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): February 10, 2016

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: LRB 2014-01137 – Westside Development, LLC. JD for Wetland 1, 2, 3, 4, 5, 6, 8, 11; Drainageway 2, 3, 4, 5, 6, 7, and 10, and Black Creek. Form 1 of 2.

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: New York County/parish/borough: Monroe City: Chili
Center coordinates of site (lat/long in degree decimal format): Lat. 43.09207 ° N, Long. -77.72328 ° W
Universal Transverse Mercator: 18
Name of nearest waterbody: Black Creek
Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: Genesee River
Name of watershed or Hydrologic Unit Code (HUC): 04130003

☑ 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: December 11, 2015

☑ Field Determination. Date(s): August 5, 2015

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): [1]

☐ TNWs, including territorial seas

☐ Wetlands adjacent to TNWs

☑ Relatively permanent waters[2] (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: Black Creek: 4,445 linear feet: 10-15 width (ft).
Wetlands: Wetland 1: 35.2 acres; Wetland 4: 0.22 acres. For a total of 35.42 acres.

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

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:
Wetland areas 2 (0.109 acre) and 3 (0.14 acre) are farmed depressional wetlands that have no surface water outlets. They are surrounded on

[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.

all sides by active farm field. They are located about 400 feet to the east of the nearest conveyance, which is an unnamed perennial tributary to Black Creek. The underlying soils are Niagara silt loam, which consists of very deep, somewhat poorly drained soils. This deep soil series precludes the possibility of a shallow subsurface hydrological connection to downstream waters. The active agriculture prevents the possibility of a biological connection, and the distance to the nearest tributary precludes the possibility for a significant chemical connection to downstream waters. Therefore, Wetlands 2 and 3 have been determined to be isolated (the factors at 328.3(a)(i-iii) were considered and determined there is no substantial nexus to interstate or foreign commerce).

Wetland areas 6 (0.013 acre) and 7 (0.014) are small depressional farmed wetlands. These wetland areas have no surface water outlets. They are surrounded by active agriculture. They are located about 300 feet to the south of the nearest conveyance, which is Black Creek. The underlying soils are Niagara silt loam. The deep soils preclude the possibility of a shallow sub-surface hydrological connection to downstream waters. The active agriculture prevents the possibility of a biological connection, and the distance to the nearest tributary precludes the possibility of a significant chemical connection to downstream waters. Therefore, Wetlands 6 and 7 have been determined to be isolated (the factors at 328.3(a)(i-iii) were considered and determined there is no substantial nexus to interstate or foreign commerce).

Wetland 11 (0.062 acre) is a small depressional farmed wetland. The wetland has no surface water outlets. This wetland is surrounded by active agriculture. Wetland 11 is located about 160 feet to the west of the nearest conveyance, which is an unnamed perennial tributary to Black Creek (which is described on form 4 of 4).

Drainageway 2 (323 linear feet), 4 (643 l.f.), 5 (113 l.f.), 6 (218 l.f), 7 (300 l.f.), and 10 (506 l.f.) are drainage ditches that were determined to be non-jurisdictional surface water conveyances. These features are man-made tributaries that were excavated in uplands and do not exhibit bed and bank features or ordinary high water mark indicators.

Drainage 3 (300 linear feet) is a naturally-occurring ephemeral swale that was determined to be a non-jurisdictional drainage feature. This drainage feature provides a drain for Wetland 4. The drainage feature does not exhibit bed and banks or ordinary high water mark features. The channel supports agricultural weeds and upland sedges. The channel does not support hydrophytic vegetation.

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[4] 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:
Drainage area:

Average annual rainfall:
Average annual snowfall:

(ii) Physical Characteristics:

(a) Relationship with TNW:

☐ Tributary flows directly into TNW.

☐ Tributary flows through 2 tributaries before entering TNW.

Project waters are *Choose an item.* river miles from TNW.
Project waters are *Choose an item.* river miles from RPW.
Project waters are *Choose an item.* aerial (straight) miles from TNW.
Project waters are *Choose an item.* aerial (straight) miles from RPW.
Project waters cross or serve as state boundaries. Explain:

Identify flow route to TNW[5]:
Tributary stream order, if known:

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

Tributary is: ☐ Natural

☐ Artificial (man-made). Explain:

☐ Manipulated (man-altered). Explain:

[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.

