

**SOUND AGRICULTURAL PRACTICE
Opinion Number 18-1**

SUBJECT: Request for an Opinion Pursuant to Section 308 of the Agriculture and Markets Law as to the soundness of the use of land for the production of field crops in relation to stormwater drainage within the Town of Gorham, Ontario County, New York.

REQUESTOR: Josh Watkins
WelBlest Farms
3274 Lake to Lake Road
Stanley, New York 14561

Preliminary Statement

On July 26, 2017, the Department received a request from Josh Watkins, owner of WelBlest Farms, for an Opinion pursuant to Section 308 of the Agriculture and Markets Law concerning the soundness of agricultural practices related to stormwater runoff from a field used to grow agricultural crops.

The Department conducted a sound agricultural practice review concerning Josh Watkins' current agricultural practices employed in relation to the available drainage infrastructure, and has concluded that the agricultural practices conducted on the affected parcels do not contribute to the drainage issues experienced.

The following information and findings have been considered in reaching this Opinion.

Information Considered in Support of the Opinion

THE FARM

1. WelBlest Farms consists of approximately 152.4 acres. The farm is located in Ontario County Agricultural District No. 6, and is subject to an agricultural assessment. County real property records maintained by Ontario County Online Resources (OnCor) indicate that the subject parcel owned by Josh Watkins (Tax Map ID No. 129.00-1-23.120) consists of about 85.9 acres and is improved by actively used barns, silos, and a machine shed. Seventy-one of the 85.9 acres of land are used to produce crops.¹ This parcel consists of his residence, yard and cropland on approximately 2.0 acres of land. From 2014 to the present, Josh Watkins has planted various types of crops on the 85.9-acre parcel.

¹ In addition to crop production, the farm also raises approximately 260 replacement heifers annually. However, the water used for the heifer raising facility does not affect the complainant neighbor's property, and is therefore outside the scope of this review.

2. The two parcels in question, one owned by the complainant neighbor David Watkins and the other owned by Josh Watkins, are the result of a subdivision by previous owners Robert and Gertrude Watkins. From the subdivided parcel, David Watkins acquired parcel 129.00-1-23.300 (2.5 acres improved by a residence, driveway and a barn) in 2002. Josh Watkins acquired ownership of the farm and parcel 129.00-1-23.120 in 2016, after Gertrude Watkins deeded it to him.
3. Information received by the Department indicates the farm has been used for the production of crops for over 34 years. By letter dated September 8, 2017, Fred Lightfoote, now Supervisor of the Town of Gorham, notified the Department that his family rented and worked the farm for 30 years prior to 2014, and utilized the same methods Josh Watkins now uses on the farm. Josh Watkins also notes that, during the transition period from the land being rented by the Lightfoote family to his ownership in 2016, he planted and harvested crops on the land in partnership with David Fox, a neighboring farmer.
4. Dr. Robert Somers, Manager of the Department's Farmland Protection Program, visited the farm on August 18, 2017 and viewed the land owned by David Watkins and Josh Watkins, as well as surrounding properties. At the time of Dr. Somers' visit, the farm parcel was planted to corn. As depicted in the current map data published by Ontario County (**Appendix A**), the Josh Watkins parcel lies adjacent to the 2.5-acre parcel owned by David Watkins and surrounds his rectangular shaped parcel on three sides. David Watkins' southern boundary is bounded by Lake to Lake Road.
5. Josh Watkins also developed a nutrient management plan for the farm in consultation with the USDA Natural Resources Conservation Service. Josh Watkins indicated that he was not currently participating in the Agricultural Environmental Management (AEM) program.

