

Appendix D4

Threatened and Endangered Species



United States Department of the Interior



FISH AND WILDLIFE SERVICE
New York Ecological Services Field Office
3817 Luker Road
Cortland, NY 13045-9385
Phone: (607) 753-9334 Fax: (607) 753-9699
Email Address: fw5es_nyfo@fws.gov

In Reply Refer To:
Project Code: 2023-0102490
Project Name: Kensington Expressway

July 10, 2023

Subject: List of threatened and endangered species that may occur in your proposed project location or may be affected by your proposed project

To Whom It May Concern:

The enclosed species list identifies threatened, endangered, proposed and candidate species, as well as proposed and final designated critical habitat, that may occur within the boundary of your proposed project and/or may be affected by your proposed project. The species list fulfills the requirements of the U.S. Fish and Wildlife Service (Service) under section 7(c) of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*).

New information based on updated surveys, changes in the abundance and distribution of species, changed habitat conditions, or other factors could change this list. Please feel free to contact us if you need more current information or assistance regarding the potential impacts to federally proposed, listed, and candidate species and federally designated and proposed critical habitat. Please note that under 50 CFR 402.12(e) of the regulations implementing section 7 of the Act, the accuracy of this species list should be verified after 90 days. This verification can be completed formally or informally as desired. The Service recommends that verification be completed by visiting the ECOS-IPaC website at regular intervals during project planning and implementation for updates to species lists and information. An updated list may be requested through the ECOS-IPaC system by completing the same process used to receive the enclosed list.

The purpose of the Act is to provide a means whereby threatened and endangered species and the ecosystems upon which they depend may be conserved. Under sections 7(a)(1) and 7(a)(2) of the Act and its implementing regulations (50 CFR 402 *et seq.*), Federal agencies are required to utilize their authorities to carry out programs for the conservation of threatened and endangered species and to determine whether projects may affect threatened and endangered species and/or designated critical habitat.

A Biological Assessment is required for construction projects (or other undertakings having similar physical impacts) that are major Federal actions significantly affecting the quality of the human environment as defined in the National Environmental Policy Act (42 U.S.C. 4332(2)

(c)). For projects other than major construction activities, the Service suggests that a biological evaluation similar to a Biological Assessment be prepared to determine whether the project may affect listed or proposed species and/or designated or proposed critical habitat. Recommended contents of a Biological Assessment are described at 50 CFR 402.12.

If a Federal agency determines, based on the Biological Assessment or biological evaluation, that listed species and/or designated critical habitat may be affected by the proposed project, the agency is required to consult with the Service pursuant to 50 CFR 402. In addition, the Service recommends that candidate species, proposed species and proposed critical habitat be addressed within the consultation. More information on the regulations and procedures for section 7 consultation, including the role of permit or license applicants, can be found in the "Endangered Species Consultation Handbook" at:

<http://www.fws.gov/endangered/esa-library/pdf/TOC-GLOS.PDF>

Migratory Birds: In addition to responsibilities to protect threatened and endangered species under the Endangered Species Act (ESA), there are additional responsibilities under the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (BGEPA) to protect native birds from project-related impacts. Any activity, intentional or unintentional, resulting in take of migratory birds, including eagles, is prohibited unless otherwise permitted by the U.S. Fish and Wildlife Service (50 C.F.R. Sec. 10.12 and 16 U.S.C. Sec. 668(a)). For more information regarding these Acts see <https://www.fws.gov/birds/policies-and-regulations.php>.

The MBTA has no provision for allowing take of migratory birds that may be unintentionally killed or injured by otherwise lawful activities. It is the responsibility of the project proponent to comply with these Acts by identifying potential impacts to migratory birds and eagles within applicable NEPA documents (when there is a federal nexus) or a Bird/Eagle Conservation Plan (when there is no federal nexus). Proponents should implement conservation measures to avoid or minimize the production of project-related stressors or minimize the exposure of birds and their resources to the project-related stressors. For more information on avian stressors and recommended conservation measures see <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php>.

