

CE-MVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2022-00518-CJB

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May 8, 2025

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the “Revised Definition of ‘Waters of the United States’”; (88 FR 3004 (January 18, 2023) as amended by the “Revised Definition of ‘Waters of the United States’; Conforming” (8 September 2023) ,¹ MVP-2022-00518-CJB, MFR 1 of 1.²

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.³ AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.⁴

On January 18, 2023, the Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) published the “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”). On September 8, 2023, the agencies published the “Revised Definition of ‘Waters of the United States’; Conforming”, which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023) (“*Sackett*”).

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ the 2023 Rule as amended,

¹ While the Revised Definition of “Waters of the United States”; Conforming had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, the territorial seas, or interstate water that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).

Name of Aquatic Resource	JD or Non-JD	Section 404/Section 10
W-11	Non-Jurisdictional	N/A

2. REFERENCES.

- a. “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”)
- b. “Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 (September 8, 2023)
- c. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)
- “Memorandum To The Field Between The U.S. Department Of The Army, U.S. Army Corps Of Engineers And The U.S. Environmental Protection Agency Concerning The Proper Implementation Of ‘Continuous Surface Connection’ Under The Definition Of ‘Waters Of The United States’ Under The Clean Water Act” (March 12, 2025)

3. REVIEW AREA.

- a. Project Area Size (in acres): 1.95
- b. Location Description: The project/review area is located in Section 21, Township 08N, Range 20E, Waukesha County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 43.14755 Longitude: -88.13303
- d. Nearest City or Town: Menomonee Falls
- e. County: Waukesha
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes):

Action ID	Type	Outcome
MVP-2022-00518-AJK (dated April 28, 2022)	AJD	All waters reviewed (W-9, W-10, W-13, W-15) were determined to be non-jurisdictional under the AJD

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.⁶

N/A

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER.

N/A

6. SECTION 10 JURISDICTIONAL WATERS⁷: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁸

N/A

7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the 2023 Rule as amended, consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the 2023 Rule as amended. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.

⁶ This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

⁷ 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

⁸ This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

- a. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A
- b. The Territorial Seas (a)(1)(ii): N/A
- c. Interstate Waters (a)(1)(iii): N/A
- d. Impoundments (a)(2): N/A
- e. Tributaries (a)(3): N/A
- f. Adjacent Wetlands (a)(4): N/A
- g. Additional Waters (a)(5): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁹

N/A

- b. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

One wetland (W-11), identified within the review area on figure labeled MVP-2022-00518-CJB Figure 2 of 3, was reviewed under the 2023 Rule as amended. The delineation report describes W-11 as a mix of forested wetland, wet meadow, and farmed wetland. Based on the wetland delineation report, aerial photos, and LiDAR images, W-11 is a depressional wetland that is surrounded by upland; however, W-11 extends to the northern and eastern boundaries of the site so those areas outside of the review area were also reviewed. To the north, W-11 connects to the southern Good Hope Road ditch. This roadside ditch lacks an ordinary high water mark and relatively permanent flow, as evident in historic aerial photos, current aerial photos, and street view photos, and is not a water of the United States in its own right. To the east, W-11 connects to a drainage

⁹ 88 FR 3004 (January 18, 2023)

feature that appears to direct storm water to the east towards an unnamed tributary located approximately 1,100 feet to the east of W-11. Based on review of current and historic aerial photos, this drainage feature also lacks an ordinary high water mark and does not carry relatively permanent flow and, therefore, is not a water of the United States in its own right. Additionally, two field tile outlets were identified at the southeastern and midwestern portions of W-11. Based on the delineation report, these drain tiles direct water to the neighboring property to the east.

