



**DEPARTMENT OF THE ARMY**  
U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT  
332 MINNESOTA STREET, SUITE E1500  
ST. PAUL, MN 55101-1323

MVP-2021-02117-JMK (SAP 021-604-016)

3 May 2024

**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),<sup>1</sup> MVP-2021-02117-JMK MFR 1 of 1

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.<sup>2</sup> 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.<sup>3</sup>

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),<sup>4</sup> the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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<sup>1</sup> 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.

<sup>2</sup> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</sup> 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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## 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).
  - i. Wetland 3, non-jurisdictional
  - ii. Wetland 4, non-jurisdictional
  - iii. Wetland 5A, non-jurisdictional
  - iv. Wetland 7, non-jurisdictional
  - v. Wetland 8, non-jurisdictional
  - vi. Wetland 11, non-jurisdictional
  - vii. Wetland 13, non-jurisdictional
  - viii. Wetland 20, non-jurisdictional
  - ix. Wetland 23, non-jurisdictional
  - x. Wetland 24, non-jurisdictional
  - xi. Wetland 25, non-jurisdictional
  - xii. Wetland 26, non-jurisdictional
  - xiii. Wetland 29, non-jurisdictional
  - xiv. Wetland 30, non-jurisdictional

## 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. \_\_\_, 143 S. Ct. 1322 (2023)

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3. REVIEW AREA. The review area for this determination includes 14 roadside ditches, as identified in Section 1(a) of this MFR and on the attached figures labeled MVP-2021-02117-JMK Figures 4, 8, 14, 22, 25, 26, and 27. The review area is located at 45.8028 N, -95.4642 W in Douglas County, Minnesota. There are no other JDs associated with the review area.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. N/A
6. SECTION 10 JURISDICTIONAL WATERS<sup>5</sup>: 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.<sup>6</sup> 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.

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<sup>5</sup> 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.

<sup>6</sup> 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.

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- 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).<sup>7</sup>
  - Wetland 3 (0.18 acre), Wetland 4 (0.06 acre), Wetland 5A (0.13 acre), Wetland 7 (0.02 acre), Wetland 8 (0.12 acre), Wetland 11 (0.17 acre), Wetland 13 (0.05 acre), Wetland 20 (0.04 acre), Wetland 24 (0.10 acre), Wetland 25 (0.28 acre), Wetland 26 (0.06 acre), Wetland 29 (0.12 acre), and Wetland 30 (0.09 acre) within the review area are linear roadside drainage ditches constructed in upland and drain only upland based on a review of US Geological Service 3DEP DEM map; MNDNR 2-foot contour maps; NWI maps; and NHD data. Recent aerial photos do not show relatively permanent flow in the aforementioned aquatic resources. Based on the desktop resources reviewed Wetland 3, 4, 5A, 7, 8, 11, 13, 20, 24, 25, 26, 29, and 30 are linear roadside drainage ditches constructed in upland, drain only upland, and do not carry a relatively permanent flow of water. Therefore, Wetland 3, 4, 5A, 7, 8, 11, 13, 20, 24, 25, 26, 29, and 30 have been determined to be Paragraph (b)(3) excluded ditches and not subject to Section 404 of the Clean Water Act (CWA).

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<sup>7</sup> 88 FR 3004 (January 18, 2023)

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- Wetland 23 (0.55 acre) within the review area is a linear roadside ditch and stormwater pond complex. The linear roadside ditch portion of Wetland 23 has been constructed in upland, drain only upland and do not carry relatively permanent water and the stormwater pond portion has been constructed in upland and retain water as settling basins based on the following:
  - MNDNR 2-foot contour map shows the pond is located in areas of the project that are higher in elevation and supportive of uplands.
  - NWI mapping does not display presence of mapped wetlands in the area the pond has been constructed.
  - Recent aerial photos show the pond is located in close proximity to a residential development and the existing roadway and consists of geometry indicative of being manmade to store stormwater from these developments.

Therefore, this feature has been determined to be both Paragraph (b)(3) excluded ditch for the linear roadside ditch portion of Wetland 23 and Paragraph (b)(5) excluded artificial lakes and ponds for the stormwater portion of Wetland 23 and not subject to Section 404 of the CWA.

- 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). N/A.

