

MEMORANDUM THRU Chief, New York Application Evaluation Section
FOR District Commander

SUBJECT: Environmental Assessment and Statement of Findings for
Department of the Army Permit Application No. 2000-00325(3)

1. This document constitutes the Environmental Assessment and Statement of Findings for Department of the Army Permit Application No. 2000-00325(3) by **NEC Transit William, LLC**. This document is in accordance with the requirements set forth in the Final Rule for the Regulatory Programs of the Corps of Engineers (33 CFR 320 et. seq.), the policies and procedures for implementation of the National Environmental Policy Act (33 CFR 230), where applicable the Guidelines for Specification of Disposal Sites for Dredged or Fill Material (40 CFR 230), and other pertinent regulations and guidelines.

2. A Public Notice describing the proposed project, its purpose, and location was distributed to the appropriate Federal, State and local agencies, and the general public in accordance with the requirements of 33 CFR 325.3. A copy of the Notice and its mailing list are in the file for this application.

a. Prior to publication of this Public Notice the project was reviewed with regard to the following laws: Section 106 of the National Historic Preservation Act of 1966; Section 7 of the Endangered Species Act; The National Environmental Policy Act of 1969; Section 7(a) of the Wild and Scenic Rivers Act; The National Fishing Enhancement Act of 1984; and, Section 302 of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended. The Notice notes any potential involvement of the project with these laws.

b. This proposed project requires Department of the Army authorization pursuant to:

Section 404 of the Clean Water Act (33 U.S.C. 1344).

c. Background information for this project:

NEC Transit William, LLC, 6495 Transit Road, Bowmansville, New York 14026, applied for a Department of the Army permit to place fill into a Federal wetland for the construction of a retail center, known as The Gateway Centre. The anchors of the retail center consist of Wal-Mart and a national home improvement store. The project is located on a 36-acre site at the northeast corner of Transit Road and William Street, in the Town of Lancaster, Erie County, New York. The applicant proposed to impact all wetlands on-site totalling 7.54 acres. The wetland boundaries were verified by USACE on June 1, 2000 under Action 1 of this processing number.

The wetland covertype is dominated by woody species

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with some scrub/shrub and wet meadow components. The wetland will be impacted through grading and filling activities. The proposed project is expected to be completed in two phases. However, the entire site will be graded/filled during the initial phase. Phase I consists of a 142,0129 square foot retail store, associated parking, gas station, restaurant, bank and installation of a 3.35 acre storm water detention basin. Phase II consists of the construction of a 130,000 square foot retail store and associated parking. The applicant has already removed all vegetation from the upland portion of the site. A 105 foot wide strip will remain along the eastern boundary of the site to act as a buffer to the adjacent residential community. A 65 foot wide undeveloped portion of this buffer will be deeded to the Town of Lancaster along with the northern mitigation area. The remaining 40 feet of buffer area containing the berm and swale will remain NEC Transit William, LLC property. The applicant has indicated that avoidance and minimization of wetland impacts is not feasible.

A public notice was published on December 29, 2000 (See Action 2) for the original proposal. It noted that a small portion (0.04 acre) of the total impact was to wetlands that extend off-site. These wetlands were expected to be lost through the secondary impacts of segmentation and loss of hydrology. This secondary impact is no longer expected due to subsequent changes, as discussed below. It also noted that to compensate for the permanent loss of 7.54 acres of wetland, the applicant proposed to provide mitigation in the form of wetland preservation and wetland creation at an off-site location. The proposed mitigation property was 12.5 acres in size and located on Crabapple Lane, Town of Cheektowaga, Erie County, New York. The property was located within the floodplain of Cayuga Creek. The existing 10.5 acres of Federal wetland would be preserved as a public passive recreation area and the remaining 2 acres of upland would be used to create wetland. The majority of the area to be preserved as part of the mitigation proposal by NEC Transit William, LLC, is wetland that was avoided by the Rushford Hollow, LLC, Crabapple Lane Patio Homes development. Rushford Hollow, LLC, submitted a report to the Corps of Engineers on May 31, 2000 (received June 2, 2000, D.A. Processing #2000-02032) indicating their intention to use Nationwide Permit #26 (NWP) for 0.31 acre of wetland impacts associated with the proposed Crabapple Lane Patio Homes. The report indicated that as part of their compliance with the NWP terms and conditions the remaining floodplain wetland was avoided. This is the same wetland that NEC Transit William, LLC proposed to use as mitigation.

In response to the Public Notice, the Town of Cheektowaga indicated that the proposed mitigation area had already been proposed to be deeded to the town as part of the Rushford Hollow project and therefore not available as mitigation. The USFWS and USEPA recommended denial of the permit based on lack of avoidance and minimization and insufficient mitigation. Numerous comments were received from the general public requesting denial of the

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permit. Most comments from the public were in the form of generic comment cards. Most public concerns were from residents of the adjacent residential subdivision regarding habitat loss and flood water retention. Based on these comments received during the public notice comment period the applicant requested withdrawal of the application to allow sufficient time to prepare a response. The application was withdrawn on May 10, 2001.