Wetland W-11 is not a TNW, territorial sea, or interstate water and therefore is not an (a)(1) water. Wetland W-11 is not a tributary and has not been created by impounding a water of the U.S.; therefore, this wetland is not a category (a)(2) or (a)(3) water. Wetland W-11 is a non-tidal wetland that does not meet the definition of adjacent and cannot be evaluated as (a)(4) adjacent wetlands. Wetland W-11 is not an intrastate lake or pond that meets the relatively permanent standard and cannot be evaluated as an (a)(5) water: lakes and ponds not identified in (a)(1) – (a)(4). Wetland W-11 does not physically abut a jurisdictional water; therefore, Wetland W-11 is not jurisdictional under the “Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 Final Rule (September 8, 2023).

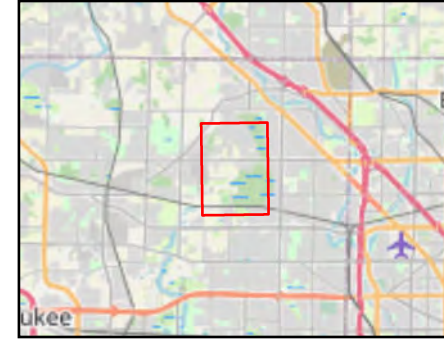
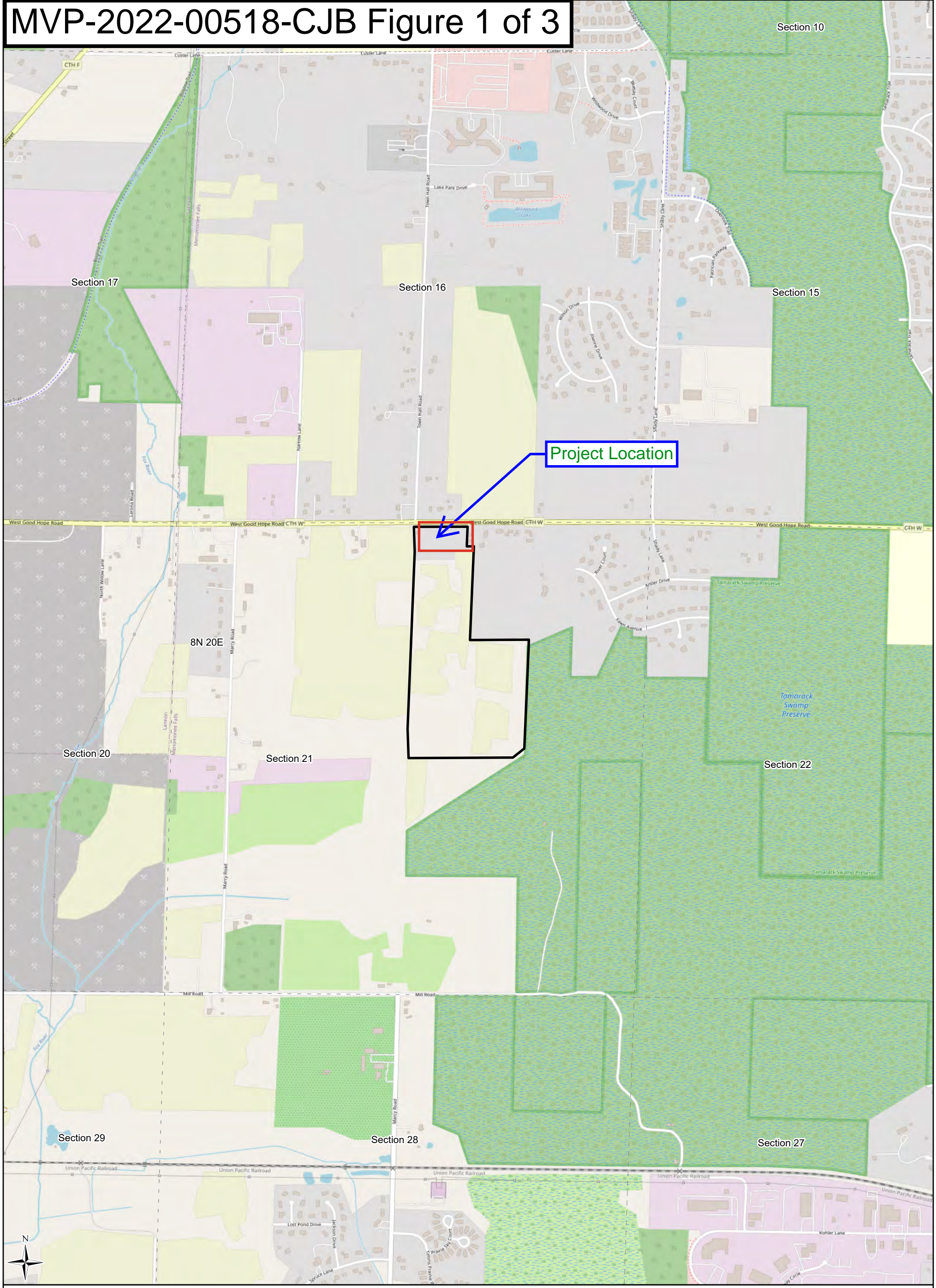
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