In addition to MBTA and BGEPA, Executive Order 13186: *Responsibilities of Federal Agencies to Protect Migratory Birds*, obligates all Federal agencies that engage in or authorize activities that might affect migratory birds, to minimize those effects and encourage conservation measures that will improve bird populations. Executive Order 13186 provides for the protection of both migratory birds and migratory bird habitat. For information regarding the implementation of Executive Order 13186, please visit <https://www.fws.gov/birds/policies-and-regulations/executive-orders/e0-13186.php>.

We appreciate your concern for threatened and endangered species. The Service encourages Federal agencies to include conservation of threatened and endangered species into their project planning to further the purposes of the Act. **Please include the Consultation Code in the header of this letter with any request for consultation or correspondence about your project that you submit to our office.**

Attachment(s):

- Official Species List

OFFICIAL SPECIES LIST

This list is provided pursuant to Section 7 of the Endangered Species Act, and fulfills the requirement for Federal agencies to "request of the Secretary of the Interior information whether any species which is listed or proposed to be listed may be present in the area of a proposed action".

This species list is provided by:

New York Ecological Services Field Office

3817 Luker Road

Cortland, NY 13045-9385

(607) 753-9334

PROJECT SUMMARY

Project Code: 2023-0102490
Project Name: Kensington Expressway
Project Type: Road/Hwy - Maintenance/Modification
Project Description: NYS Route 33, Kensington Expressway Project PIN 5512.52
Project Location:

The approximate location of the project can be viewed in Google Maps: <https://www.google.com/maps/@42.9095322,-78.84564254011244,14z>



Counties: Erie County, New York

ENDANGERED SPECIES ACT SPECIES

There is a total of 1 threatened, endangered, or candidate species on this species list.

Species on this list should be considered in an effects analysis for your project and could include species that exist in another geographic area. For example, certain fish may appear on the species list because a project could affect downstream species.

IPaC does not display listed species or critical habitats under the sole jurisdiction of NOAA Fisheries¹, as USFWS does not have the authority to speak on behalf of NOAA and the Department of Commerce.

See the "Critical habitats" section below for those critical habitats that lie wholly or partially within your project area under this office's jurisdiction. Please contact the designated FWS office if you have questions.

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1. [NOAA Fisheries](#), also known as the National Marine Fisheries Service (NMFS), is an office of the National Oceanic and Atmospheric Administration within the Department of Commerce.

INSECTS

NAME	STATUS
Monarch Butterfly <i>Danaus plexippus</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/9743	Candidate

CRITICAL HABITATS

THERE ARE NO CRITICAL HABITATS WITHIN YOUR PROJECT AREA UNDER THIS OFFICE'S JURISDICTION.

YOU ARE STILL REQUIRED TO DETERMINE IF YOUR PROJECT(S) MAY HAVE EFFECTS ON ALL ABOVE LISTED SPECIES.

IPAC USER CONTACT INFORMATION

Agency: New York State Department of Transportation

Name: Bonnie Lottes

Address: 100 Seneca Street

City: Buffalo

State: NY

Zip: 14203

Email: bonnie.lottes@dot.ny.gov

Phone: 7168473125

LEAD AGENCY CONTACT INFORMATION

Lead Agency: Federal Highway Administration



August 25, 2023

David Denk
Regional Permit Administrator
NYS Department of Environmental Conservation
Region 9
700 Delaware Avenue
Buffalo, NY 14209

RE: Threatened and Endangered Species Determination
New York State Route 33, Kensington Expressway Project
Erie County, New York
PIN 5512.52

Dear David Denk:

This letter documents the New York State Department of Transportation (NYSDOT) threatened and endangered species determination for the New York State Route 33, Kensington Expressway Project (Project). The Project location includes the section of NYS Route 33 (Kensington Expressway) and Humboldt Parkway between Best Street and Sidney Street in the City of Buffalo, Erie County, New York. The Project also includes various City of Buffalo streets adjacent to the Kensington Expressway and Humboldt Parkway in the area generally bounded by High Street, Genesee Street, Northland Avenue, Fillmore Avenue, and Wohlers Avenue. Please review the enclosed Project Location Map and Study Area.