In light of the Supreme Court Decision of January 9, 2001, an isolated water determination was performed for the on-site wetlands. On April 3, 2001 a letter was sent to the applicant indicating that all wetlands on-site are historically part of a tributary system to Lake Erie, a navigable waterway, and therefore not isolated. The applicant appealed the determination on June 1, 2001. On August 30, 2001, a letter was sent to the applicant from Rodney Woods, USACE Appeal Officer, indicating that the appeal was determined to have no merit. Therefore, all wetlands located on-site were confirmed to be jurisdictional waters of the United States.

On Aug. 20, 2001, a revised application package was received (Action 3) and the proposed project impacts were the same as originally submitted. However, the applicant provided additional information to support their statement that avoidance/minimization of wetland impacts is not practicable. In addition they provided an alternate mitigation package. The new mitigation package consisted of the creation of 9.54 acres of wetland and 9.61 acres of upland preservation at two locations in the Town of Lancaster. Specifically, the applicant proposed to acquire a 6.41 acre parcel immediately north of the project site where they proposed 2.37 acres of wetland creation and 3.66 acres of upland/wetland preservation. (A 0.38 acre discrepancy was discovered in the break down of upland and wetland versus the total parcel size.) The second parcel is located in the northwest corner of Steinfeldt Road and Broadway, where they proposed 7.17 acres of wetland creation, preservation of 1.46 acres of floodplain wetland associated with Plum Bottom Creek and 4.37 acres of upland preservation. Since project impacts did not change a new public notice was not issued. The additional information was forwarded to the resource agencies for review and comment. The USFWS still recommended denial based on inadequate alternatives analysis and insufficient mitigation.

A wetland delineation of the northern mitigation area was requested as well as a functions and values comparison of the wetlands to be impacted by the project versus those provided by the proposed mitigation. The wetland delineation on the northern mitigation parcel, prepared by Earth Dimensions (EDI) dated February 5, 2002, revealed that the site contained substantially more wetland than anticipated and the majority of the site was forested. Therefore, the applicant modified the mitigation proposal including changes to the parcel boundaries. The new proposal entailed the preservation of a 5.8 acre area including 1.61 acres of wetland and 4.25 acres of upland. In addition,

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they offered an additional 6-7 acres of wetland/upland preservation to the north of the northern mitigation area pending feasibility of acquisition. A potential preservation area of a total of approximately 13 acres. The applicant later determined that only 10.75 acres of preservation (6.72 acres of upland and 4.03 acres of wetland) was available for acquisition.

In addition, the information provided by EDI indicated that the wetlands located off-site to the west of the project area were more extensive than originally indicated by Nussbaumer & Clarke, the original wetland delineators for the project. Further investigation revealed that Wetlands C & D were actually part of an extensive wetland complex extending off-site to the west and north. The original delineation indicated only a small portion (0.04 acre) of Wetlands C & D extended off-site and as such were included within the project impacts due to secondary impacts. Now that the wetlands extending off-site are more extensive, the secondary impact due to fragmentation and isolation is no longer anticipated reducing project impacts to 7.50 acres. However, a new concern was noted since the drainage from the B,C,E Wetland flows to the off-site wetland complex. The filling of the on-site wetlands may result in a secondary impact to the off-site wetlands via loss or reduction in hydrology. In order to ensure the off-site wetlands are not secondarily impacted, the applicant proposes to construct a vegetated swale directing water from the off-site detention pond, located east of the project site, to the off-site wetlands located to the west of the project site. The vegetated swale will stop at the property line since they do not have authority to work on the adjacent site. However, existing grade contours show the drainage will naturally flow into the off-site wetlands. In addition, drainage from the off-site detention basin that feeds Wetland D will be redirected into the northern mitigation area to ensure these off-site wetlands are not secondarily impacted via loss/reduction of hydrology. The construction of the vegetated drainage swales from existing off-site detention basins, located to the east of the project, to off-site properties to the north and west are not expected to increase water flow to these adjacent properties. Rather, the channels only serve to maintain existing drainage through the site in order to prevent secondary impacts through loss or reduction of hydrology to off-site wetlands. The applicant has indicated that special permission or coordination with the adjacent property owner is not required since this proposal will not increase flow off-site.

The wetland delineation of the northern mitigation area by EDI also indicated a discrepancy in the wetland boundary at the property line separating the northern mitigation area and the project site. The delineation on the northern mitigation parcel indicated that the wetlands extended onto the project site, however the wetland boundaries delineated by Nussbaumer & Clarke did not coincide. A site investigation was performed on July 17, 2002 and it was determined that additional wetland existed on the project site along the northern property line. The extent could

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not be determined in the field since the property line was not marked and the area was heavily wooded. The boundary of Wetland D was redelineated by EDI to include the additional area. Some minor changes, due to survey errors were also made along the southern boundary of Wetland D slightly decreasing the wetland size along this boundary. A map showing the new boundary was received on November 4, 2002. The original size of Wetland D was 0.85 acres, including a 0.02 acre portion extending off-site. The redelineated Wetland D now consists of 0.87 acres on-site and a large amount of off-site wetland for which the acreage was not calculated. The new Wetland D boundary was field verified by USACE personnel on November 13, 2002.

Total project impacts to waters of the US remain at 7.54 acres and no secondary impact to off-site wetlands are anticipated. (Original impact amount of 7.54 acres minus 0.04 acre of secondary impacts no longer anticipated plus 0.04 acres of additional wetland newly delineated in the on-site portion of Wetland D.) Since this change did not affect the total project wetland impact amount, no additional coordination with the resource agencies was performed.