Tributary properties with respect to top of bank (estimate):
Average width:
Average depth:
Average side slopes:

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:
Presence of run/riffle/pool complexes. Explain:
Tributary geometry:
Tributary gradient (approximate average slope): #%

(c) Flow:
Tributary provides for:
Estimate average number of flow events in review area/year:
Describe flow regime:
Other information on duration and volume:

Surface flow is: *Choose an item.* Characteristics:

Subsurface flow: *Choose an item.* Explain findings:
- ☐ Dye (or other) test performed:

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

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):
- ☐ High Tide Line indicated by:
  - ☐ oil or scum line along shore objects
  - ☐ fine shell or debris deposits (foreshore)
  - ☐ physical markings/characteristics
  - ☐ tidal gauges
  - ☐ other (list):
- ☐ Mean High Water Mark indicated by:
  - ☐ survey to available datum;
  - ☐ physical markings;
  - ☐ 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:
Identify specific pollutants, if known:

[6]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.
[7]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: Wetland 4: 0.217 acre; Wetland 5: 0.077 acre: Wetland 8: 0.426 acre

Wetland type. Explain: Palustrine emergent

Wetland quality. Explain: Wetland 4, 5, and 8 are farmed depressional wetlands. Due to the active agricultural activities, these wetlands are of low quality.

Project wetlands cross or serve as state boundaries. Explain:

(b) General Flow Relationship with Non-TNW:

Flow is: Ephemeral Flow Explain: Wetland 4, 5 and 8 are connected to Black Creek via non-jurisdictional ephemeral drainage features. Wetland 4 flows into Drainageway 3 (300 l.f.) after heavy precipitation events. Drainageway 3, 4, and 7 do not receive sufficient hydrology to support hydrophytic vegetation; therefore, the drainages are expected to carry flow only in the spring snow-melt season and after heavy precipitation events. Wetland 5 flows into Drainageway 4 (643 l.f), which then outlets directly into Black Creek. Wetland 8 outlets into Drainageway 7 (300 l.f.) which also outlets directly into Black Creek.

Surface flow is: Discrete and Confined

Characteristics: Drainageway 3 is a non-jurisdictional, naturally-occurring ephemeral feature that connects Wetland 4 to Black Creek. At the time of the August 2015 site visit, no surface flow was observed within the drainage channel. On-site observations and a review of aerial imagery indicates that flow occurs within the channel on an ephemeral basis. Drainages 4, and 7 are man-made drainage channels that were constructed to convey flow from adjacent cropland. These drainage channels carry flow on an ephemeral basis, and likely during the spring snowmelt period.

Subsurface flow: No Explain findings:

- ☐ Dye (or other) test performed:

(c) Wetland Adjacency Determination with Non-TNW:

- ☐ Directly abutting
- ☑ Not directly abutting
  - ☑ Discrete wetland hydrologic connection. Explain: Wetland 4, 5, and 8 flow directly into Black Creek via unregulated drainage features.
  - ☐ 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 1-2 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: Wetlands 4, 5, and 8 are farmed wetlands, therefore, the system is degraded. At the time of the August 2015 site visit, there was no surface water within the wetland areas.

Identify specific pollutants, if known: Likely pollutants are those that are introduced though large-scale agricultural practices, such as excess sediment, pesticides, and herbicides.

(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: Amphibians likely use the depressional wetland for breeding and/or foraging habitat in the spring prior to plowing and/or seeding.

☐ Aquatic/wildlife diversity. Explain findings:

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

All wetland(s) being considered in the cumulative analysis: 4
Approximately (35.964) acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

Directly abuts? (Y/N)	Size (in acres)	Directly abuts? (Y/N)	Size (in acres)
Wetland 1 (Y)	35.244		
Wetland 4 (N)	0.217		
Wetland 5 (N)	0.077		
Wetland 8 (N)	0.426		

Summarize overall biological, chemical and physical functions being performed: Wetland 4 drains directly into Wetland 1, which directly abuts and is continuous with Black Creek. Wetland 4 is a headwater wetland that serves as a primary collector and processor of organic matter for downstream waters. Wetland 5 and 8 drain through ephemeral drainages directly into Black Creek. The August 2015 site visit showed the wetlands in a saturated condition, thereby slowly releasing water to their primary drainages (drainageway 3, 4, and 7). The wetlands functions to moderate downstream flows and have the capacity to recharge local groundwater. Flood attenuation /runoff storage, pollutant trapping/water quality, removal of suspended solids, dissolved solids, toxins and treatment of nitrogen and phosphorus, functions are considered to be low. Wildlife habitat functions are considered to be low.