- a. Office Evaluation conducted on May 2, 2025
- b. Wetland Delineation Report, completed by raSmith, dated March 29, 2022
- c. Google Maps Street View, accessed May 2, 2025
- d. Google Maps Aerial Photos, accessed May 2, 2025
- e. USACE Regulatory Viewer, LiDAR Hillshade and DEM layers, accessed May 2, 2025

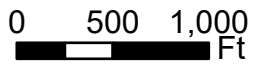
10. OTHER SUPPORTING INFORMATION. N/A

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR’s structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

MVP-2022-00518-CJB Figure 1 of 3



- Study Area (59.52 ac)
- PLSS Township
- PLSS Section

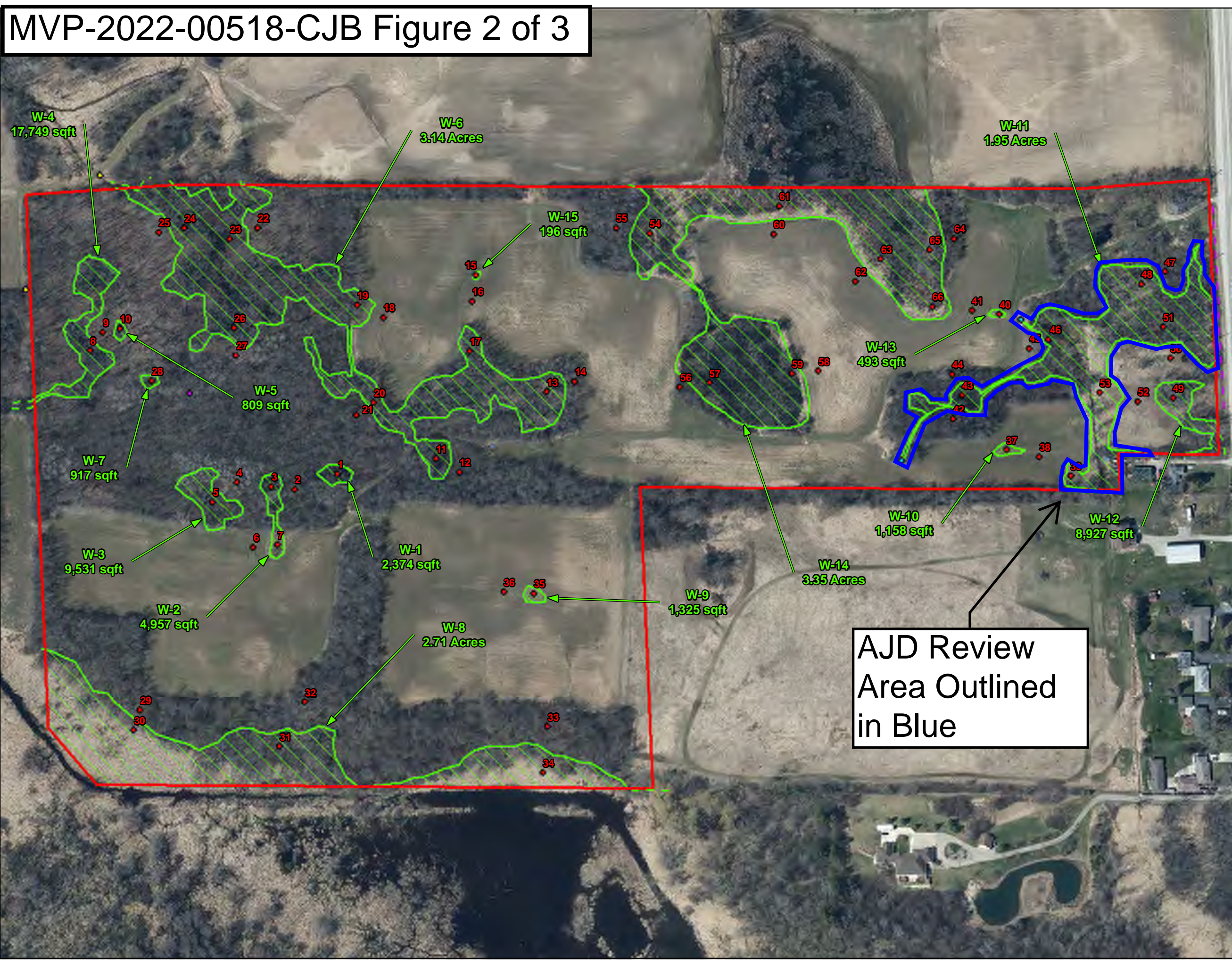


Heartland
ECOLOGICAL GROUP INC

Figure 1. Project Location
Sanctuary at Good Hope E.
Project #20220833
T8N, R20E, S21
V Menomonee, Waukesha Co

OpenStreetMap
ESRI
LRR: MW

Shady Lane Corporation
 Good Hope Road Parcels
 Village of Menomonee Falls
 Waukesha County, Wisconsin



- Map Legend
- Culvert
 - Cursory Sampling Point
 - Drain Tile Outlet
 - Sampling Point
 - Off-site Roadside Ditch
 - Off-site Wetland
 - Delineated Wetland (12.27 Acres)
 - Study Area (59.55 Acres)