Project Description

The purpose of the Project is to reconnect the community surrounding the defined transportation corridor and improve the compatibility of the corridor with the adjacent land uses, while addressing the geometric, infrastructure, and multi-modal needs within the corridor in its current location. The transportation corridor is defined as NYS Route 33 (Kensington Expressway) and Humboldt Parkway between Best Street and Sidney Street.

The following objectives have been established to further refine the Project purpose:

- Reconnect the surrounding community by creating continuous greenspace to enhance the visual and aesthetic environment of the transportation corridor;
- Maintain the vehicular capacity of the existing transportation corridor;

- Improve vehicular, pedestrian, and bicycle mobility and access in the surrounding community by implementing Complete Street roadway design features; and
- Address identified geometric and infrastructure deficiencies within the transportation corridor.

Federal Protected Species

The United States Fish and Wildlife Service (USFWS) Information for Planning and Consultation System (IPaC) website was consulted on July 10, 2023 to obtain a Project-specific species list of federal protected threatened, endangered, or proposed plant and animal species. No federal endangered or threatened species or critical habitats were identified in IPaC as having the potential to occur in the Study Area. One federal candidate species (Monarch butterfly) was identified by IPaC (see description below). Please refer to the enclosed IPaC Official Species List for the Project.

New York State Protected Species

The New York Natural Heritage Program (NYNHP) database was consulted on July 27, 2023 to obtain a Project-specific species list of New York State protected threatened, endangered, or proposed plant and animal species within a 1.5-mile radius of the Study Area per the NYSDOT Transportation Environmental Manual. There were no threatened or endangered species identified by the NYNHP database as known to occur or as having the potential to occur within the Study Area. Three species were identified in the NYNHP database as known to occur or having the potential to occur within the 1.5-mile check zone.

The federal candidate species identified by IPaC is described below and the three state listed species that were identified in the NYNHP database, their likelihood of being affected by the Project, and the NYSDOT's effect determination for each species are discussed below.

Monarch Butterfly (Danaus plexippus)

Monarch butterfly became a candidate for federal listing by the USFWS in December 2020, and it currently does not have any protection under the Federal Endangered Species Act (ESA), Section 7.

Peregrine Falcon (Falco peregrinus)

Peregrine falcon is New York State listed as endangered. Areas within and adjacent to the Project include residential, institutional, educational, commercial, and transportation uses. Based on the lack of essential habitat preferred by peregrine falcon within, and adjacent to, the Project and pursuant to 6 NYCRR Part 182, the NYSDOT has made a “**no take, no habitat**” determination for this species. Therefore, this species is not subject to regulation under this part.

Golden Dock (Rumex fueginus)

Golden dock is New York State listed as endangered. Areas within and adjacent to the Project include residential, institutional, educational, commercial, and transportation uses. According to the NYNHP database, the last known record of this

species was documented in 1898 in the City of Buffalo. American golden dock is considered a wetland plant and is typically found along the edges of ponds and creeks. No wetlands or surface waters would be impacted by the Project as the Scajaquada Creek is piped underground within the Study Area. Therefore, the likelihood of this species occurring within the highly disturbed transportation corridor is improbable. In addition, a walkover of the Study Area was conducted in May 2023, and this species was not observed at that time. Based on the lack of essential habitat preferred by American golden dock within, and adjacent to, the Project, the lack of recent occurrence or precise location data documented in the NYNHP database, and pursuant to 6 NYCRR Part 182, the NYSDOT has made a **“not likely to result in the take”** or taking of the species. Therefore, this species is not subject to regulation under this part.