COMMENTS FROM ADJOINING LANDOWNERS

6. Dr. Somers sent a letter, dated August 29, 2017, to the Town of Gorham, Josh Watkins and 13 landowners that surround the 85.9-acre parcel (Tax Parcel ID 129.00-1-23.100). The letter stated that Josh Watkins requested a Sound Agricultural Practice Opinion pursuant to Section 308 of the Agriculture and Markets Law, summarized the issues being examined under the review, and invited them to submit comments on or before September 29, 2017.
7. On September 8, 2017, the Department received a letter from Town of Gorham Supervisor Fred Lightfoote. Supervisor Lightfoote stated that he is familiar with the agricultural practices applied by Josh Watkins and acknowledged that his family rented and worked the farm for 30 years prior to 2014. He stated that, in his opinion, Josh Watkins has done nothing wrong. Supervisor Lightfoote explained that Josh

utilizes the same farming methods that his family used in the years prior to Josh working the farm. He also cited the epic nature of recent storms in the area, referencing a storm event occurring just prior to the complaint brought 3.7 inches of rain fall over a 20-minute period. Supervisor Lightfoote opined that the "...true cause [of] the damage suffered by David Watkins was his installation of piping and subsequent filling of the swale directly behind his garage/barn, which reduced the ability of rain water to flow away from David Watkins' buildings."

8. In October 2017, David Watkins' attorney sought and was provided additional time to submit information. On March 1, 2018, the Department received an Order to Show Cause and a Memorandum of Law in Support of Preliminary Injunction presented against Josh Watkins. No further information or documentation has been submitted on behalf of David Watkins.
9. In a letter dated January 8, 2018, Gertrude Watkins indicates that David Watkins entered the property now owned by Josh Watkins without permission to fill the ditch that changed the drainage patterns, and that she has been unable to communicate with David Watkins since her husband Robert Watkins passed away on May 19, 2012. Ms. Watkins also confirmed that neither she or her late husband performed any tiling work in the fields.
10. No correspondence was received from the 13 landowners that were invited to submit comments to the Department.
11. According to Josh Watkins, and information from Town Supervisor Lightfoote, he has not been cited for a violation of any local laws.

DRAINAGE AND STORMWATER ISSUES

12. By letter² to Josh Watkins dated July 20, 2017, David Watkins' attorney contends that "...water continuously flows..." from Josh Watkins' property onto property owned by David Watkins. He alleges that water pools around structures on his client's property and the water has damaged a barn, constructed on the property in 2015. The correspondence demanded that Josh Watkins hire a licensed engineer and develop a plan that diverts the water away from his client's property.

Existing Infrastructure Prior to Ownership

13. Before the subdivision of the property, Robert Watkins constructed an open drainage ditch, which carried surface and subsurface water from the middle of the farmed

² The correspondence also indicated an existing boundary dispute, which is outside the scope of this review as these issues do not involve agricultural practices.

parcel to several stormwater ponds on land now owned jointly by Josh Watkins and Gertrude Watkins. The open drainage ditch is depicted in a 2006 Google Earth image of the properties (**Appendix B**). Furthermore, as depicted in the attached 1995 aerial image, the diversion structure and ditching existed and was in use when the image was acquired over 22 years ago (**Appendix C**). This ditch was constructed and maintained by Robert and Gertrude Watkins when they owned both properties.

14. In addition, Josh Watkins indicated that tile had been installed on the farm prior to his acquiring ownership. He stated that he replaced two tile ends, but did not know the age of the existing tile or its spacing. Since his ownership, however, no tile drainage has been installed on the subject agricultural parcel. Josh Watkins also noted that he did not alter any of the existing drainage infrastructure, but opined that David Watkins caused the drainage ditch to be filled.
15. On January 17, 2018, Josh Watkins indicated that, in a discussion with Supervisor Lightfoote, Mr. Lightfoote stated that his family did not install the existing tile on the property. By letter received by the Department on September 8, 2017, Supervisor Lightfoote also noted that they farmed the property 30 years prior to Josh Watkins' ownership of the parcel. Based on these statements, the existing tile infrastructure has been in place for over 30 years.

