE OF NEW YORK  
DEPARTMENT OF TRANSPORTATION  
REGION FOUR  
1530 JEFFERSON ROAD  
ROCHESTER, NEW YORK 14623  
www.nysdot.gov

KEVIN B. O'BUCKLEY, P.E.  
REGIONAL DIRECTOR

ASTRID C. GLYNN  
ACTING COMMISSIONER

February 28, 2007

Mr. Frank Dolan  
28 East Main Street  
200 First Federal Plaza  
Rochester, NY 14614-1909

Proj. No. 6956  
Org. F. Dolan  
Enc. \_\_\_\_\_  
Full Copy \_\_\_\_\_  
Copies to copy

Re: Wal-Mart Expansion  
Route 19, Town of Warsaw  
Wyoming County

Dear Mr. ~~Dolan~~: *Frank*:

We have completed our review of the February, 2007 Draft Traffic Impact Study for the 105,000(approximately) square foot expansion of the existing 75,167 square foot Wal-Mart. The existing Wal-Mart has two driveways on Route 19 including a right-in/right-out driveway and a full access driveway across from a bank driveway.

The recommended traffic mitigation for the proposed Wal-Mart Expansion is to install a traffic signal at the intersection of Route 19 and the Wal-Mart Plaza/bank driveway. We agree with this recommendation. The developer/property owner is responsible for the installation of the traffic signal and an annual maintenance fee to maintain the traffic signal.

We agree that the traffic signal should have three phases, including a northbound left turn arrow on Route 19 and an overlapping eastbound right turn arrow for right turns exiting the Wal-Mart Plaza. The existing through/left lane for the Wal-Mart driveway should be aligned with the entering lane at the bank driveway. Pedestrian crosswalks and phasing should be included on the north and west side of the intersection for pedestrians crossing Route 19 and the Wal-Mart plaza driveway. With the three color traffic signal in place, we agree that traffic impacts of the proposed Wal-Mart Expansion should be addressed.

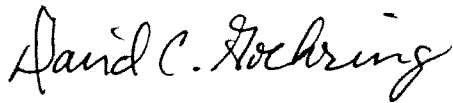
A Highway Work Permit is required for all work within state right-of-way. Please submit detailed traffic signal plans prepared in accordance with the Region 4 Checklist for Highway Work Permits to Ms. Sue Erdle, Assistant Resident Engineer at the following address:

New York State Department of Transportation  
3879 Route 19, PO Box 370  
Warsaw, NY 14569

February 28, 2007  
Page 2

If there are any questions regarding our review please contact Mr. Robert Duennebacke at 272-3475.

Sincerely,

A handwritten signature in cursive script that reads "David C. Goehring".

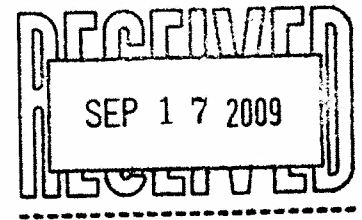
David C. Goehring, P.E.,  
Regional Transportation Operations Engineer

DCG/RLD/

c: H. Miller, Supervisor, Town of Warsaw  
S. Erdle, Assistant Resident Engineer, Wyoming County  
J. Frank, Permit Review



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



REPLY TO

September 16, 2009

Regulatory Branch

SUBJECT: Acceptance of Wetland Delineation, Application No. 2007-00602

Mr. F. J. Buholtz  
Bergmann Associates, P.C.  
28 East Main Street, 200 First Federal Plaza  
Rochester, New York 14614

Dear Mr. Buholtz:

This pertains to the request submitted by Bergmann and Associates, P.C. for a Jurisdictional Determination located at 2348 State Route 19 North, Town of Warsaw, Wyoming County, New York.

The Corps of Engineers regulatory responsibilities under Section 404 of the Clean Water Act establishes jurisdiction over the discharge of dredged or fill material into waters of the United States, including wetlands.