A small modification was also made to the Steinfeldt mitigation proposal. During USACE review of the wetland delineation for this parcel, it was discovered that a tributary to Plum Bottom Creek and associated wetland was located in the southwest corner of the parcel. The mitigation design was modified to include the existing wetland area in the preservation area, now totalling 1.61 acres. The creation area was slightly reduced to 7.14 acres, a 0.03 acre reduction.

Since the creation component of the entire mitigation package was reduced, the applicant was requested to locate additional creation/restoration opportunities to add to their mitigation package. They presented a proposal on March 19, 2002 to fund Ducks Unlimited's restoration of 12 acres of wetland at the Tonawanda Wildlife Management Area (TWMA), approximately \$86,400.

The total mitigation package now consists of: 12 acres of shallow emergent marsh/wet meadow wetland restoration at TWMA, 10.75 acres of preservation (4.03 acres wetland and 6.72 acres upland) at the northern mitigation area located adjacent to the project site, and creation of 7.14 acres of shallow emergent/wet meadow wetland and preservation of 5.86 acres (4.25 acres upland and 1.61 acres wetland) at the Steinfeldt Road site. The total creation is 19.14 acres for creation to impact ratio of 2.5:1. The total preservation is 16.61 acres for a preservation to impact ratio of 2.2:1.

d. Comments received from Federal, state and local agencies in response to the Public Notice were considered and are summarized below:

USFWS RECOMMENDED DENIAL

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USEPA	RECOMMENDED DENIAL
NYSOPRHP	RECOMMENDED MODIFICATIONS OR CONDITIONS
NYSDEC	OTHER

Agency Codes (used above and elsewhere in this document):

USFWS	- U.S. Fish and Wildlife Service
USEPA	- U.S. Environmental Protection Agency
NYSOPRHP	- New York State Office of Parks, Recreation and Historic Preservation
NYSDEC	- New York State Department of Environmental Conservation

Comments provided by the above referenced agencies of specific importance to this project:

USFWS

USFWS requested denial of the permit in a letter dated January 25, 2001 due to the inadequate alternatives analysis, substantial impacts to aquatic resources and the lack of adequate compensatory mitigation. In response to concerns raised, the applicant submitted additional information on August 20, 2001.

In a letter dated October 12, 2001, the USFWS provided additional comments and again requested denial due to the inadequate alternatives analysis, failure to avoid and minimize impacts to aquatic resources, and the lack of adequate compensatory mitigation. In response to these concerns, the applicant provided additional information dated November 2, 2001.

In an email dated April 17, 2002, the USFWS provided additional comments after reviewing the applicants additional information. The following concerns were noted: 1) the USFWS does not support preservation as a means of mitigation, 2) the USFWS does not support mitigation on state land since the area is already protected from development and part of an area managed for wildlife, 3) they are concerned that the wetland creation proposed at the Steinfeldt site will be isolated and therefore not protected from future impacts under Section 404, 4) the mitigation plan inadequately replaces lost wetland functions and values and 5) the avoidance and minimization documentation is still not adequate.

In response to the USFWS comments, USACE does not agree with the USFWS regarding preservation and has determined that preservation is an important part of the mitigation package, especially preservation of forested wetlands and buffers under developmental pressure.

USACE also does not agree with the USFWS regarding mitigation on public lands. USACE agrees that the land is already protected, however funding to perform restoration work is limited and may not ever be completed without other sources such as mitigation funds. In addition, mitigation on public lands

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generally have greater long term success due to public ownership and management. Further, mitigation on public lands are generally available to the general public for passive recreational uses that cannot be offered by sites under private ownership.

The question regarding isolation is unfounded since the creation area will be sited directly adjacent to and between Plum Bottom Creek and its tributary. Any drainage flowing out of the created wetlands will flow either directly or via the tributary into Plum Bottom Creek, a tributary to Lake Erie, a navigable waterway. Further, the mitigation area will be protected in perpetuity through deed restrictions. This protection will be more beneficial since it will also restrict the removal of vegetation, which is unregulated under Section 404.

USACE does not agree with the USFWS determination that the mitigation does not adequately compensate for lost functions and values. A detailed discussion regarding functions and values can be found under the public interest review portion of this document.

The additional documentation provided by the applicant adequately supports their determination that further avoidance and minimization are not practicable and the proposed project is the least damaging practicable alternative (See discussion of alternatives below under 4(a).) *Note: The USFWS letter did not invoke the MOA by stating there "may" and "will" have impacts on USEPA*
an ARNI. QM

In a letter dated January 29, 2001, the USEPA recommended denial of permit since the project was not in compliance with the Clean Water Act Section 404(b)(1) guidelines. Specifically, avoidance and minimization was not adequately documented, the mitigation was not adequate and the project will have substantial and unacceptable impacts on the wetlands they determined to be "aquatic resources of national importance". In response to these comments the applicant submitted additional information on multiple occasions.

In a letter dated April 25, 2002, the USEPA provided additional comments in response to the additional information provided by the applicant. The following comments were provided: 1) the revised alternatives analysis adequately meets the Section 404(b)(1) Guidelines, 2) the revised mitigation plan is adequate to compensate for the unavoidable project impacts, and 3) the USEPA no longer objects to permit issuance provided the following conditions are included in the permit:

-That all plants in the mitigation area shall achieve 85% success though a period of 5 years. Should the desired plant community not be progressing successfully, the applicant shall be responsible for any regrading or replanting of the mitigation area that is deemed necessary by the federal review agencies to ensure the successful establishment of a wetlands ecosystem at the mitigation site.