Modifications to the Existing Drainage Infrastructure

16. Before subdivision, the drainage ditch managed the flow of water from the parcel. Review of an aerial image dated April 15, 1995 shows the farm when it was used as one property. At this time, the land is shown in production and the drainage ditch is present. In a historical aerial image dated September 24, 2013 (**Appendix D**), the drainage ditch appears to have been filled in. That diversion ditch, before being filled in, pushed the water behind the house, joined the now filled in water ditch that runs onto land now owned by Josh Watkins, and moved the water from west to east across David Watkins' property to the ponds on Josh Watkins' property. An image dated July 15, 2015 (**Appendix E**) depicts the construction of the barn owned by David Watkins. The close-up of this 2015 image shows that fill was brought in to elevate the barn being constructed, and the diversion ditch to the west of the house has been removed.
17. At the request of Josh Watkins, Tucker Kautz, Water Resources Technician for the Ontario County Soil and Water Conservation District, examined the site to analyze the drainage issue. Mr. Kautz is a Certified Crop Advisor (CCA) and performs assessments of drainage and water infrastructure for the Soil and Water Conservation District.

18. Mr. Kautz summarized his findings in a September 8, 2017 e-mail to Dr. Somers. Mr. Kautz stated that he reviewed historical air imagery/topographical data and compared his observations of the site from Lake to Lake Road. He confirmed that both the property that Josh Watkins farms, and the property now owned by David Watkins, were owned/worked by the same landowner, Gertrude Watkins. During that time, there was a diversion ditch that started on the upslope of the agricultural land, ran through both properties now owned by Josh and David Watkins, and outletted into the pond to the east on land jointly owned by Josh Watkins and Gertrude Watkins. Based on the physical observations of the site in conjunction with the available historical aerial imagery, Mr. Kautz concluded that once the property was divided, the ditch was subsequently filled in, and an underground pipe was installed in an attempt to move the surface water to the ponds.
19. Mr. Kautz further stated that, based on the historical aerial imagery and his observations, the pipe currently installed cannot handle the volume of surface water that comes off the upslope farm fields during larger rain events, as compared to the pre-existing open ditch system. While some of the water entering the upslope ditch is from artificial tile drainage, the diversion and tile outlet were in place well before the property was divided and David Watkins acquired ownership. Secondly, there is a slight swale that runs west to east, parallel to Lake to Lake Rd, that also runs into the property owned by David Watkins. Mr. Kautz indicated that, based on his observations, the diversion appeared to be filled in. A parking area as well as a barn/shop was then built directly in the area where the water runs and pools, exacerbating the stormwater issue.
20. Mr. Kautz also indicated that three images of the area, as acquired through OnCor (<http://www.co.ontario.ny.us/714/OnCor>), taken over a 9-year period (2006, 2009 and 2014), provide a pictorial timeline that shows the demise of the existing diversion ditch (**Appendix F**). Furthermore, he stated that the image attached hereto as Appendix E shows the barn/shop being constructed directly at the location where the two prior drainage systems intersected.
21. In addition, Mr. Kautz submitted a Light Detection and Ranging (LiDAR) map of the two primary "natural" flow paths for surface water in the study area (**Appendix G**). LiDAR data is used to examine natural and manmade features for a number of purposes, including hydrographic surveying. Light pulses measure the distance between the ground and the data collector to create a 3-dimensional file of the shape of the earth and its surface characteristics. (National Ocean Service, National Oceanic and Atmospheric Administration, <https://oceanservice.noaa.gov/facts/lidar>).
 - a. The LiDAR image shows the flow of water traveling west to east and parallel to Lake to Lake Road within the road right-of-way. Just before reaching the home

owned by David Watkins, the drainage way changes course and carries the water behind his house, intersects with the filled-in drainage ditch that runs from the agricultural field, south to David Watkins house, and then travels east to the two ponds. This image clearly demonstrates that prior to David Watkins' ownership of the property, the natural/man-made drainage path brought water towards and behind his house and eventually to the ponds on Josh and Gertrude Watkins' property.