The wetland delineation you submitted confirms that wetlands and waters under Federal jurisdiction exist on the property, but I understand that you do not intend to impact them at this time. In this regard, I would like to point out that the Federal wetland boundary located on your property, as shown on the attached drawings, was confirmed on **July 9, 2009** 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. 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.

Based upon my review of the submitted delineation and on-site observations, I have determined that the wetlands and waters 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, the wetlands and waters 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.

Regulatory Branch

SUBJECT: Acceptance of Wetland Delineation, Application No. 2007-00602

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:

Review Officer  
Great Lakes and Ohio River Division  
CELRD-PDS-O  
550 Main Street, Room 10032  
Cincinnati, OH 45202-3222  
Phone: 513-684-7261

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 **November 16, 2009**.

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. Donald Coogan at Terrestrial Environmental Specialists, Inc.

Questions pertaining to this matter should be directed to me at (716) 879-4308, by writing to the following address: U.S. Army Corps of Engineers, 1776 Niagara Street, Buffalo, New York 14207, or by e-mail at: amy.m.krueger@usace.army.mil

Sincerely,



Amy M. Krueger  
Biologist

Enclosures

**NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND  
REQUEST FOR APPEAL**

Applicant: Bergmann Associates, P.C.	File Number: 2007-00602	Date: September 16, 2009
--------------------------------------	-------------------------	--------------------------

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/cecwo/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:

Amy Krueger  
U.S. Army Corps of Engineers  
1776 Niagara Street  
Buffalo, New York 14207  
(716) 879-4308  
amy.m.krueger@usace.army.mil

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

Review Officer  
U.S. Army Corps of Engineers  
Great Lakes and Ohio River Division  
550 Main Street, Room 10032  
Cincinnati, OH 45202-3222  
(513) 684-7261;FAX(513) 684-2460

**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.

Date:

Telephone number:

\_\_\_\_\_  
Signature of appellant or agent.

**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): September 16, 2009**

**B. DISTRICT OFFICE, FILE NAME, AND NUMBER: Buffalo District; Warsaw Wal-mart; 2007-00602 Form 1 of 1**

**C. PROJECT LOCATION AND BACKGROUND INFORMATION:**

State: New York County/parish/borough: Wyoming City: Warsaw  
Center coordinates of site (lat/long in degree decimal format): Lat. 42.76824° **N**, Long. -78.12760° **W**.  
Universal Transverse Mercator:

Name of nearest waterbody: unnamed tributary of Oatka Creek and Oatka Creek

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

Name of watershed or Hydrologic Unit Code (HUC): 4130003

- 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: August 3, 2009  
 Field Determination. Date(s): July 9, 2009

**SECTION II: SUMMARY OF FINDINGS**

**A. RHA SECTION 10 DETERMINATION OF JURISDICTION.**

There **Are no** "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 **Are** "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):<sup>1</sup>**

- TNWs, including territorial seas  
 Wetlands adjacent to TNWs  
 Relatively permanent waters<sup>2</sup> (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: Unnamed tributary to Oatka Creek (420 linear feet); Oatka Creek (1,830 feet); linear feet: 2250 total width (ft) and/or acres.  
Wetlands: WA (0.25 acre); WB (0.25 acre); WC (3.33 acres); WD (2.24 acres); total = 6.07 acres.

**c. Limits (boundaries) of jurisdiction based on: 1987 Delineation Manual**

Elevation of established OHWM (if known): Unknown.

**2. Non-regulated waters/wetlands (check if applicable):<sup>3</sup>**

- Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.  
Explain: .

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

<sup>2</sup> 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).

<sup>3</sup> 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 *Rapanos* 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 waterbody<sup>4</sup> 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: **Pick List**

Drainage area: **Pick List**

Average annual rainfall: inches

Average annual snowfall: inches

(ii) **Physical Characteristics:**

(a) Relationship with TNW:

Tributary flows directly into TNW.

Tributary flows through **Pick List** tributaries before entering TNW.

Project waters are **Pick List** river miles from TNW.

Project waters are **Pick List** river miles from RPW.