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:

RELEVANT REACH
The relevant reach for the significant nexus determination is from Wetland 4, Wetland 5, and Wetland 8, through unnamed unregulated drainage channels, to Wetland 1, then to the confluence with Black Creek, a perennial tributary to the Genesee River, a TNW. Drainage channel 3 measures about 300 feet in length and is a naturally-occurring ephemeral channel that lacks bed and bank features or ordinary high water mark features. Drainages 4 and 7 are man-made agricultural ditches that convey flow from Wetlands 5 and 8 on an ephemeral basis.

SIGNIFICANT FACTORS
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?

Yes, Black Creek flows into the Genesee River about 3 miles downstream from the site. Black Creek and its adjacent wetlands were found to influence the capacity of the tributary to carry pollutants to the Genesee River based on proximity, flow, drainage area, and adjacent wetland characteristics as explained below.

Flow Characteristics:
Wetland 4 drains into its unregulated drainage channel on an ephemeral basis. Wetlands 5 and 8 flow into their respective man-made drainages on an ephemeral basis. At the time of the August 2015 site visit, saturated soils were found within the confines of the channels. A review of aerial imagery indicates that hydrology signatures persist within the channels in years experiencing typical hydrology. Each channel's ephemeral flow contributes surface flow from Wetland 4, Wetland 5, and Wetland 8 into the riparian wetland that directly abuts Black Creek.

Drainage:
Wetland 1, 4, 5, and 8 and their unregulated drainage channels drain an area that is characterized as a suburban landscape with agriculture and a patchwork of undeveloped areas. Pollutants, sediments, and excessive flows are treated by the wetlands.

Wetlands:
Wetland 1 is a large forested wetland complex that extends off site. Wetland 4, 5, and 8 occur entirely within the boundaries of the 120-acre site. The small farmed wetlands are characterized as seasonally saturated palustrine emergent marsh wetlands. Each Wetland outlets directly into their respective unregulated drainage feature, which flows directly into Wetland 1, which is a large forested riparian wetland that is continuous with Black Creek. Functioning as headwater wetlands, Wetland 1, 4, 5, and 8 serve as primary collectors and processors of organic matter for downstream waters. The storage and transformation of organic matter is important because it prevents downstream water quality degradation as a result of excess organic matter. The August 2015 site visit showed the wetlands in saturated conditions, slowly releasing water to their primary drainages. The wetlands function to moderate downstream flows and, in combination with Wetland 1, have the capacity to recharge local groundwater. Flood attenuation /runoff storage, pollutant trapping/water quality, removal of suspended solids, dissolved solids, toxins and retention/treatment of nitrogen and phosphorus, functions are considered to be low for Wetland 4, 5, and 8. The water quality of receiving waters is strongly influenced by the quality of water coming from the headwater streams and wetlands that feed into them. Wildlife habitat functions are considered to be low.

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?

Yes. Given the flow regime and close proximity to the Genesee River, Black Creek, and its adjacent and abutting wetlands, through their capacity to store, process, and transport food and nutrients, and their capacity to treat stormwater runoff play an important cumulative role in improving water quality and providing habitat and lifecycle support functions for fish and other species present in the Genesee River. Genesee River fish species will likely be found within Black Creek into which its adjacent wetlands directly drain. These species would be there specifically for such activities such as feeding, nesting, and spawning. In summary, Black Creek and its adjacent wetlands influence the capacity to support fish species that also utilize the Genesee River.

Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?

Yes, functioning as headwater wetlands, Wetlands 1, 4, 5, and 8 serve as primary collectors and processors of organic matter and nutrients for downstream waters. The storage and transformation of organic matter is important to these types of systems because it prevents downstream water quality degradation as a result of excess organic matter. It also transforms unusable organic matter (inorganic carbon) into food for aquatic organisms (organic carbon). The wetland functions to moderate downstream flows preventing excess organic matter from reaching downstream waters. In addition, this system functions to retain and process excess nutrients, such as nitrogen and phosphorus, transforming them into biologically useful forms that are slowly released to downstream waters.

CONCLUSION

Black Creek and Wetland 1 are jurisdictional by definition. In addition, the adjacent Wetland 4, 5, and 8 were found to influence the chemical, physical, and biological integrity of downstream waters. Based upon the evaluation presented herein, there is a significant nexus between Wetland 4, 5, and 8 and the Genesee River. Therefore, Wetland 4, 5, and 8 are jurisdictional waters of the US.

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: Black Creek is depicted on the USGS NY West Henrietta Quadrangle as a solid blue named line. The tributary measures about 65 feet in width from bank to bank. The channel has well defined bed and banks. A review of aerial imagery indicates that there is surface water within the channel on a perennial basis.