- b. In the spring of 2006, Airborne 1 Corporation, under contract to Pictometry International Corporation, acquired LiDAR imagery for Monroe and Ontario Counties. The LiDAR data was processed and an accuracy assessment was performed by the Institute for the Application of Geospatial Technology, located in Auburn, New York. The accuracy assessment determined that the dataset met the Federal Emergency Management Agency's (FEMA) specifications for detailed flood studies. (www.co.ontario.ny.us/DocumentCenter/View/7520).
22. Before subdivision of the properties, it appears the drainage system collected water from the agricultural field north of David Watkins' property line and the road ditch along a portion of Lake to Lake Road. The water was then carried to a point where David Watkins constructed a garage, and then moved easterly in a man-made ditch to several small ponds located on land now owned by Josh Watkins and Gertrude Watkins. Josh Watkins also believes that David Watkins filled in the diversion ditch, constructed a garage on top of an area where water pooled, and filled in a portion of the drainage way with 12-inch plastic conveyance pipe and soil at the time David Watkins built the barn. Josh Watkins stated, however, that he is not certain about what portions of the altered property contain the plastic conveyance pipe. A portion of the pipe is visible where it dumps water into a pond on his property.
 23. Mr. Kautz concluded that while there are artificial and natural drainage impacts to the David Watkins property, the man-made ditch and drainage system was in place prior to David Watkins' ownership of the property, during a time when both properties were owned by Robert and Gertrude Watkins. The same conclusion was also reached by Dr. Somers after visually examining the current and modified drainage system and examining the LiDAR map. Dr. Somers also concluded that modifications to a well-established drainage system and the effect of stormwater flow from an intense storm event contribute to the difficulties experienced by David Watkins.

Findings

Based upon the facts, information and circumstances described above, and in consultation with the Advisory Council on Agriculture, the New York State Department of Environmental Conservation, the USDA Natural Resources Conservation Service, and

the Sound Agricultural Practice Guidelines³ by which agricultural practices are evaluated, I find the following:

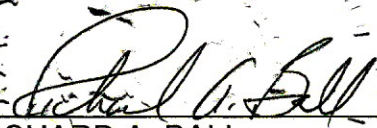
1. The Department has found no evidence or received other information indicating that Josh Watkins, or WelBlest Farms, is in violation of federal, state or local law resulting from the current use of its land for agricultural purposes, or the current drainage practices employed.
2. David Watkins alleges that the current agricultural use of the land has caused flood damage on his property. However, the Department has found no evidence of any specific agricultural or water management practices employed by Josh Watkins causally related to the alleged property damage off the farm.
3. The current use of the land for crop production has achieved results in a reasonable and supportable way. Information received by the Department indicates that the drainage issues result from alteration of the pre-existing drainage ditch, which was also exacerbated by an intense rainfall event that dropped 3.7 inches of rain over 20 minutes. The drainage patterns employed before the drainage system was altered had been in place for decades, and had supported similar agricultural operations on the parcel. The continued use of the land adjacent to property owned by David Watkins for the production of crops has not changed for over 30 years. There appeared to be no issues with flooding prior to the alterations. A recent change in storm patterns may have also have contributed to the damage complained of.
4. It is necessary for WelBlest Farms to continue to use the long-established drainage system to move water from his crop field to the water retention ponds on his property so that he can continue to effectively grow crops on his field. The drainage system that had been in place for decades supported crop production on the parcel for decades before the infrastructure was modified. Further modifications would disrupt the farm's ability to continue to operate, particularly given the uncertainty surrounding the extent and location of the recent modifications.

³ On November 1, 1993 the NYS Advisory Council on Agriculture published its report entitled *Protecting the Right of New York Farmers to Engage in Sound Agricultural Practices*. The Council developed guidelines to assist the Commissioner of the Department of Agriculture and Markets in determining what is sound pursuant to Section 308 of the Agriculture and Markets Law. The Guidelines state that the practice 1) should be legal; 2) should not cause bodily harm or property damage off the farm; 3) should achieve the results intended in a reasonable and supportable way; and 4) should be necessary. The sound agricultural practices guidelines recommended by the Advisory Council on Agriculture are given significant weight in assessing agricultural practices.