Project waters are **Pick List** aerial (straight) miles from TNW.

Project waters are **Pick List** aerial (straight) miles from RPW.

Project waters cross or serve as state boundaries. Explain:

Identify flow route to TNW<sup>5</sup>:

Tributary stream order, if known:

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

<sup>5</sup> 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.

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

- Tributary is:  Natural  
 Artificial (man-made). Explain:  
 Manipulated (man-altered). Explain:

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

Average width: feet  
Average depth: feet  
Average side slopes: **Pick List**.

Primary tributary substrate composition (check all that apply):

- |  |  |                                   |
|--|--|-----------------------------------|
| <input type="checkbox"/> Silts           | <input type="checkbox"/> Sands                     | <input type="checkbox"/> Concrete |
| <input type="checkbox"/> Cobbles         | <input type="checkbox"/> Gravel                    | <input type="checkbox"/> Muck     |
| <input type="checkbox"/> Bedrock         | <input type="checkbox"/> Vegetation. Type/% cover: |                                   |
| <input type="checkbox"/> Other. Explain: |  |                                   |

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

Presence of run/riffle/pool complexes. Explain:

Tributary geometry: **Pick List**

Tributary gradient (approximate average slope): %

(c) Flow:

Tributary provides for: **Pick List**

Estimate average number of flow events in review area/year: **Pick List**

Describe flow regime:

Other information on duration and volume:

Surface flow is: **Pick List**. Characteristics:

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

Dye (or other) test performed:

Tributary has (check all that apply):

- |   |   |  |
|---|---|--|
| <input type="checkbox"/> Bed and banks  |   |  |
| <input type="checkbox"/> OHWM <sup>6</sup> (check all indicators that apply): |   |  |
| <input type="checkbox"/> clear, natural line impressed on the bank            | <input type="checkbox"/> the presence of litter and debris          |  |
| <input type="checkbox"/> changes in the character of soil                     | <input type="checkbox"/> destruction of terrestrial vegetation      |  |
| <input type="checkbox"/> shelving   | <input type="checkbox"/> the presence of wrack line                 |  |
| <input type="checkbox"/> vegetation matted down, bent, or absent              | <input type="checkbox"/> sediment sorting                           |  |
| <input type="checkbox"/> leaf litter disturbed or washed away                 | <input type="checkbox"/> scour                                      |  |
| <input type="checkbox"/> sediment deposition                                  | <input type="checkbox"/> multiple observed or predicted flow events |  |
| <input type="checkbox"/> water staining                                       | <input type="checkbox"/> abrupt change in plant community           |  |
| <input type="checkbox"/> other (list):  |   |  |
| <input type="checkbox"/> Discontinuous OHWM. <sup>7</sup> Explain:            |   |  |

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

- |  |  |
|--|--|
| <input checked="" type="checkbox"/> High Tide Line indicated by:   | <input checked="" type="checkbox"/> Mean High Water Mark indicated by: |
| <input type="checkbox"/> oil or scum line along shore objects      | <input type="checkbox"/> survey to available datum;                    |
| <input type="checkbox"/> fine shell or debris deposits (foreshore) | <input type="checkbox"/> physical markings;                            |
| <input type="checkbox"/> physical markings/characteristics         | <input type="checkbox"/> vegetation lines/changes in vegetation types. |
| <input type="checkbox"/> tidal gauges                              |  |
| <input type="checkbox"/> other (list):                             |  |

(iii) **Chemical Characteristics:**

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

Explain:

Identify specific pollutants, if known:

<sup>6</sup>A 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.

<sup>7</sup>Ibid.

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

- Riparian corridor. Characteristics (type, average width):
- 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:

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: WA = 0.25 acre; WD = 2.24 acres

Wetland type. Explain: WA is a wet meadow and WD is an open water wetland.

Wetland quality. Explain: The quality of both wetlands is high. Numerous wildflower vegetation, birds and shorebirds (great blue heron, kill deer, etc.), fish, and dragonflies were observed.