☐ 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: Black Creek: 4,445 linear feet 65 width (ft).

☐ Other non-wetland waters: # acres.
Identify type(s) of waters:

3. Non-RPWs[8] 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: Wetland 1 directly abuts and is continuous with Black 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: Wetland 1: 35.244 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 jurisidictional. Data supporting this conclusion is provided at Section III.C.

Provide acreage estimates for jurisdictional wetlands in the review area: Wetland 4: 0.217 acre; Wetland 5: 0.077 acre; Wetland 8: 0.426 acre; for a total of 0.72 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).

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):

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[8]See Footnote # 3.

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

[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.*

- ☐ 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: Wetland 2, 3, 6, 7, and 11. For a total of 0.338 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: Earth Dimensions, Inc (October 13, 2014)
- ☑ 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.
  - ☑ USGS 8 and 12 digit HUC maps.
- ☑ U.S. Geological Survey map(s). Cite scale & quad name: USGS NY 7.5 Minute West Henrietta Quadrangle
- ☑ USDA Natural Resources Conservation Service Soil Survey. Citation: http://websoilsurvey.nrcs.usda.gov/app/
- ☑ National wetlands inventory map(s). Cite name: http://www.fws.gov/wetlands/Data/Mapper.html
- ☑ State/Local wetland inventory map(s): http://www.dec.ny.gov/animals/38801.html
- ☐ FEMA/FIRM maps:
- ☐ 100-year Floodplain Elevation is: (National Geodectic Vertical Datum of 1929)
- ☑ Photographs: ☑ Aerial (Name & Date): Bing Maps Oblique Aerial Imagery (date unknown)
  - ☐ or ☑ Other (Name & Date): Ground-level photographs (October 2014)
- ☐ Previous determination(s). File no. and date of response letter:
- ☐ Applicable/supporting case law:
- ☐ Applicable/supporting scientific literature:
- ☐ Other information (please specify):

B. ADDITIONAL COMMENTS TO SUPPORT JD:

January 19, 2016

Katie A. Buckler
Project Manager

Date

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): February 10, 2016

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: LRB 2014-01137 – Westside Development, LLC. JD for Wetland 9, Wetland 10, Drainageway 8, and Drainageway 9. Form 2 of 2.

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: New York County/parish/borough: Monroe City: Chili
Center coordinates of site (lat/long in degree decimal format): Lat. 43.09207 ° N, Long. -77.72328 ° W
Universal Transverse Mercator: 18
Name of nearest waterbody: Black Creek
Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: Genesee River
Name of watershed or Hydrologic Unit Code (HUC): 04130003

☑ 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: December 23, 2015

☑ Field Determination. Date(s): August 5, 2015,

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): [1]

☐ TNWs, including territorial seas

☐ Wetlands adjacent to TNWs

☐ Relatively permanent waters[2] (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: Tributary 9: 1,467 linear feet. 4-5 feet in width.
Wetlands: Wetland 9 (0.584 acre); Wetland 10 (0.670 acre); for a total of 1.254 acres.

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

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: Drainages 8 (530 l.f.) is a drainage ditch that was determined to be a non-jurisdictional surface water conveyance. This feature is a man-made tributary that was excavated in uplands and does not exhibit bed and bank features or ordinary high water mark indicators.

[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 *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[4] 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:
Drainage area:

Average annual rainfall: # inches
Average annual snowfall: # inches

(ii) Physical Characteristics:
(a) Relationship with TNW:

☐ Tributary flows directly into TNW.

☐ Tributary flows through *Choose an item.* tributaries before entering TNW.

Project waters are *Choose an item.* river miles from TNW.
Project waters are *Choose an item.* river miles from RPW.
Project waters are *Choose an item.* aerial (straight) miles from TNW.
Project waters are *Choose an item.* aerial (straight) miles from RPW.
Project waters cross or serve as state boundaries. Explain:

Identify flow route to TNW[5]:
Tributary stream order, if known:

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

Tributary is: ☐ Natural

☐ Artificial (man-made). Explain:

☐ Manipulated (man-altered). Explain:

[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.