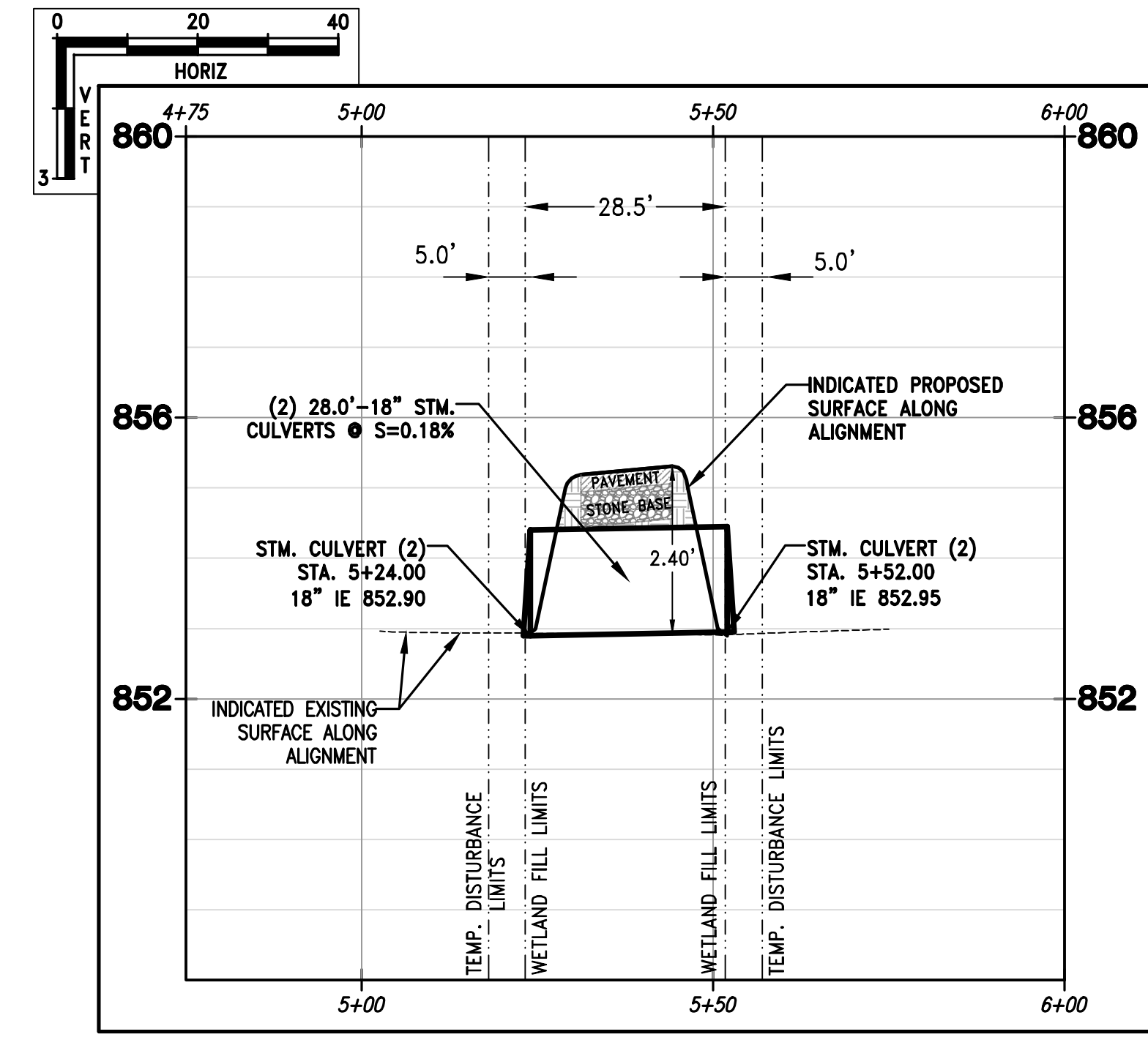