Project wetlands cross or serve as state boundaries. Explain: N/A.

(b) General Flow Relationship with Non-TNW:

Flow is: **Intermittent flow**. Explain:

Surface flow is: **Discrete**

Characteristics: WD is an open water wetland that directly connects to WA which is a wet meadow. A drainage swale was observed towards to northeast of WA which connects to WB, a riparian wetland which directly abuts the tributary to Oatka Creek. The swale was approximately 15 feet in length and had evidence of flow. It was depressional, had water-stained leaves, and sediment debris.

Subsurface flow: **Unknown**. Explain findings:

- Dye (or other) test performed:

(c) Wetland Adjacency Determination with Non-TNW:

Directly abutting

Not directly abutting

Discrete wetland hydrologic connection. Explain: A drainage swale was observed towards to northeast of WA.

The swale was approximately 15 feet in length and had evidence of flow. It was depressional, had water-stained leaves, and sediment debris. The swale was observed to be wet and there had been rain within the past couple of days.

Ecological connection. Explain:

Separated by berm/barrier. Explain: The open-water wetland (WD) was man-made (although not maintained). It appeared that the spoils from the construction were placed in the area in between WA and WB; therefore (aside from the swale) WD and WB are separated from WB and the unnamed tributary to Oatka Creek.

(d) Proximity (Relationship) to TNW

Project wetlands are **30 (or more)** river miles from TNW.

Project waters are **30 (or more)** aerial (straight) miles from TNW.

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

Estimate approximate location of wetland as within the **500-year or greater** 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: The water was clear and appeared to have good water quality.

Identify specific pollutants, if known: Specific pollutants would likely include runoff of oils, gasoline, roadsalt, etc. from the nearby Wal-Mart and shopping center parking lot and the roads.

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

Riparian buffer. Characteristics (type, average width): Wetland A connected to the riparian buffer of Wetland B.

Wetland D had a vegetated buffer along the open-water pond area.

Vegetation type/percent cover. Explain: ranged from grasses to trees; cover is high.

Habitat for:

Federally Listed species. Explain findings:

Fish/spawn areas. Explain findings: Numerous fish were observed in the open water wetland (WD).

Other environmentally-sensitive species. Explain findings:

Aquatic/wildlife diversity. Explain findings: Many birds were heard and seen in the wetland area including shorebirds like great blue heron and killdeer. Many wildflowers and wetland vegetation (water hemlock, willow herb) were observed.

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

All wetland(s) being considered in the cumulative analysis: **4**

Approximately ( 6.07 ) 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>
WA - N	0.25	WC - Y	3.33
WB - Y	0.25	WD - N	2.24

Summarize overall biological, chemical and physical functions being performed: The wetlands are serving to provide habitat for numerous birds, insects, fish, and other animals as well as vegetation. The wetlands provide water quality benefits by acting as filters for pollution and sinks for sediments and nutrients before the water enters Oatka Creek, which eventually flows into the Genesee River, a TNW. The wetlands are situated adjacent to a developed area (Wal-mart, Tops, etc. shopping center, parking lots, roads) and provide an area of habitat as well as collecting any pollutants and sediment and retaining flood waters.

### 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:
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: The wetlands are serving to provide habitat for numerous birds, insects, fish, and other animals as well as vegetation. The wetlands provide water quality benefits by acting as filters for pollution and sinks for sediments and nutrients before the water enters Oatka Creek, which eventually flows into the Genesee River, a TNW. The Genesee River is also listed on the Nationwide River Inventory by the National Park Service. The wetlands are situated adjacent to a developed area (Wal-mart, Tops, etc. shopping center with parking lots and roads). The increase in impervious surface area increases runoff of water and pollutants. These wetlands serve to collect and filter the pollutants and sediment as well as retain flood waters during storm events and spring melt. Wetland D is connected to WA which is connected to Wetland B by an approximately 15 foot swale. This swale shows that Wetlands D and A are providing storage of flood waters and pollutants before the water flows into WB and the unnamed tributary of Oatka Creek during rain/storm events and snowmelt.