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-That the applicant provides the federal review agencies with detailed annual reports in writing. Such reports should document the progress of all mitigation areas throughout the five year period, including photos and information on percent survival, growth, etc. for each plant species.

-That the two mitigation areas be preserved in perpetuity through deed restrictions or conservation easements. The restrictions or easements shall be in place within 6 months from the date of permit issuance.

In response to the USEPA comments, the suggested conditions will be incorporated into the permit special conditions.

NYSOPRHP

In a letter dated January 19, 2001, the NYSOPRHP requested a Phase 1 archeological survey and additional information on historical structures. In a letter dated September 26, 2001, the NYSOPRHP indicated the project located at the northeast corner of Transit Road and William Street will have No Impact upon cultural resources. The Phase 1A and 1B Cultural Resource Investigation for the Steinfeldt mitigation site was submitted on August 8, 2002. In a letter dated August 23, 2002, the NYSOPRHP indicated that the proposed mitigation at the Steinfeldt Road and Broadway site will have No Effect upon cultural resources.

NYSDEC

The NYSDEC indicated the following concerns in a letter to the applicant dated December 22, 2000: 1) archaeological concerns and lack of NYSOPRHP effect determination, 2) requested confirmation that USACE accepted the off-site mitigation proposal and requested to be actively involved in mitigation discussions, and 3) expressed concerns over the proposed off-site mitigation at the Rushford Hollow Subdivision due to SEQR issues.

In response to the NYSDEC comments, USACE ensured that they were included in the coordination process via phone conversations and meetings and that they received copies of all new information submitted. Based on numerous conversations with the NYSDEC, it appears that all their water quality concerns were addressed through the minor modifications to the project and proposed mitigation. The NYSDEC failed to act on the December 29, 2000 request for water quality certification (WQC) within the one (1) year time limit. Subsequently, a WQC waiver was deemed to have occurred. The NYSDEC was notified of the waiver in a letter dated November 6, 2002. The NYSDEC responded in a letter dated November 13, 2002 indicating their agreement that a waiver of WQC was deemed to have occurred.

e. Comments received from the public in response to the Public Notice were considered and are summarized below:

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Numerous comments were received from the general public in response to the public notice in opposition to the project. Their relevant concerns include the following: loss of wildlife habitat, loss of passive recreation and green space, increased flooding, project need, and objected to various impacts associated with development (i.e., noise, pollution, sustainability, etc.) Their concerns were noted and are addressed in the public interest review.

Drake Environmental Consultants email dated January 28, 2001:
Drake Environmental Consultants, the consultant hired by the opposition group, Citizens Against Retail Sprawl (CARS), provided the following comments: 1) the assertion that the wetlands on-site are "low value" is incorrect, 2) the project site is part of a major wildlife corridor, 3) the wetlands are part of a large system of interconnected wetlands and the interconnectivity is not considered in the value or mitigation, 4) the delineation was performed during one of the driest winters on record so they feel there are additional wetlands on-site including vernal pools, 5) potential off-site effects of removal of on-site wetlands to the remainder of the wetland complex are not considered in the application materials and 6) the mitigation descriptions provided are highly inconsistent and appear totally insufficient for the value of the wetlands to be removed.

In response to the concerns noted by Drake Environmental Consultants, I offer the following: 1) concur with comment #1; 2) the site is part of a wildlife corridor, however movement to the south and east of the site are limited due to development. In addition, the mitigation package has been modified to include preservation of part of the wildlife corridor; 3) concur with comments 3 and 5. Project has been modified to ensure no secondary impacts to off-site wetland complex; 4) the delineation was verified by USACE after site inspections during spring and summer; and 5) mitigation package has been modified to more accurately reflect value of wetlands to be impacted.

David Seeger, letter dated January 26, 2001:
Mr. Seeger, the attorney representing CARS, requested denial of the permit for the following reasons: 1) applicant has failed to demonstrate that there are no practicable alternatives, 2) rezoning of the parcel to commercial use is currently in litigation and may not be zoned appropriately, 3) further review of cultural resources is necessary, 4) proposed mitigation results in a net loss of freshwater wetlands exceeding 5 acres, and 5) application is so deficient that it may require a supplemental public notice. In addition, the letter listed several reasons why a public hearing should be held. The reasons basically mirror reasons 1-5 listed above. In addition, in a letter dated April 3, 2001, David Seeger provided a copy of the courts decision regarding rezoning. The zoning was returned to it's original residential designation and was remitted to the Town Board of Lancaster for further proceedings. Mr. Seeger again requested that the permit be denied until the parcel is

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rezoned commercial, and adequate mitigation is provided.

In response to the concerns provided by Mr. Seeger, I offer the following: 1) the applicant provided additional information to demonstrate the lack of practicable alternatives, 2) rezoning is a local issue and subject to change (Update regarding zoning- the Town of Lancaster rezoned the parcel to commercial use on April 8, 2002 however the decision is currently in litigation.), 3) the NYSOPRHP provided No Effect determinations for both the project site and mitigation area., 4) the applicant submitted an alternate mitigation proposal, and 5) project related impacts to waters of the US have changed only minimally since the original application, and therefore a supplemental public notice is not required. Mr. Seeger was notified, in a letter dated November 4, 2002 that the request for a public hearing was denied. The letter also notified Mr. Seeger that he had 15 days to submit any additional information pertinent to the permit decision. No additional information was provided.