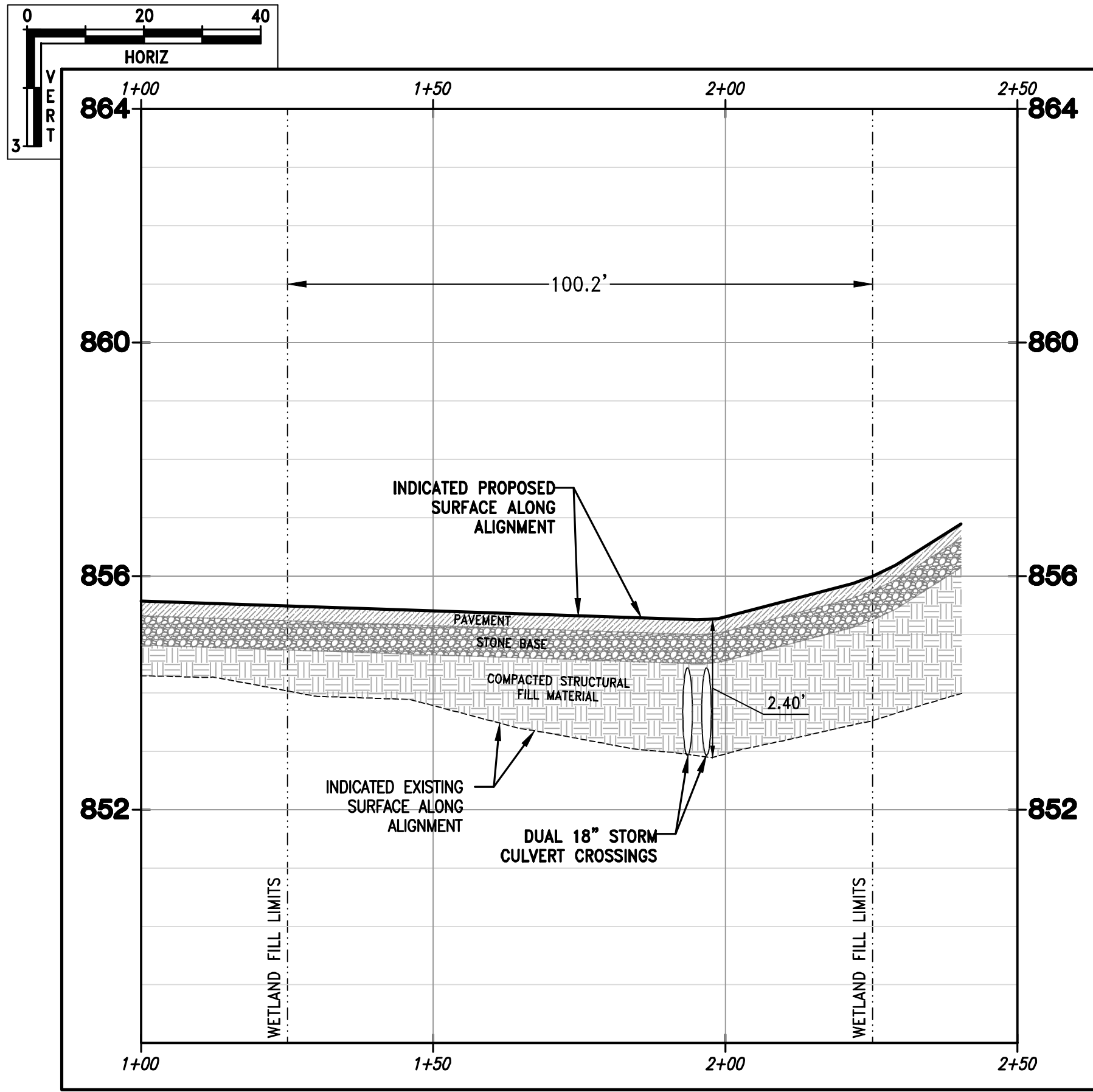