Canada Bluets (*Houstonia canadensis*)

Canada bluets is New York State listed as threatened. Areas within and adjacent to the Project include residential, institutional, educational, commercial, and transportation uses. According to the NYNHP database, an undated specimen was collected in the City of Buffalo. Canada bluets is typically found on pond shores. No wetlands or surface waters would be impacted by the Project as the Scajaquada Creek is piped underground within the Study Area. Therefore, the likelihood of this species occurring within the highly disturbed transportation corridor is improbable. In addition, a walkover of the Study Area was conducted in May 2023, and this species was not observed at that time. Based on the lack of essential habitat preferred by Canada bluets within, and adjacent to, the Project, the lack of recent occurrence or precise location data documented in the NYNHP database, and pursuant to 6 NYCRR Part 182, the NYSDOT has made a **“not likely to result in the take”** or taking of the species. Therefore, this species is not subject to regulation under this part.

The Project is not likely to result in a take or taking of the above listed species; therefore, an Incidental Take Permit pursuant to 6 NYCRR Part 182 is not required. The NYSDOT requests the NYSDEC’s concurrence with its determinations. The monarch butterfly is a candidate species and does not have any protection under the Federal ESA, Section 7. Consultation or conference with the FHWA or USFWS is not required for the monarch butterfly at this time.

If you have any questions or would like to discuss the Project in more detail, please contact Jessica Prockup at (518) 417-6642 or Jessica.Prockup@dot.ny.gov.

Sincerely,

Timothy Simon

Tim Simon

Environmental Specialist, Environmental Impact Statements & Special Projects Bureau

TS/bl

Encl: Project Location Map
Study Area
IPaC Official Species List

cc: M. Seymour, FHWA NY Division (w/ encl.)
S. Vaidya, NYSDOT R-5 (w/ encl.)
C. Leslie, NYSDOT MO (w/ encl.)
J. Prockup, NYSDOT MO (w/ encl.)