### 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: Oatka Creek is a named stream represented by a soil blue line on the USGS Quad map. The unnamed tributary also is a solid line. Both streams contained surface water during the July site visit and water is visible in the photographs submitted with the delineation report. Both streams have defined beds and banks and the channels are clearly visible from aerial photography.
- 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:

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

- Tributary waters: **Oatka Creek = 1,830 linear feet; unnamed tributary to Oatka Creek = 420 linear feet; total = 2,250 linear feet** width (ft).
  - Other non-wetland waters: acres.
- Identify type(s) of waters:

3. **Non-RPWs<sup>8</sup> 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: **WB and WC are riparian wetlands that directly abut Oatka Creek and the unnamed tributary of Oatka Creek.**
- 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:

Provide acreage estimates for jurisdictional wetlands in the review area: **6.07 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: **2.49 acres: WA = 0.25 acre and WD = 2.24 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.<sup>9</sup>**

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

- Demonstrate that impoundment was created from "waters of the U.S.," or

<sup>8</sup>See Footnote # 3.

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

- 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).

**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):<sup>10</sup>**

- 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): \_\_\_\_\_

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.**

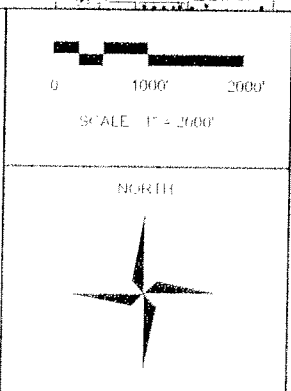
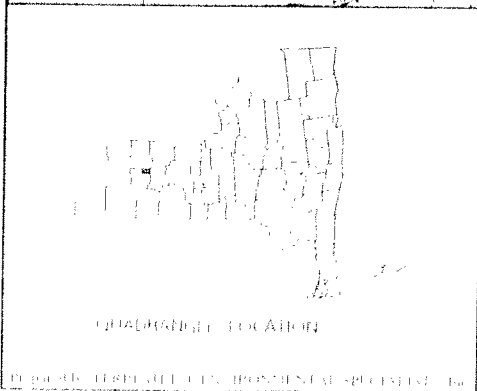
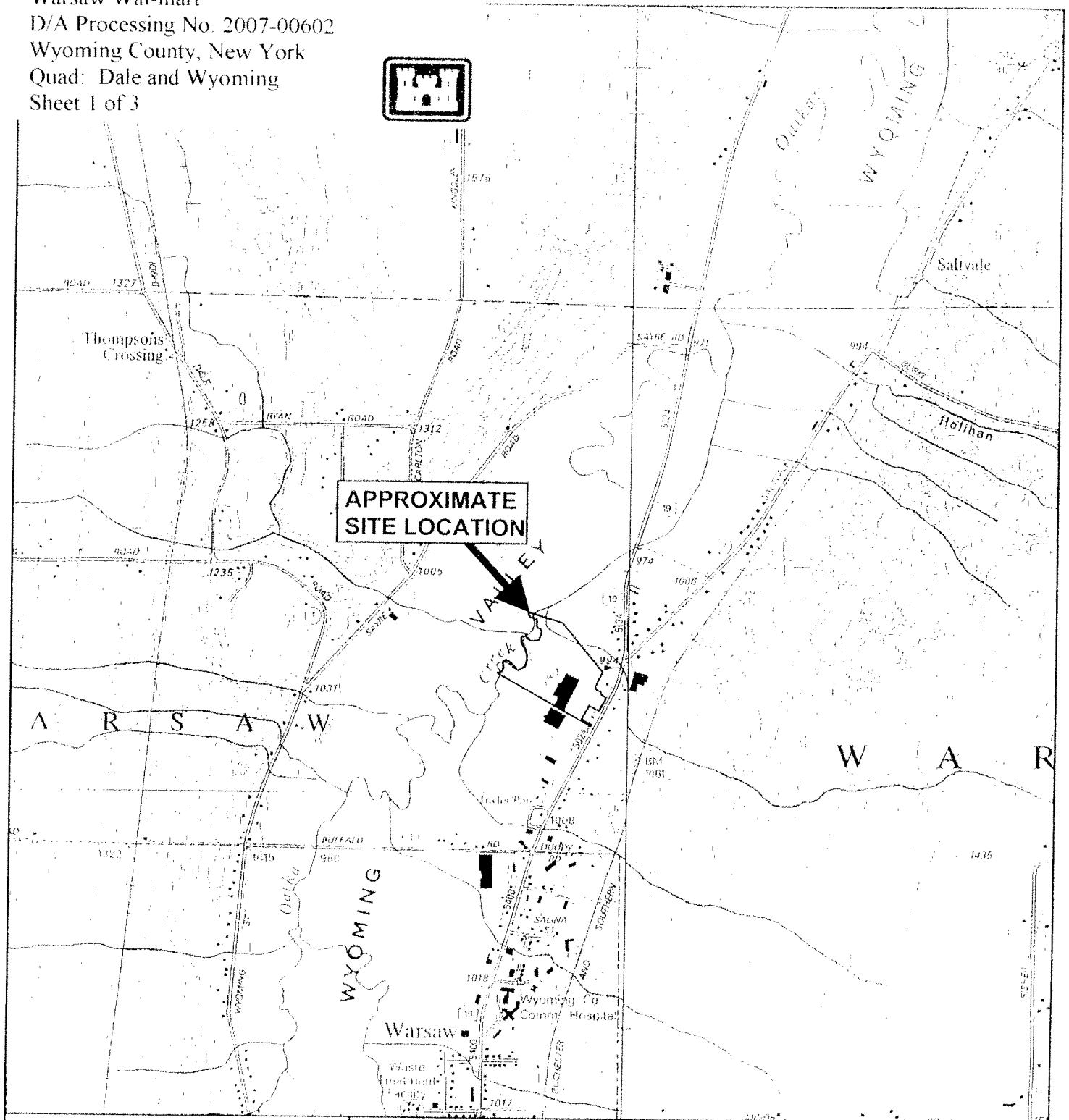
**A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):**

- Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: Figure 8. Wetland Location Map and TES Wetland Delineation Report for the Warsaw Wal-mart Site, Town of Warsaw, Wyoming County, New York.
- 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.

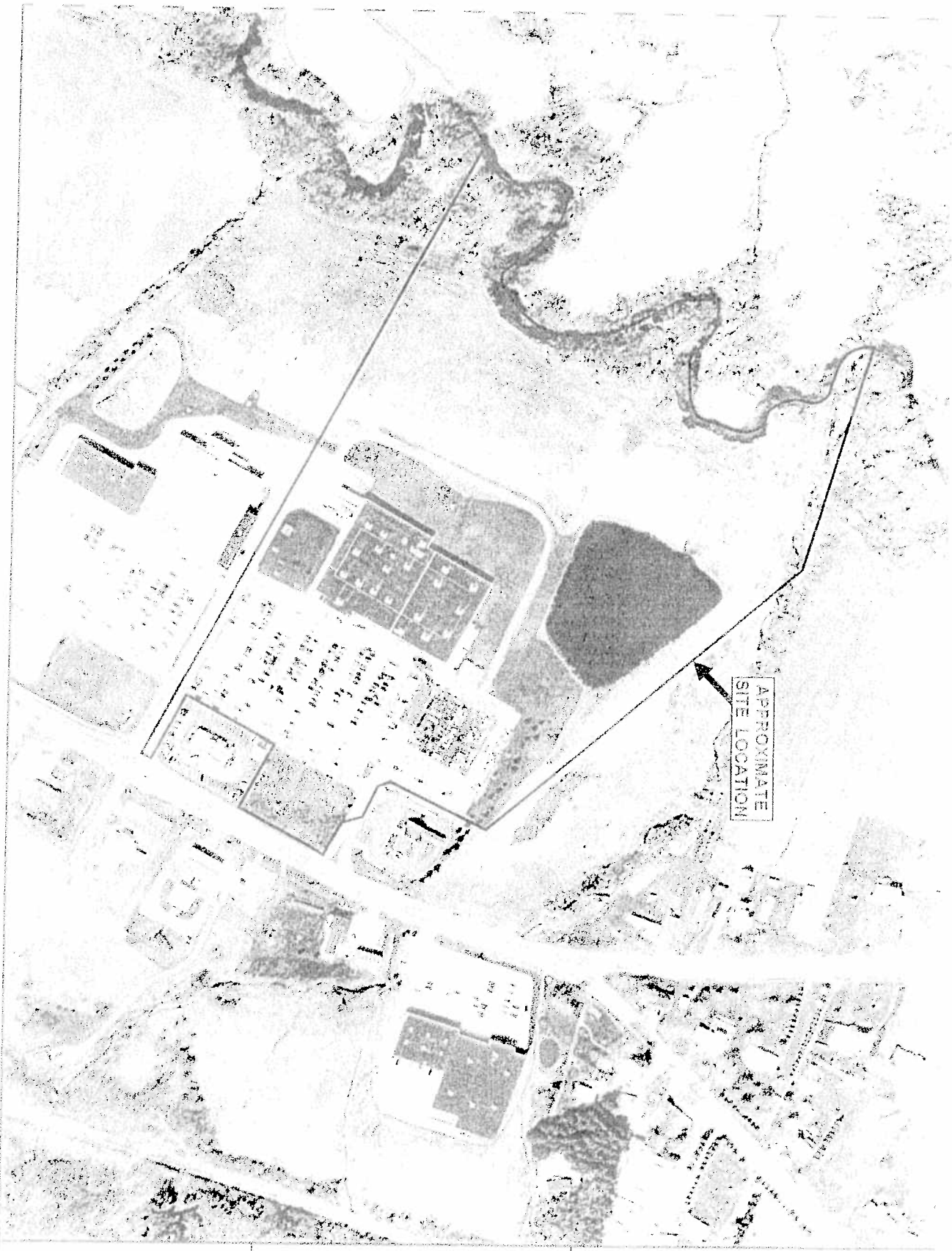
<sup>10</sup> Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos.

- USGS 8 and 12 digit HUC maps.
- U.S. Geological Survey map(s). Cite scale & quad name: Dale and Wyoming Quads; 1" = 2000'.
- USDA Natural Resources Conservation Service Soil Survey. Citation: Provided in delineation report.
- National wetlands inventory map(s). Cite name: Provided in delineation report.
- State/Local wetland inventory map(s): Provided in delineation report.
- FEMA/FIRM maps: Provided in delineation report.
- 100-year Floodplain Elevation is: (National Geodectic Vertical Datum of 1929)
- Photographs:  Aerial (Name & Date): Online and in delineation report.  
or  Other (Name & Date): Provided in delineation report.
- Previous determination(s). File no. and date of response letter:
- Applicable/supporting case law:
- Applicable/supporting scientific literature:
- Other information (please specify): Live Search Maps online, Google Maps online, NYS Gazetteer,  
<http://www.nps.gov/ncrc/programs/rtca/nri/states/ny.html>