Town of Cheektowaga letter dated January 24, 2001:

The Town of Cheektowaga indicated that the proposed mitigation area was to be deeded to them by Rushford Hollow LLC as part of their development of the adjoining parcel. The proposed mitigation area is located with the Cayuga Creek floodplain and floodway and is designated as archaeologically sensitive by NYSOPRHP. Based on this information the Town requested that the Corps not accept the proposed mitigation. As a result of this comment, the applicant was notified that the proposed mitigation area was unacceptable.

f. The project has been reviewed for the need for the following certifications:

(1) Water Quality Certification pursuant to Section 401 of the Clean Water Act was: **assumed waived on December 30, 2001 since the NYSDEC failed to act upon the WQC request within the one (1) year time limit, initiated on December 29, 2000. The NYSDEC concurred with the waiver in a letter dated November 13, 2002.**

(2) Certification of Consistency pursuant to Section 307(c) of the Coastal Zone Management Act of 1972, as amended was: **NOT REQUIRED.**

3. Individual and Cumulative Impacts of the Proposed Action on the Public Interest:

The decision on this permit application is based upon the advantages and disadvantages of the proposed action in terms of its individual and cumulative impacts on the following public interest review factors: conservation of natural resources, economics, aesthetics, general environmental concerns, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion,

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recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, wetland values, mineral needs, considerations of property ownership, and in general, the needs and welfare of the public.

I have considered the extent and permanence of the beneficial and/or detrimental effects which the proposed activity is likely to have on the public and private uses to which the area is suited; the extent of the public and private need for the activity; and the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed project.

The following is my summary of the probable individual and cumulative impacts of the project on public interest factors relevant to this particular permit application. This impact analysis reflects any modifications and special conditions noted above in Item 2 and attached.

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Public Interest Factor	Impact							
	NA	+++	++	+	O	-	--	---
Conservation of Natural Resources				P		P		
Economics			P			T		
Aesthetics						P		
General Environmental Concerns				P		P		
Historic Properties					X			
Fish and Wildlife Values				P		P		
Flood Hazards					X			
Flood Plain Values				P				
Land Use				P				
Navigation	NA							
Shore Erosion and Accretion	NA							
Recreation				P				
Water Supply and Conservation					X			
Water Quality					X			
Energy Needs					X			
Safety					X			
Food and Fiber Production	NA							
Wetland Values				P		P		
Mineral Needs	NA							
Consideration of Property Ownership				P				

KEY

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|-----|-------------------------------|-----|--------------------------------|
| +++ | Significant Beneficial Impact | --- | Significant Detrimental Impact |
| ++ | Substantial Beneficial Impact | -- | Substantial Detrimental Impact |
| + | Minor Beneficial Impact | - | Minor Detrimental Impact |
| O | No Appreciable Impact | T | Temporary Impact |
| NA | Factor is not Applicable | P | Permanent Impact |

Information of particular relevance to this project and the public interest review is as follows:

Conservation of Natural Resources/General Environmental Concerns/Fish and Wildlife Values/Wetland Values: The proposed project will result in the loss of 7.54 acres of wetland. The wetlands are located primarily in areas of historical drainages that discharge to Cayuga Creek, a tributary to Lake Erie. Upland portions of the site have been cleared of vegetation and some of the larger trees have been removed from the wetland. This unregulated activity has degraded the quality

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of the wetlands and has severely limited/reduced the wildlife habitat.

EDI prepared a wetland assessment using "The Highway Methodology Workbook Supplement - Wetland Functions and Values", published by USACE New England District. The results are included in the administrative record. The descriptions below were based in part on the EDI assessment and various site inspections by USACE staff.

Wetland A is 1.43 acre mix of palustrine forested, scrub-shrub and emergent vegetative communities and its principal function is wildlife habitat. Hydrology is mainly precipitation driven with some minor input from the adjacent subdivision. It is located up-gradient of Wetland B such that water flows from Wetland A into Wetland B.

Wetland system B,C,E is part of a large wetland complex that extends off-site and consists of 5.16 acres on-site with a mix of palustrine scrub-shrub, forested and emergent vegetative communities. The total wetland size has not been determined since it extends off-site onto private properties. The main water source is from water flow from outlets of several detention ponds on the Northwoods subdivision. This wetland discharges into a culvert pipe which is part of a closed drainage system installed by NYS Department of Transportation. The drainage system is located along Transit Road that outlets to Cayuga Creek to the north. Historically the drainage from this wetland continued west under Transit Road into a wetland complex and tributary of Cayuga Creek. The principal functions are floodflow alteration, sediment/toxicant retention, nutrient removal and wildlife habitat.

Wetland D is part of an extensive wetland complex extending off-site with 0.87 acre on-site composed of palustrine forested wetland. The wetland is fed by a detention pond from the Northwoods subdivision and is part of the Cayuga Creek watershed tributary drainage. It's principal functions are sediment/toxicant retention and wildlife habitat. The EDI wetland assessment did not consider wildlife habitat as a major function of this wetland. However USACE disagrees based on the following: the wetland is very similar to the on-site portion of the Wetland B,C,E complex and is part of the same extensive off-site wetland complex.