Tributary properties with respect to top of bank (estimate):
Average width: # feet
Average depth: # feet
Average side slopes: *Choose an item.*

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:
Presence of run/riffle/pool complexes. Explain:
Tributary geometry:
Tributary gradient (approximate average slope): #%

(c) Flow:
Tributary provides for:
Estimate average number of flow events in review area/year:
Describe flow regime:
Other information on duration and volume:

Surface flow is: *Choose an item.* Characteristics:

Subsurface flow: *Choose an item.* Explain findings:
☐ Dye (or other) test performed:

Tributary has (check all that apply):
☐ Bed and banks
☐ OHWM[6] (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):

☐ High Tide Line indicated by:	☐ Mean High Water Mark indicated by:
☐ oil or scum line along shore objects	☐ survey to available datum;
☐ fine shell or debris deposits (foreshore)	☐ physical markings;
☐ physical markings/characteristics	☐ vegetation lines/changes in vegetation types.
☐ tidal gauges	
☐ 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:

[6]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.
[7]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: Wetland 9: 0.584 acre; Wetland 10: 0.670 acres

Wetland type. Explain: Palustrine emergent

Wetland quality. Explain: Both wetlands are of low quality due to active farming activities. Both Wetlands are farmed wetlands.

Project wetlands cross or serve as state boundaries. Explain:

(b) General Flow Relationship with Non-TNW:

Flow is: Ephemeral Flow Explain: Wetland 10 directly abuts both an unregulated drainage ditch (Drainageway 8), and the perennial tributary to Black Creek (Drainageway 9). Wetland 9 flows into Wetland 10 via overland sheetflow; therefore, they are considered one wetland hydrologically.

Surface flow is: Discrete and Confined, and overland sheetflow

Characteristics: Wetland 10 directly abuts a perennial tributary to Black Creek. Wetland 9 is located about 50 feet to the north of Wetland 10. A review of aerial imagery indicates that Wetland 9 sheetflows into Wetland 10 at several locations. This overland sheetflow occurs in the spring, and likely occurs after heavy precipitation events.

Subsurface flow: Unknown Explain findings:

- ☐ Dye (or other) test performed:

(c) Wetland Adjacency Determination with Non-TNW:

- ☑ Directly abutting: Wetland 10 directly abuts an unnamed perennial tributary to Black Creek.
- ☑ Not directly abutting
  - ☑ Discrete wetland hydrologic connection. Explain: Wetland 9 flows through Wetland 10 and eventually drains into the perennial tributary to Black Creek.
  - ☐ 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 1-2 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: Surface water was not present during the August 2015 site visit. The wetland is located in active cropland. Therefore, the system likely receives pollutants associated with agricultural practices.

Identify specific pollutants, if known: Specific pollutants are unknown.

(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: Amphibians likely use the wetland areas for breeding and foraging habitat.
  - ☐ Aquatic/wildlife diversity. Explain findings:

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

All wetland(s) being considered in the cumulative analysis: 3
Approximately (36.498) acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

Directly abuts? (Y/N)	Size (in acres)	Directly abuts? (Y/N)	Size (in acres)
Wetland 1 (Y)	35.244		
Wetland 9 (N)	0.584		
Wetland 10 (Y)	0.670		

Summarize overall biological, chemical and physical functions being performed: Wetland 9 and 10 drain into a non-jurisdictional drainage channel, which outlets directly into a perennial tributary to Black Creek. Wetland 10 also directly abuts the perennial tributary. Wetland 9 and 10 are headwater wetlands that serve as primary collectors and processors of organic matter for downstream waters. The August 2015 site visit showed the wetlands in a saturated condition, thereby slowly releasing water to the primary drainages (drainageway 8 and 9). The wetlands function to moderate downstream flows and have the capacity to recharge local groundwater. Flood attenuation /runoff storage, pollutant trapping/water quality, removal of suspended solids, dissolved solids, toxins and treatment of nitrogen and phosphorus, functions are considered to be low. Wildlife habitat functions are considered to be low.

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:

RELEVANT REACH
The relevant reach for the significant nexus determination is from Wetland 9, Wetland 10, and Wetland 1 to the confluence with Black Creek, a perennial tributary to the Genesee River, a TNW. Wetland 9 drains directly into Wetland 10 via overland sheetflow. Wetland 10 directly abuts a perennial tributary to Black Creek.

SIGNIFICANT FACTORS
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?

Yes, Black Creek flows into the Genesee River about 3 miles downstream from the site. Black Creek and its adjacent wetland were found to influence the capacity of the tributary to carry pollutants to the Genesee River based on proximity, flow, drainage area, and adjacent wetland characteristics as explained below.

Flow Characteristics:
Wetland 9 drains into Wetland 10 on a seasonal and ephemeral basis. Wetland 10 directly abuts the perennial tributary to Black Creek. Flow between the wetland and tributary occurs during periods of excess hydrology, such as in the early spring and after heavy

precipitation events.