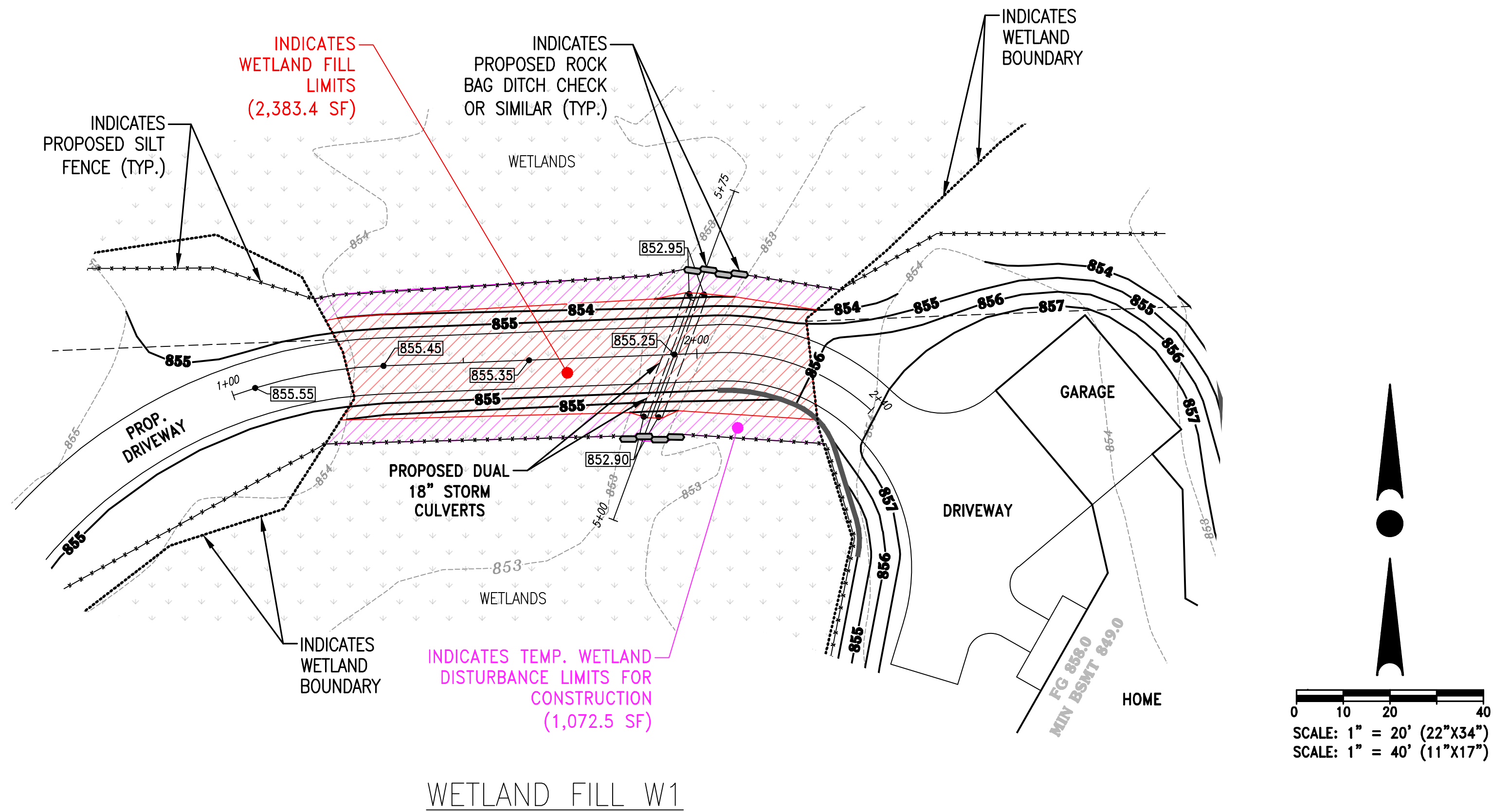
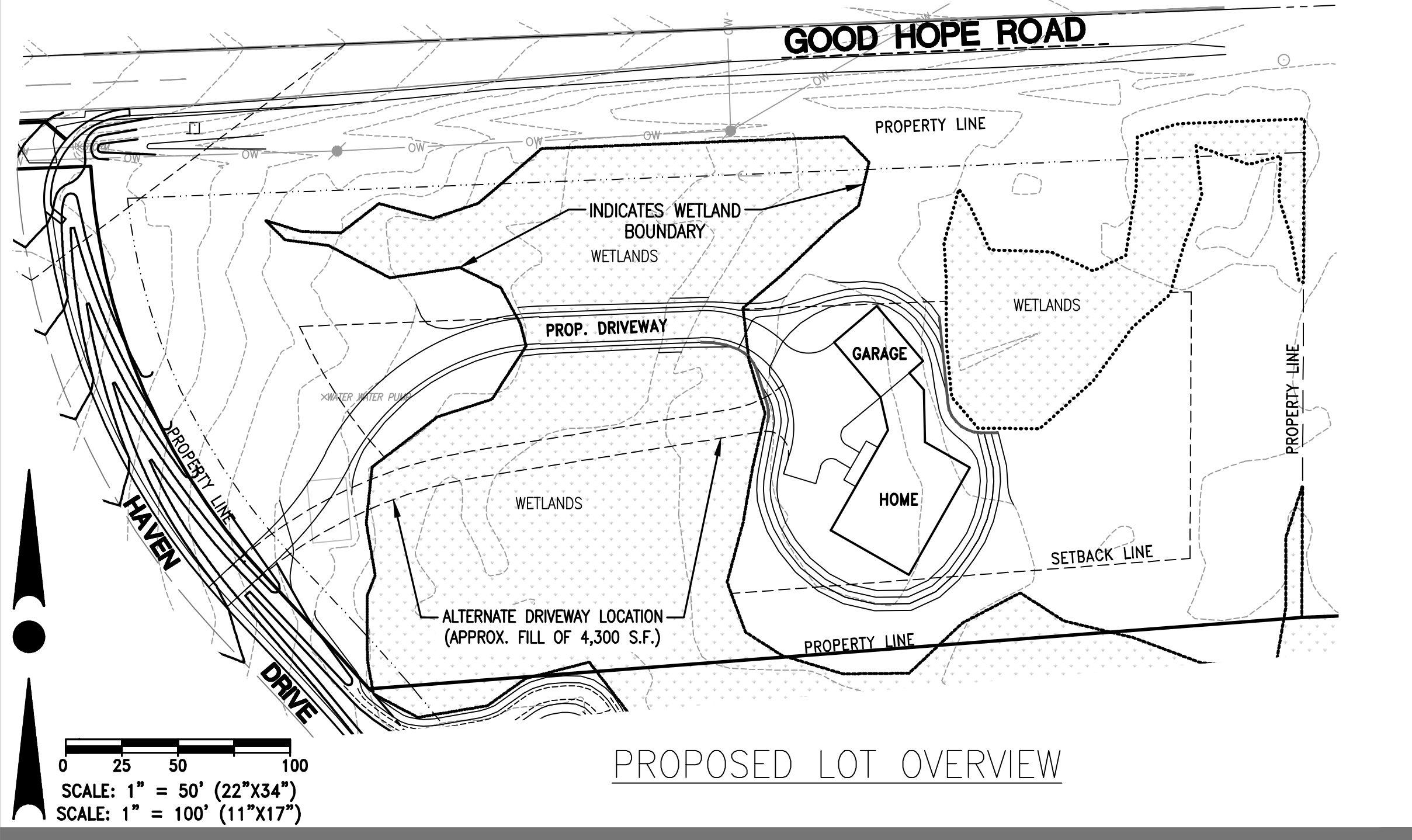
AJD Review
 Area Outlined
 in Blue