Wetland F is 0.10 acre palustrine forested wetland. Hydrological input is mainly precipitation and sheet flow from adjacent upland and backyard drainage from Northwoods subdivision. Principal function is wildlife habitat. Wetland F is located only a few feet southeast of Wetland A and is clearly part of the same ecosystem and is therefore considered adjacent.

To compensate for the lost functions and values the applicant

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proposes the following:

1) Preservation of 10.75 acres of forested upland (6.72 acres) and wetland (4.03 acres) through the use of a permanent conservation easement/deed restriction and deeding the property to the Town of Lancaster. The parcel is located immediately north of the project site and is part of a ~125 acre tract of undeveloped forest. The undeveloped tract is bounded by Transit Road, Como Park Boulevard and Penora Street. The property will be available to the general public for passive recreational activities. This area is under development pressure due to its close proximity to Transit Road. The conservation of this area prevents the unregulated removal of vegetation which would seriously degrade the quality of the forested wetland/upland complex. The preservation of a forested area provides and maintains a wooded community that is not quickly realized in restoration or creation components due to the time needed for development and maturity. This preservation area will be immediately adjacent to the project site and will connect with the proposed vegetated buffer along the eastern portion of the project site maintaining a wildlife corridor. Although under development pressure, the siting of this preservation area is more favorable for wildlife usage than the project site due to its distance from William Street and adjacent development.

2) Funding of the restoration of 12 acres of wet meadow/shallow emergent habitat at the TWMA. The proposed restoration was designed by and will be performed by Ducks Unlimited (DU). DU will also monitor the success of the mitigation area, provide status reports to USACE for five years, and perform any corrective measures. The project was approved by the TWMA managers at NYSDEC and will have long term management as part of the TWMA. Restoration activities have a greater probability of success since the areas were originally wetland and generally only require slight modification to achieve success. The restoration at this mitigation site requires the installation of an earthen berm to restore hydrology. The primary function of the wetland will be wildlife habitat.

3) Creation of 7.14 acres of wet meadow/shallow emergent wetland, preservation of 1.61 acres of wetland and 4.25 acres of upland at the Steinfeldt Road Site. The site is located within a fairly well developed residential area and was originally slated for a high density residential subdivision. The northern portion of the site contains 1.46 acres of high quality forested floodplain wetland and a small length of Plum Bottom Creek, a tributary to Cayuga Creek. The mitigation area is located upstream of the proposed project and both the mitigation area and impact area are located within the Cayuga Creek watershed. The majority of the site is an upland meadow. A small area of upland forest is located between the floodplain forest and the proposed creation area. This upland forest will not be impacted during construction. In addition, the entire site will be protected in perpetuity through the use of deed restrictions and deeding the

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parcel to the Town of Lancaster to maintain as green space. The primary functions of the wetland will be wildlife habitat, floodflow alteration, nutrient removal, and sediment and toxicant removal. In addition, this mitigation area will provide valuable green space adjacent to Plum Bottom Creek. The wetland creation will be constructed within the existing upland meadow within three cells in a step design that will ultimately discharge to Plum Bottom Creek. Seasonal overland flow from the immediately surrounding area will add surface water input into the new wetland in addition to precipitation. The proposed creation areas are underlain by Niagara soils. Niagara soil is somewhat poorly drained. Monitoring wells indicate existing ground water levels at 0.5 to 0.55 feet below the ground surface elevation. Shrubs will be planted within the upland buffer along the eastern property line between the creation area and the existing residential subdivision. The shrub plantings will provide habitat for avian species as well as limiting human impacts to the site from adjacent housing lots, i.e. dumping of yard wastes, mowing, etc. The new wetland vegetative density structure will provide some sediment trapping as well as trapping and transformation of nutrients received from surface runoff. Although the wetland will be initially constructed as wet meadow it is expected that through natural succession the area will become scrub-shrub and forested habitat. The mix of wetland, upland and stream communities will make the area attractive to a diverse number of wildlife species.

4) On-site proposals: a) The proposed development plan includes the installation of a storm water detention basin at the northern end of the project site. The basin will provide flood retention and attenuation functions currently provided by the existing on-site wetlands and ensure that the project will not cause flooding to adjacent parcels. Water from the basin will be piped into the existing closed system along Transit Road. Therefore water flow from the site will continue to discharge into Cayuga Creek. b) Two drainage swales will be constructed to maintain existing water flow through the site to the off-site wetlands. This will ensure that the off-site wetlands are not secondarily impacted by the filling of the on-site wetlands through the loss of hydrologic input.

The proposed project will have a minor detrimental impact on the public interest review factors of Conservation of Natural Resources, Fish & Wildlife Values, Wetland Values and General Environmental Concerns due to the loss of on-site wetlands. The combined mitigation package in conjunction with the installation of a detention basin and drainage swales on the project site adequately compensate for the functions and values of the wetlands lost due to project development. The proposed mitigation will result in a minor beneficial impact to these public interest review factors.

Economics/Land Use/Consideration of Property Ownership: The applicant estimates that a full build out facility will generate

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between \$350,000 and \$500,000 in property taxes which is more than 10 times the taxes currently received from these properties. They further estimate state sales taxes at between \$1.5 million and \$3 million annually. Permanent employment is anticipated at 200 full-time and 100 part-time. Total construction is estimated at \$18 million including, as much as \$3 million in payroll during construction.