**B. ADDITIONAL COMMENTS TO SUPPORT JD:**



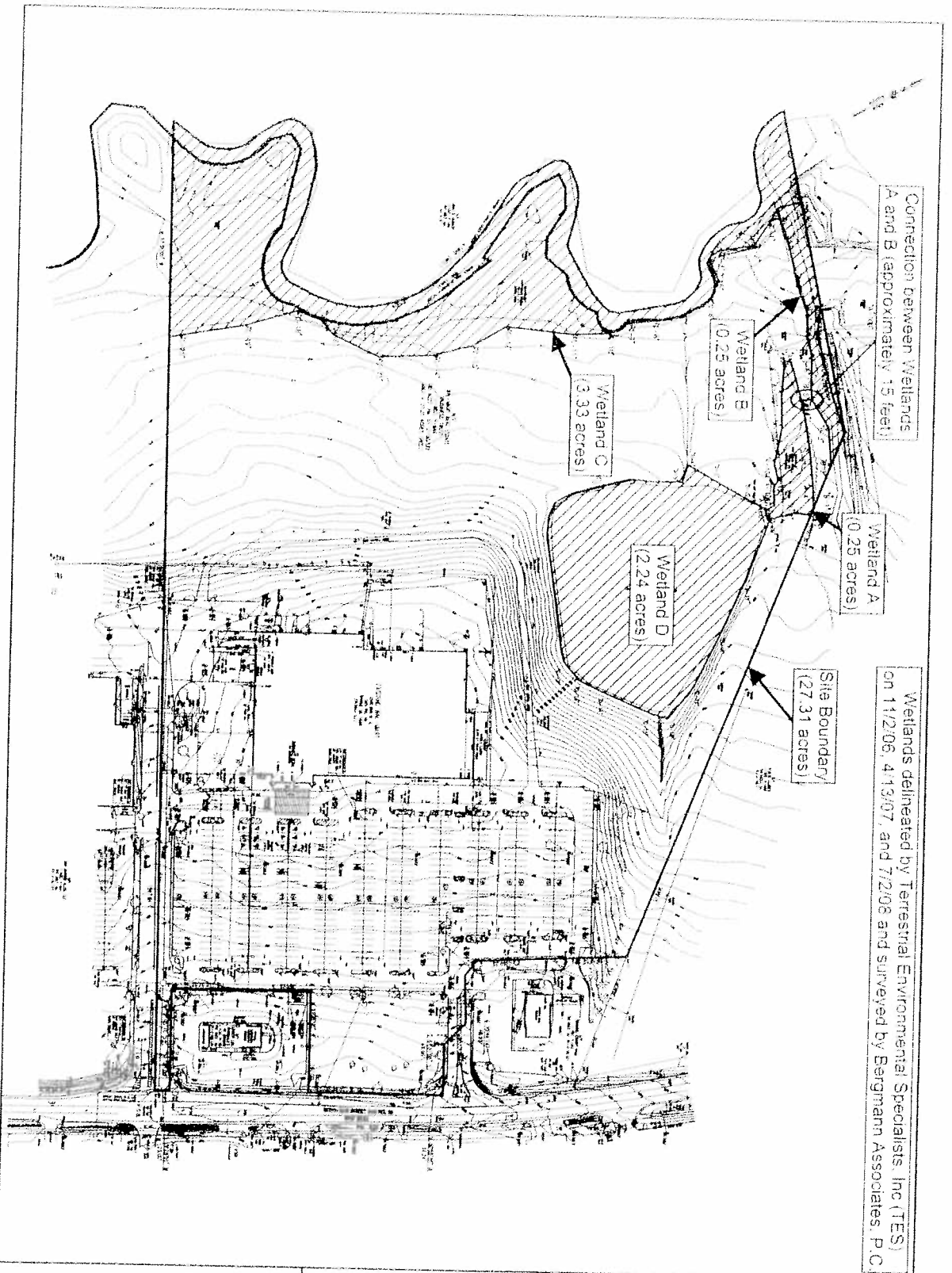
**Figure 1. Site Location**  
NYS DOT Topographic Map  
Dale and Wyoming Quadrangles  
1998



APPROXIMATE  
SITE LOCATION

Warsaw Wal-mart  
D/A Processing No. 2007-00602  
Wyoming County, New York  
Quad: Dale and Wyoming  
Sheet 2 of 3





APPROXIMATE SCALE IN FEET



Base Map Provided by Bergmann Associates

Figure Prepared by Terrestrial Environmental Specialists, Inc.

Figure 8.  
Wetland Location Map

Warsaw Wal-mart  
D/A Processing No. 2007-00602  
Wyoming County, New York

Quad Dale and Wyoming  
Sheet 3 of 3