Conclusion

Based on the information and findings set forth above and in accordance with Section 308 of the Agriculture and Markets Law, I conclude that, from a water management perspective, the use of land for agricultural production and the movement of water from the cultivated fields, as described above, is sound.

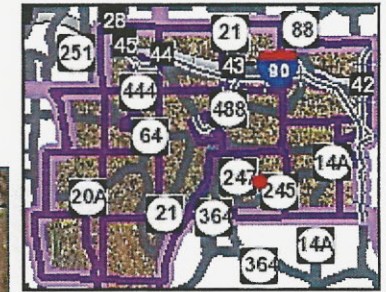
4/27/18
Date



RICHARD A. BALL
Commissioner of Agriculture and
Markets



Josh Watkins Property - Appendix A



Legend

- Thruway Exits
- Tax Parcels
- Streets
 - Interstate
 - State or US Routes
 - County Roads
 - Local Public Roads
 - Private Roads
- Railroads
- Streams
- Municipal Boundaries
- Finger Lakes Region
- Water Bodies

Report Created: 2/21/2018

Notes

800.0 0 400.00 800.0 Feet

11/24/2006

APPENDIX B
June 4, 2006 Image from Google Earth
Drainage Ditch on Land Owned by
David Watkins

Lake-to-Lake Rd

Image USDA Farm Service Agency

Imagery Date: 6/4/2006 42°48'41.72" N 77°10'20.36" W ele



APPENDIX C
April 15, 1995 Image from Google Earth
Drainage Ditch on Land Owned by
David Watkins

Lake-to-Lake Rd

Image U.S. Geological Survey

Imagery Date: 4/15/1995 42°48'41.72" N 77°10'20.36" W ele



9/24/2013

APPENDIX D

September 24, 2013 Image from Google Earth, Drainage Ditch on Land Owned by David Watkins has Been Filled In



7/15/2015

APPENDIX E
July 15, 2015 Image from Google Earth
Barn Construction - David Watkins
Drainage Ditch has Been Filled In