Flix theater complex, located south of the project site, would likely gain significant exposure from people frequenting the area and potentially increased business from the large retail complex.

Aesthetics: The development of the large scale retail facility will have a negative impact to aesthetics during construction and through the conversion of undeveloped green space to concrete and pavement. The applicant has modified the proposal to include a vegetated buffer between the development and the residential subdivision located directly to the east in an attempt to reduce the visual impact. In addition, movement of vehicles at the rear of the building has been restricted to maintenance vehicles only to address the issue of noise sensitivity.

Historic Properties: In coordination with the NYSOPRHP, it has been determined that the proposed project, including the proposed mitigation will have no effect on historic properties.

Flood Hazards: Several commentors expressed concern for the potential of increased flooding resulting from the loss of on-site wetlands. The applicant proposes to install a stormwater detention basin on-site to prevent an increase in water flow off-site. Stormwater from the basin will be piped directly to the existing stormwater system along Transit Road, which discharges directly into Cayuga Creek to the north. Further, the construction of the vegetated drainage swales from existing off-site detention basins, located to the east of the project, to off-site properties to the north and west are not expected to increase water flow to these adjacent properties. Rather, the channels only serve to maintain existing drainage through the site in order to prevent secondary impacts through loss or reduction of hydrology to off-site wetlands.

Flood Plain: The project area itself is not located within the 100 year flood plain. However, roughly 5 percent of the Steinfeldt mitigation area lies within Plum Bottom Creek 100 year flood plain. No work is proposed within the flood plain but the creation of the wetland complex immediately adjacent will provide flood relief to nearby homes during major storm events.

Water Supply & Conservation/Energy Needs: The proposed project is not expected to affect these public interest review factors.

Navigation/Shore Erosion & Accretion/Food & Fiber Production/Mineral Needs: These public interest review factors are not applicable to the proposed project.

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Recreation: Many comments were received from the general public regarding the recreational value of the project site for wildlife viewing, hiking, hunting and snowmobiling. Since the site is privately owned, the only legal recreational use for the general public is viewing wildlife from adjacent property. As part of the mitigation package, the applicant proposes to preserve a 10.75 acre area adjacent to the project site. This parcel will be deeded to the Town for passive recreational use by the general public. In addition, the applicant proposes to fund the restoration of 12 acres of wetland at the TWMA. This area will be available to the general public for recreational activities.

Water Quality: No appreciable impacts to water quality are expected. The proposed stormwater detention basin will help filter out sediment before the water is discharged into Cayuga Creek. In addition, the incorporation of vegetated drainage swales to convey water to the off-site wetlands will further reduce sediments and toxicants from entering the existing wetland system. Further, the applicant will employ erosion and sediment control devices during construction to prevent impacts to wetlands on the adjacent sites.

Safety: Project design has been modified to ensure the increase in traffic will safely flow through the proposed development and within the Transit Road and William Street complex.

4. Section 404(b)(1) Evaluation: I have evaluated the proposal with regard to the Guidelines promulgated by the U.S. Environmental Protection Agency (40 CFR 230) for the specification of disposal sites for the discharge of dredged or fill material into waters of the United States. I have determined the following with regard to the project (this finding reflects any modifications and special conditions noted above in Item 2 and attached):

a. The discharge represents the least environmentally damaging practicable alternative, and if located in a special aquatic site (40 CFR Part 230, Subpart E) the activity associated with the discharge requires direct access or proximity to, or must be located in, the special aquatic site to fulfill its basic purpose. This finding is based on the following study of practicable alternatives:

The stated project purpose is to provide retail space for two major national retail tenants new to the Lancaster area and several smaller tenants.

No Build Alternative: The applicant has calculated their investment in the project to date at \$5,400,000. In the event the project does not go forward the applicant does not expect that re-sale of the property would recoup their investment.

Alternative Site Locations: The applicant limited their review to sites located near a major arterial roadway in the Town of

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Lancaster. They identified Transit Road as the only major roadway that met their criteria. They further reduced the review area to the section of Transit Road located between the Village of Depew and French Road due to the existence of established retail facilities at these locations.

(a) Alternative Site #1-Benderson Development/Kulback Construction Property: Site #1 is located to the northwest of the proposed project site, to the north of Strasmer Road and west of Transit Road in the Town Of Cheektowaga. The property was discounted due to the potential for greater impacts to the aquatic environment and the size is not sufficient for the proposed project. In addition, the Kulback property is slated for the construction of a senior housing center (See DA#96-976-0199).

(b) Alternative Site #2-Vacant Land North of Subject Property: Site #2 consists of about 85 acres of vacant forest land to the north of the proposed development. A resource review of the area revealed a substantial amount of wetlands that appear to have greater water storage capacity than the proposed parcel. Other factors that made this site not suitable include safety and traffic issues associated with the nearby Depew High School, reduced visibility due to existing businesses along Transit Road and unknown feasibility of property acquisition due to well-established commercial business which occupy the property frontage.

(c) Alternative Site #3-Southwest Corner of Transit and Losson Roads Property: Site #3 is approximately 13 acres in size and was only included because it is vacant commercial land within the applicant's target market. The site is not large enough to support even one anchor store and the site contains jurisdictional wetlands. Further, the current owner has development plans for the parcel.