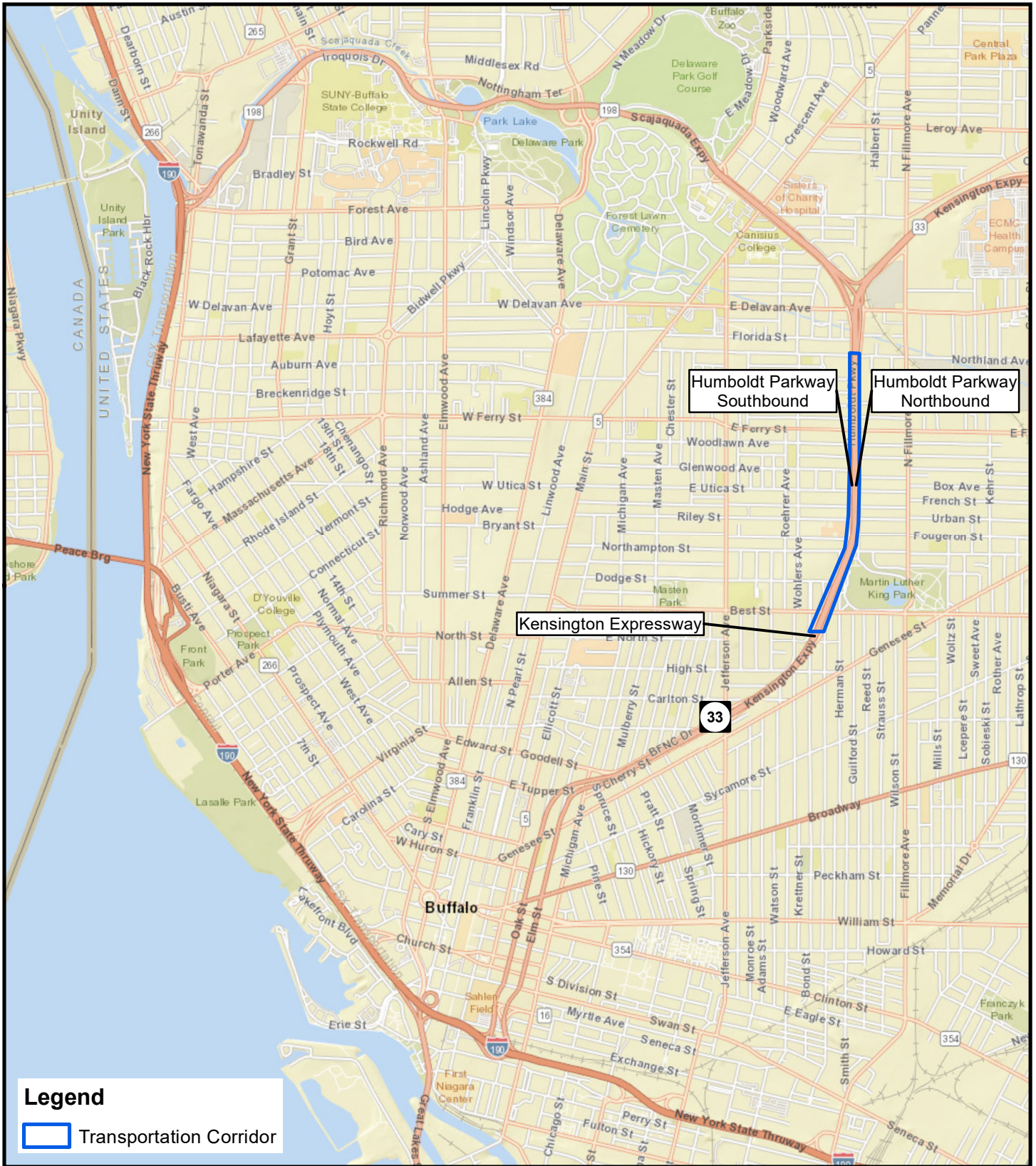


Figure 1.2-1

Project Location Map

PIN 5512.52

NYS Route 33, Kensington Expressway Project
Erie County, NY

Source: Erie County 2021, LaBella 2023, NYSDOT 2021, NYSGIS Clearinghouse 2022, World Street Map.