Drainage:
Wetlands 1, 9, and 10, and the unregulated drainage channel drain an area that is characterized as a suburban landscape with agriculture and a patchwork of undeveloped areas. Pollutants, sediments, and excessive flows are treated by Wetlands 1, 9, 10.

Wetlands:
Wetland 1 is a large forested wetland that continues off site. Wetlands 9 and 10 occur entirely within the boundaries of the 120-acre site. The small farmed wetlands are characterized as seasonally saturated palustrine emergent marsh wetlands. Wetland 9 flows into Wetland 10, which then outlets directly into the unregulated drainage feature, which flows into a perennial tributary to Black Creek. Functioning as headwater wetlands, Wetland 9 and 10 serve as primary collectors and processors of organic matter for downstream waters. The storage and transformation of organic matter is important because it prevents downstream water quality degradation as a result of excess organic matter. The August 2015 site visit showed the wetlands in a saturated condition, slowly releasing water to their primary drainage. The wetlands function to moderate downstream flows and, in combination with Wetland 1, have the capacity to recharge local groundwater. Flood attenuation /runoff storage, pollutant trapping/water quality, removal of suspended solids, dissolved solids, toxins and retention/treatment of nitrogen and phosphorus, functions are considered to be low for Wetland 9 and 10. The water quality of receiving waters is strongly influenced by the quality of water coming from the headwater streams and wetlands that feed into them. Wildlife habitat functions are considered to be low.

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?

Yes. Given the flow regime and close proximity to the Genesee River, Black Creek, and its adjacent and abutting wetlands, through their capacity to store, process, and transport food and nutrients, and their capacity to treat stormwater runoff play an important cumulative role in improving water quality and providing habitat and lifecycle support functions for fish and other species present in the Genesee River. Genesee River fish species will likely be found within Black Creek into which its adjacent wetlands directly drain. These species would be there specifically for such activities such as feeding, nesting, and spawning. In summary, Black Creek and its adjacent wetlands influence the capacity to support fish species that also utilize the Genesee River.

Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?

Yes, functioning as headwater wetlands, Wetland 9 and 10 serve as primary collectors and processors of organic matter and nutrients for downstream waters. The storage and transformation of organic matter is important to these types of systems because it prevents downstream water quality degradation as a result of excess organic matter. It also transforms unusable organic matter (inorganic carbon) into food for aquatic organisms (organic carbon). The wetland functions to moderate downstream flows preventing excess organic matter from reaching downstream waters. In addition, this system functions to retain and process excess nutrients, such as nitrogen and phosphorus, transforming them into biologically useful forms that are slowly released to downstream waters.

CONCLUSION

Black Creek, Wetland 1, and the perennial unnamed tributary to Black Creek (Drainageway 9) are jurisdictional by definition. In addition, the adjacent Wetlands 9 and 10 were found to influence the chemical, physical, and biological integrity of downstream waters. Based upon the evaluation presented herein, there is a significant nexus between Wetlands 9 and 10 and the Genesee River. Therefore, Wetland 9 and Wetland 10 are jurisdictional waters of the US.

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: The unnamed tributary to Black Creek (Drainageway 9) measures about 7 feet in width from bank to bank and has well defined bed and banks. The channel also exhibits an ordinary high water mark. A review of aerial imagery shows that surface water is present within the channel on a perennial basis. At the time of the August 2015 site visit, there was about 4 inches of standing water within the channel. The bed load consists of silt and sands. Obligate hydrophytes are present along the tributary banks, which indicates a constant source of hydrology is provided by the channel.
- ☐ 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: Drainageway 9: 1,467 linear feet 5 width (ft).
  - ☐ Other non-wetland waters: # acres.
    Identify type(s) of waters:

3. Non-RPWs[8] 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: *Click here to enter text.*

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: Wetland 10 directly abuts and is continuous with Drainageway 9.

☐ 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: # 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 jurisidictional. Data supporting this conclusion is provided at Section III.C.

Provide acreage estimates for jurisdictional wetlands in the review area: Wetland 9: 0.584; Wetland 10: 0.670 acres; for a total of 1.254 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).

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):

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[8]See Footnote # 3.

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

[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.*

☐ 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: Earth Dimensions, Inc (October 13, 2014)

☑ 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.

☑ USGS 8 and 12 digit HUC maps.