(d) Alternative Site #4-Flix Parcel: Site #4 is located on the south side of William Street, east of Transit Road. The site only has 8 acres of developable land and was therefore discounted.

On-site Alternatives:

(a) The applicant originally proposed a much larger project prior to submission of the initial application, which would have extended further to the north and west of the current project boundaries. Due to the extent of wetland located to the west and north of the proposed project and to safety and traffic concerns, the applicant reduced the scope while maintaining a financially viable project.

(b) Reducing the square footage and corresponding parking requirements: The proposed buildings are already the smallest size acceptable to the "big box" tenants. The applicant could not initially identify the proposed tenants due to

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confidentiality agreements. However, they indicated that the existing contracts specify a minimum square footage and parking requirements needed for these stores to operate. These minimum requirements are reflected in the proposed project design. The primary tenant was later identified as Wal-Mart and the second tenant was noted to be a large nationwide home improvement chain.

(c) Reducing the project to one anchor tenant: This option could reduce wetland impacts to approximately 3 acres provided the store was placed in the southern portion of the parcel. However, the applicant indicated this option was not financially feasible since a large portion of the site development costs were to be recouped from the second anchor tenant. They indicated that they would not be able to recoup the initial investment, considering annual taxes, insurance and maintenance of not only the developed parcel but on the undeveloped parcel as well.

(d) Develop parcel with smaller tenants: Smaller tenants pay higher rent compared to large anchor tenants. Therefore, the project size could be reduced resulting in reduction in wetland impacts while maintaining financial viability. However, there was little interest by the smaller tenants and multiple small store vacancies in the area clearly demonstrate a lack of need for this type of development.

b. The activity will not violate applicable State water quality standards or effluent standards promulgated under Section 307 of the Clean Water Act. The activity will not jeopardize the existence of a Federally listed threatened or endangered species or its habitat, nor will it violate the requirements of any Federally designated marine sanctuary.

c. The activity will not cause or contribute to significant degradation of waters of the United States, including adverse effects on human health, life stages of aquatic life and other wildlife dependent on aquatic ecosystems, ecosystem diversity, productivity and stability, and recreational, aesthetic, and economic values.

d. Appropriate and practicable steps have been taken to minimize the potential adverse impact of the discharge on the aquatic ecosystem. These actions include the following:

The applicant has provided documentation to support their assertion that they cannot feasibly reduce aquatic impacts on the project site. However, they have modified the proposal to ensure there are no secondary impacts to adjacent off-site wetlands as a result of the project. This includes the addition of vegetated drainage swales to maintain hydrology to off-site wetlands and the use of sediment and erosion control devices. Further, the proposed mitigation adequately compensates for the adverse impacts of the discharge on the aquatic environment (7.54 acres of wetland impact versus 7.14 acres wetland creation, 12 acres wetland restoration, 5.64 acres of existing wetland preservation

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and 10.97 acres of upland preservation).

e. There is minimal potential for the discharge to have any significant short-term or long-term effects on the physical substrate at the disposal site; on water current patterns, water circulation, and normal water fluctuations; on the kinds and concentrations of suspended particulates in the vicinity of the disposal site; on the level and availability of contaminants; on the structure and function of the aquatic ecosystem and organisms, both individually and cumulatively; and, on the disposal site. There is further a minimal potential for the discharge to have any significant short-term or long-term cumulative or secondary effects on the aquatic ecosystem.

5. I have reviewed the administrative record for this permit application and determined the following with regard to the proposed activity subject to any modifications and special conditions noted above in Item 2 and attached:

a. The act of granting a permit for this work does not constitute a major Federal action significantly affecting the quality of the human environment. A Finding of No Significant Impact is appropriate for this project. Accordingly, an Environmental Impact Statement is not required.

b. I have determined that the discharges of dredged or fill material comply with the USEPA Guidelines at 40 CFR 230 with the inclusion of appropriate conditions.

c. I have carefully considered and balanced all of the beneficial and detrimental effects relating to the final proposal and find that it will not have a significant individual or cumulative impact on the environment nor will it contravene the public interest. There are no unresolved conflicts as to resource use.

6. The proposal has been analyzed for conformity pursuant to regulations implementing Section 176(c) of the Clean Air Act. It has been determined that the activities proposed under this permit will not exceed *de minimus* levels of direct emissions of a criteria pollutant or its precursors and are exempt by 40 CFR Part 93.153. Any later indirect emissions are generally not within the Corps continuing program responsibility and generally cannot be practicably controlled by the Corps. For these reasons a conformity finding is not required for this action.

Prepared By: Bridget E. Brown Date: December 31, 2002
Bridget E. Brown
Biologist

Reviewed By: Arthur K. Marks Date: JAN 7, 2003
ARTHUR K. MARKS
Chief, AES-NY

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7. In view of the above findings, I have decided to issue a Department of the Army permit for this work and to include where appropriate certain conditions which will safeguard the environment. This decision is not contrary to any state or local decisions as specified in 33 CFR 320.4(j)(2) and (4). Special Conditions to which the project will be subject are attached to this document.

Approved By:



Date:

1/7/03

Jeffrey M. Hall
Lieutenant Colonel, Corps of Engineers
District Engineer