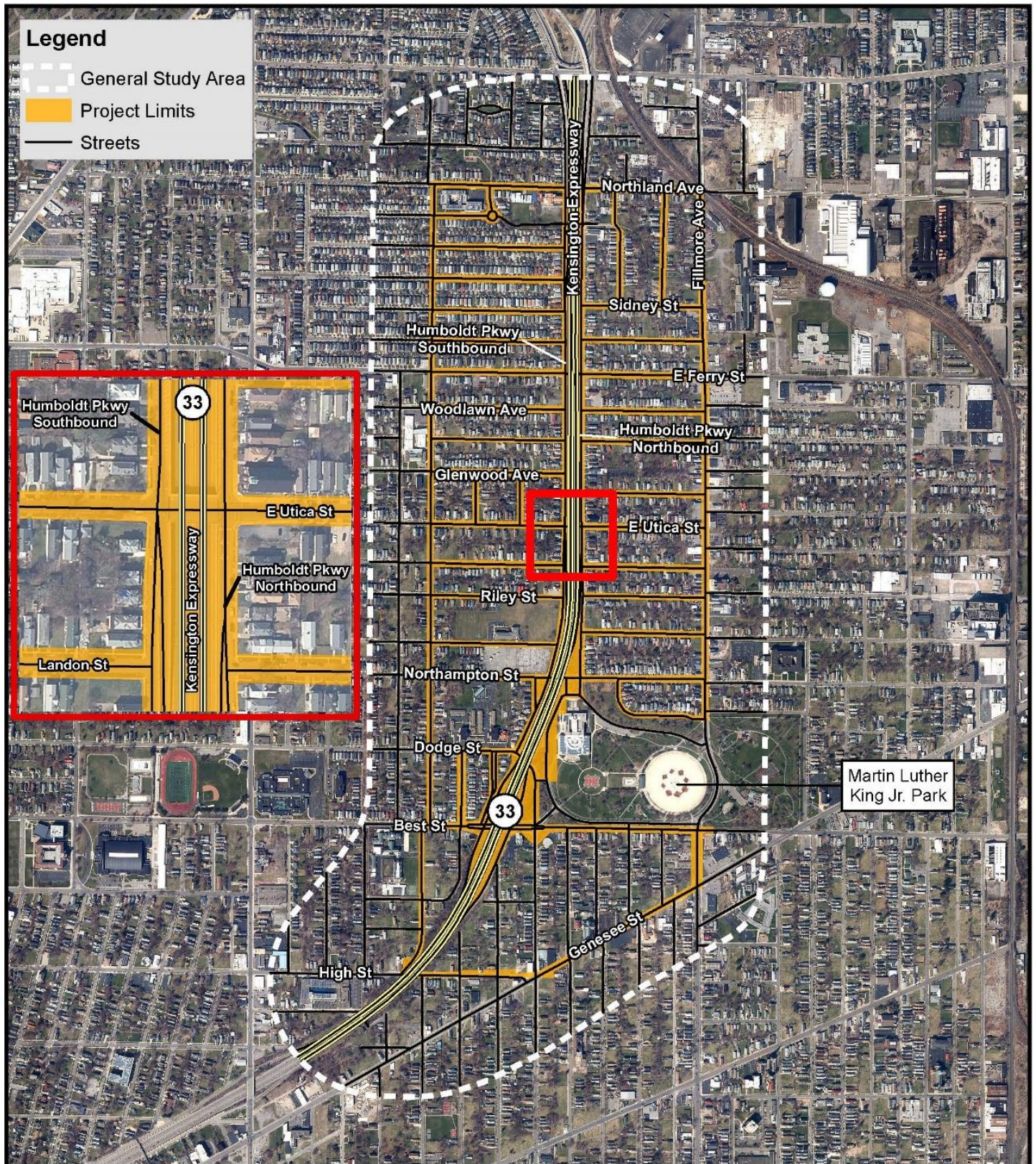


Figure 1.2-2

Study Area

PIN 5512.52

NYS Route 33, Kensington Expressway Project
Erie County, NY

Source: Erie County 2021, LaBella 2023, NYSDOT 2021, NYSGIS Clearinghouse 2022, US Census Bureau 2010.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Division of Environmental Permits, Region 9
700 Delaware Avenue, Buffalo, NY 14209
P: (716) 851-7165 | F: (716) 851-7168
www.dec.ny.gov

SENT VIA EMAIL

September 6, 2023

Tim Simon
New York State Department of Transportation
timothy.simon@dot.ny.gov

Dear Tim Simon:

**Letter of No Jurisdiction for
Endangered and Threatened Species**
Kensington Expressway Project
New York State Route 33
Between Best Street and Sidney Street
City of Buffalo, Erie County
DEC ID No. 9-1402-01176/00001

The New York State Department of Environmental Conservation (NYSDEC) has received your letter, dated August 25, 2023, requesting concurrence with the determination that the above-referenced project will not require a permit pursuant to the implementing regulations (6 NYCRR Part 182) of the New York State Endangered and Threatened Species Law (Article 11-0535). The NYSDEC has reviewed the information provided and concurs with this determination. Accordingly, no permit is required at this time.

Be advised that any changes in location, expansion of the footprint of the project, modifications of the scope, or changes in the timing of proposed action that are not identified in the submission referenced above may trigger NYSDEC jurisdiction. Please reinstate contact with this office if such activities are contemplated. Please note that this letter does not relieve you of the responsibility of obtaining all other necessary permits or approvals from NYSDEC, other agencies or local municipalities.

Sincerely,

David S. Denk

David S. Denk
Regional Permit Administrator

MRW

ecc: Catherine Leslie, NYSDOT
Jessica Prockup, NYSDOT
Sanjyot Vaidya, NYSDOT
Matthew Seymour, FHWA