Esri, HERE, Garmin, (c) OpenStreetMap contributors

Figure 2
 Wetland Boundary
 Map



Document Path: H:\2021\0597\GIS\Wetland Figures\Figure 2 - Wetland Boundary Map.mxd



HX:\500\595\19020-01\EXHIBITS\AN AT GOOD HOPE CSM LOT_WETLAND IMPACT EXHIBIT_2025-02-17.DWG

CONTRACTOR IS REQUIRED TO CONTACT DIGGERS HOTLINE TOLL FREE TO OBTAIN LOCATION OF UNDERGROUND UTILITIES PRIOR TO COMMENCING THE WORK. WISCONSIN STATUTE 182.0715 REQUIRES MIN. OF 3 WORK DAYS NOTICE BEFORE YOU EXCAVATE. CALL DIGGERS HOTLINE 1-800-242-6511

NOTE: EXISTING UNDERGROUND UTILITY INFORMATION WAS OBTAINED FROM AVAILABLE RECORDS. THE ENGINEER MAKES NO GUARANTEE AS TO THE ACCURACY OF THIS INFORMATION. VERIFICATION TO THE SATISFACTION OF THE CONTRACTOR OF ALL UNDERGROUND UTILITIES, WHETHER OR NOT SHOWN ON THE PLANS, SHALL BE ASSUMED AS A CONDITION OF THE CONTRACT. THE CONTRACTOR SHALL NOTIFY THE ENGINEER OF ANY DISCREPANCIES BETWEEN LOCATION OF UTILITIES IN THE FIELD AND LOCATIONS SHOWN ON THE PLANS.



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PROJECT:
SANCTUARY AT GOOD HOPE EAST
CSM LOT 1
SINGLE FAMILY WETLAND FILL EXHIBIT
VILLAGE OF MENOMONEE FALLS, WISCONSIN
BY: KOLBECK DEVELOPMENT

REVISION HISTORY	
DATE	DESCRIPTION
03/28/2025	WETLAND IMPACT EXHIBIT

DATE:
MARCH 28, 2025

JOB NUMBER:
19-020-595

DESCRIPTION:
WETLAND IMPACT PLAN - CSM LOT

SHEET

FILL-1