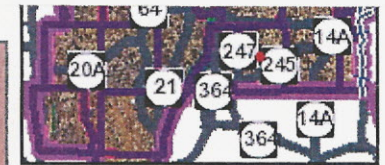
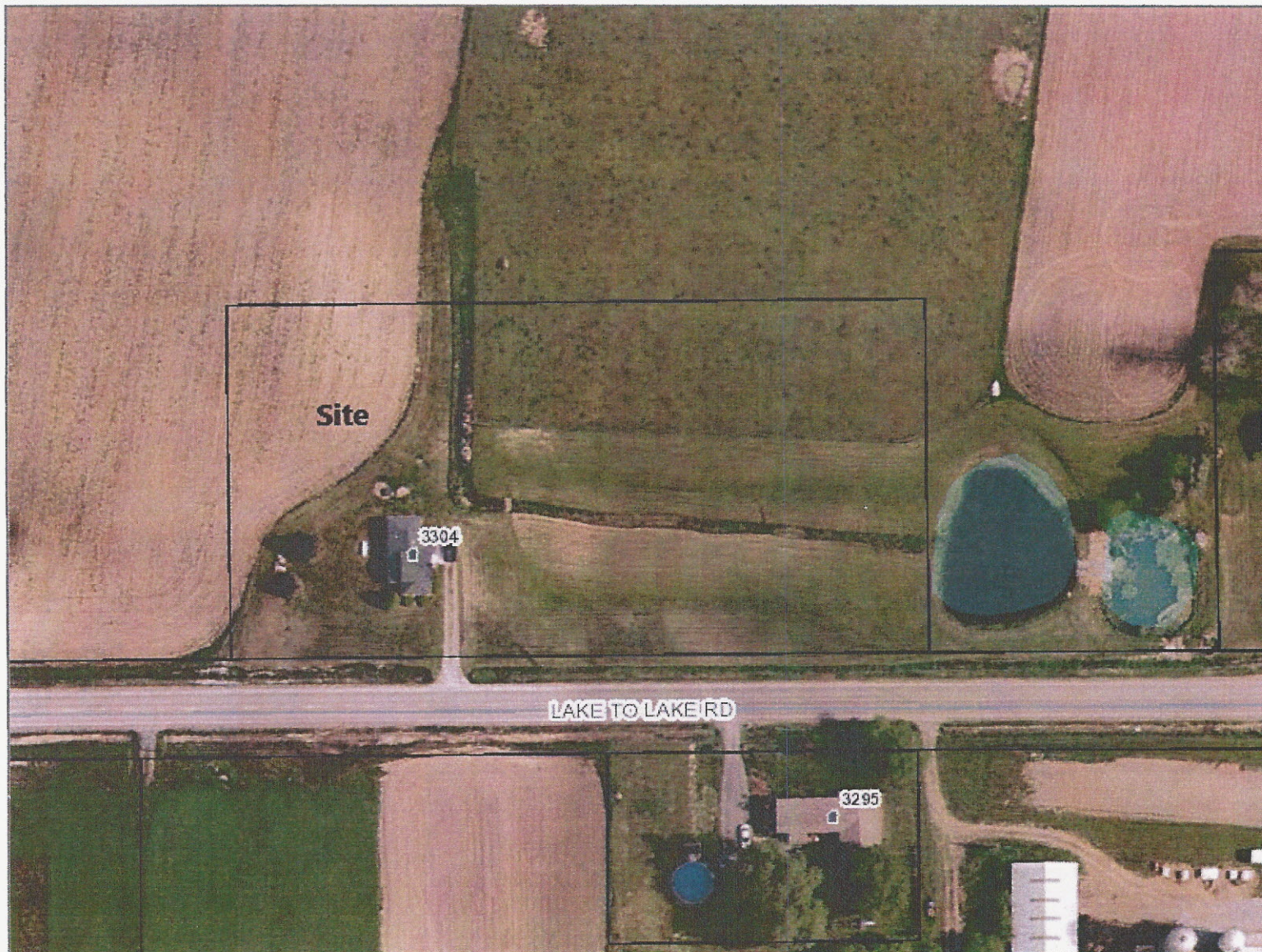
Imagery Date: 7/15/2015 -42°48'41.72" N 77°10'20.36" W



3304 Lake to Lake Rd, Gorham - 2006

APPENDIX F

Ontario County Property Images
2006, 2009, 2014



Legend

- Address Points
- Thruway Exits
- Tax Parcels
- Streets
 - Interstate
 - State or US Routes
 - County Roads
 - Local Public Roads
 - Private Roads
- + Railroads
- Streams
- Municipal Boundaries
- Finger Lakes Region
- Water Bodies

Report Created: 3/05/2018

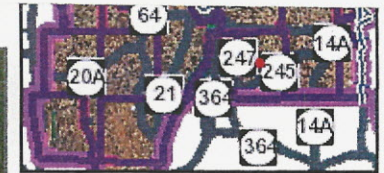
Notes

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3304 Lake to Lake Rd, Gorham - 2009

APPENDIX F Ontario County Property Images 2006, 2009, 2014



Legend

- Address Points
- Thruway Exits
- Tax Parcels
- Streets
 - Interstate
 - State or US Routes
 - County Roads
 - Local Public Roads
 - Private Roads
- Railroads
- Streams
- Municipal Boundaries
- Finger Lakes Region
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Report Created: 3/05/2018

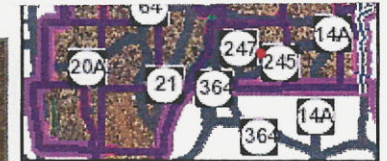
Notes

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3304 Lake to Lake Rd, Gorham - 2014

APPENDIX F Ontario County Property Images 2006, 2009, 2014



Legend

- Address Points
- Thruway Exits
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Notes

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Welblest Farm - Watershed

APPENDIX G

LiDAR data

Natural Flow Paths for Surface Water

National Ocean Service, NOAA