☑ U.S. Geological Survey map(s). Cite scale & quad name: USGS NY 7.5 Minute West Henrietta Quadrangle

☑ USDA Natural Resources Conservation Service Soil Survey. Citation: http://websoilsurvey.nrcs.usda.gov/app/

☑ National wetlands inventory map(s). Cite name: http://www.fws.gov/wetlands/Data/Mapper.html

☑ State/Local wetland inventory map(s): http://www.dec.ny.gov/animals/38801.html

☐ FEMA/FIRM maps:

☐ 100-year Floodplain Elevation is: (National Geodectic Vertical Datum of 1929)

☑ Photographs: ☑ Aerial (Name & Date): Bing Maps Oblique Aerial Imagery (date unknown)

☐ or ☑ Other (Name & Date): Ground-level photographs (October 2014)

☐ Previous determination(s). File no. and date of response letter:

☐ Applicable/supporting case law:

☐ Applicable/supporting scientific literature:

☐ Other information (please specify):

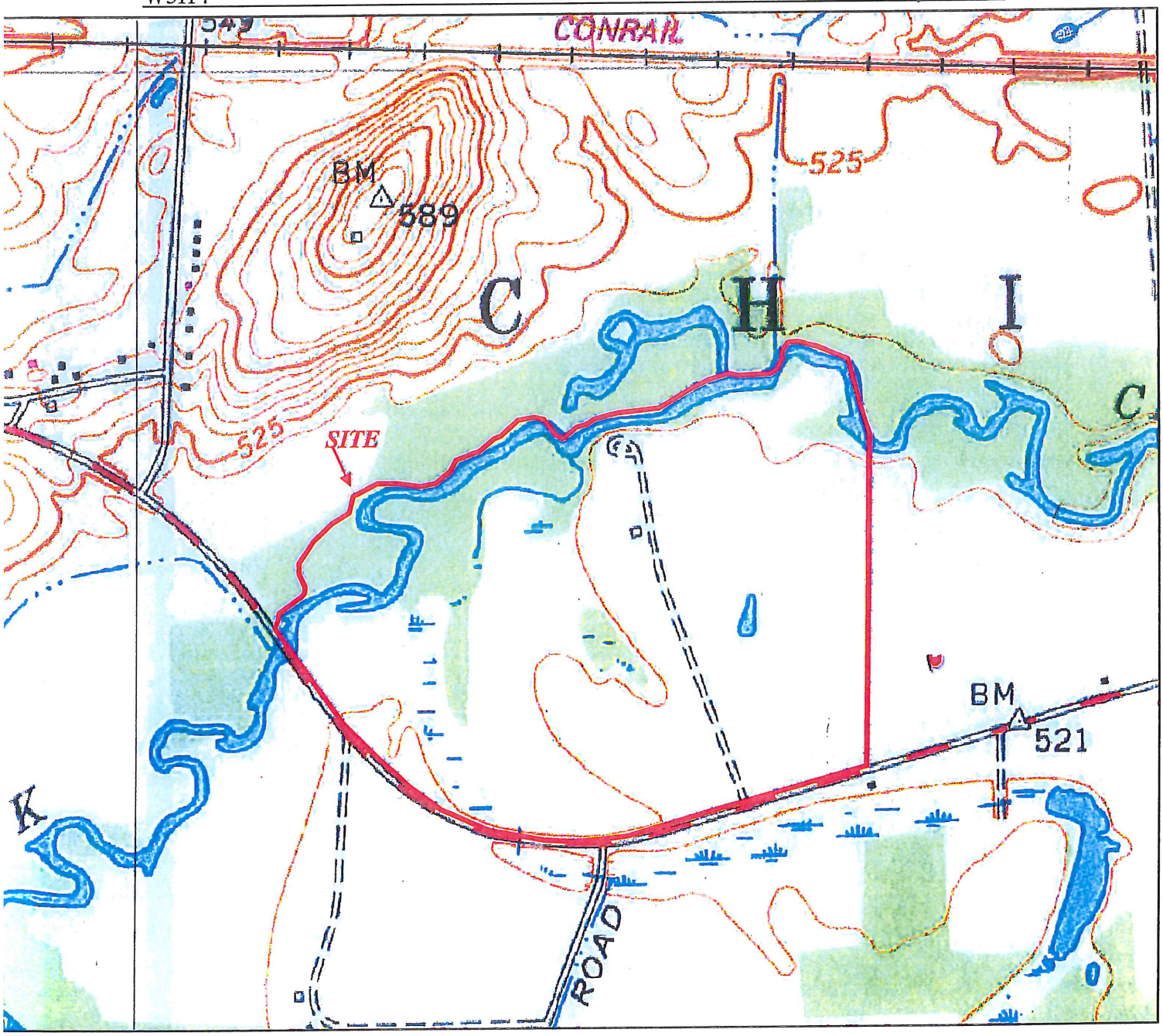
B. ADDITIONAL COMMENTS TO SUPPORT JD:

January 19, 2016

Katie A. Buckler
Project Manager

Date

W5I14 420 Ballantyne Road



EARTH DIMENSIONS, INC.
* Soil & Hydrogeologic Investigations * Wetland Delineations
1091 Jamison Road, Elma NY 14059
(716) 655-1717 * Fax (716) 655-2915 www.earthdimensions.com

Figure 1: USGS 7.5 Minute Topographical Map
West Henrietta Quadrangle/ GPS Expert

Westside Development, LLC
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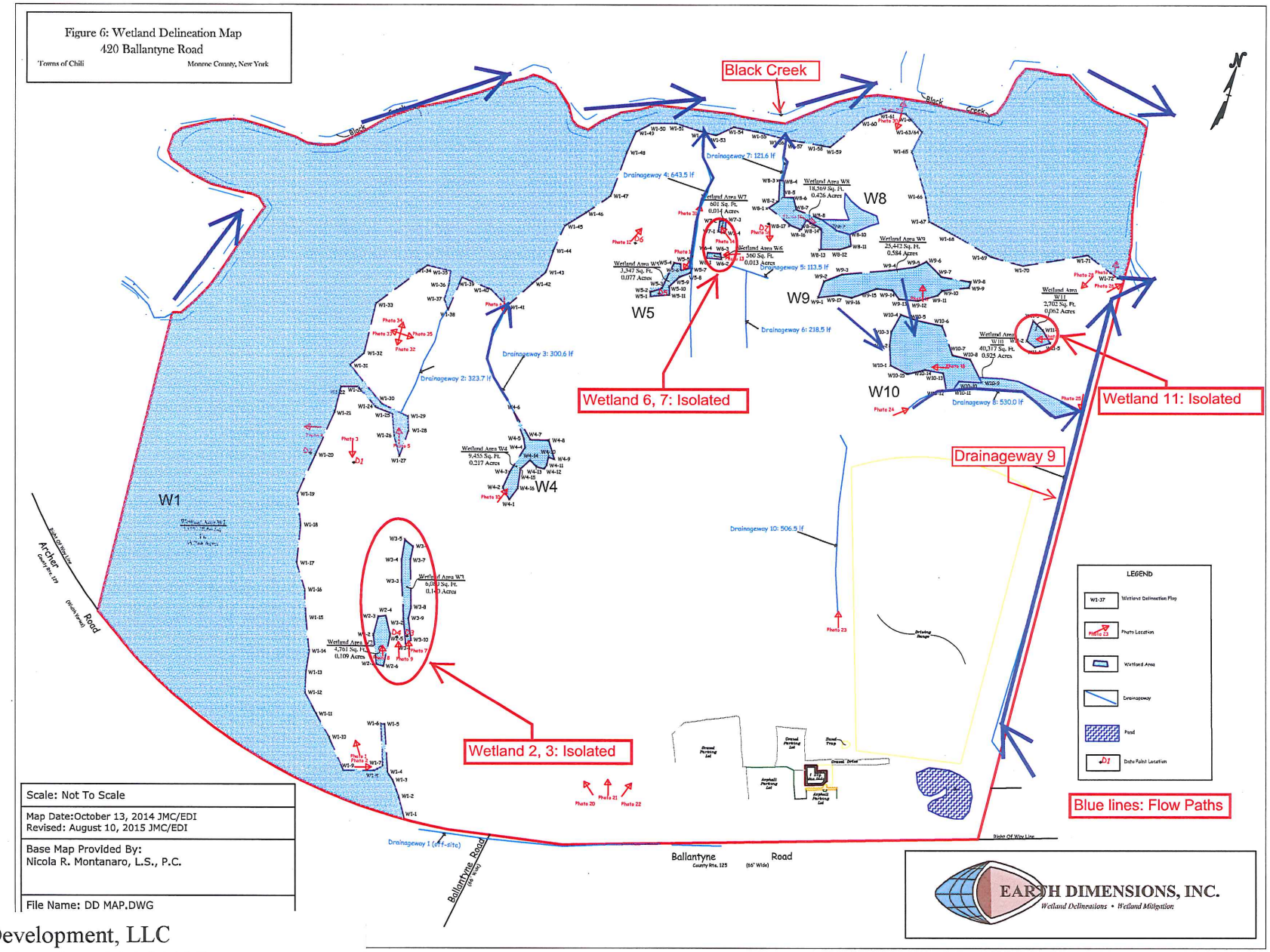
Quad: West Henrietta
Sheet 1 of 3

New York



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