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. Figure 1 of 30 through 30 of 30 titled MVP-2021-02117-JMK.
- b. Minnesota Regulatory Viewer: 2016 MNDNR Hillshade layer, MNDNR 2-foot contour layer, US Geological Service 3DEP Digital Elevation Model (DEM) and NHD layers, and USFWS NWI layer.

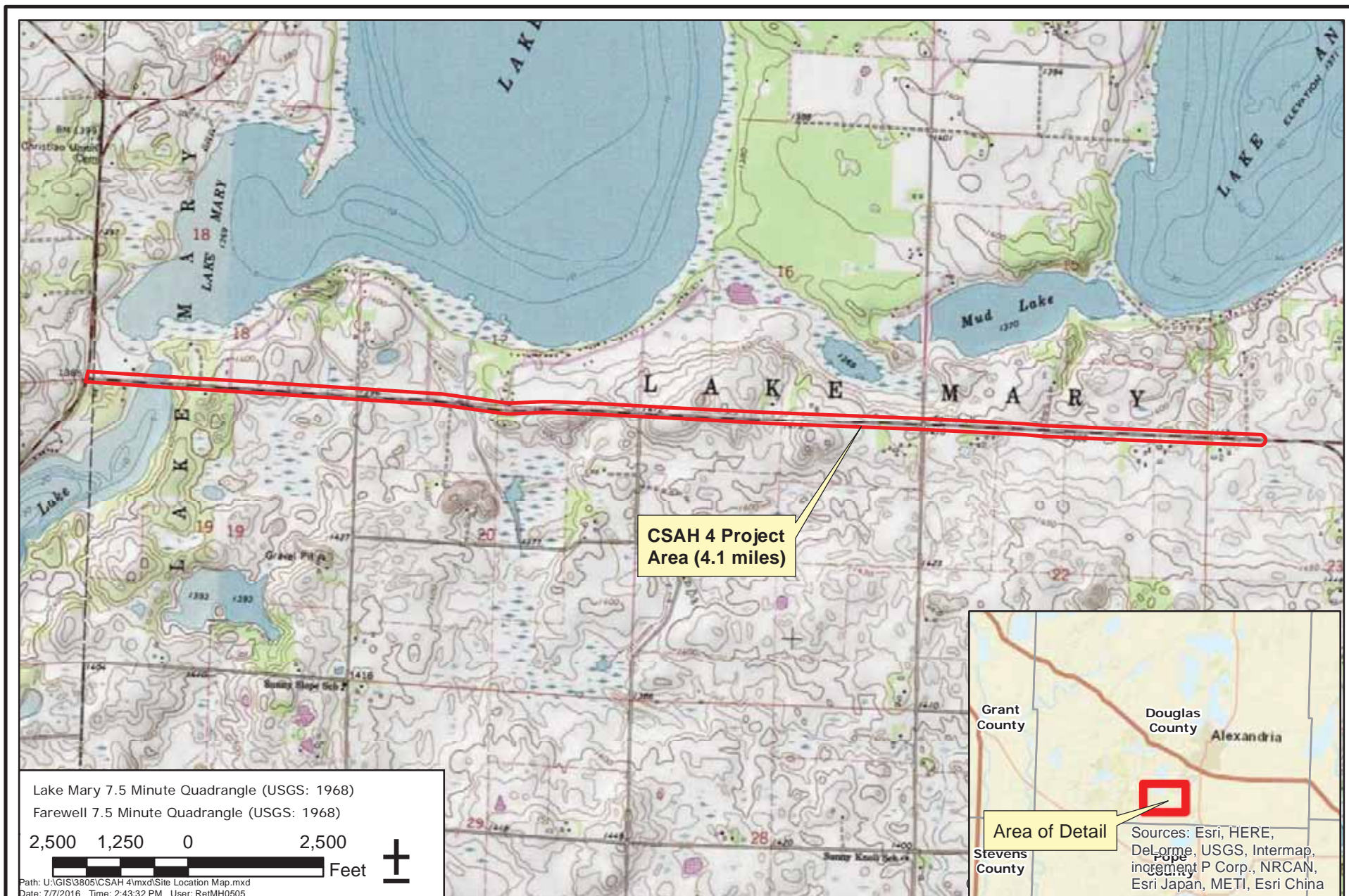
10. OTHER SUPPORTING INFORMATION. N/A

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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.





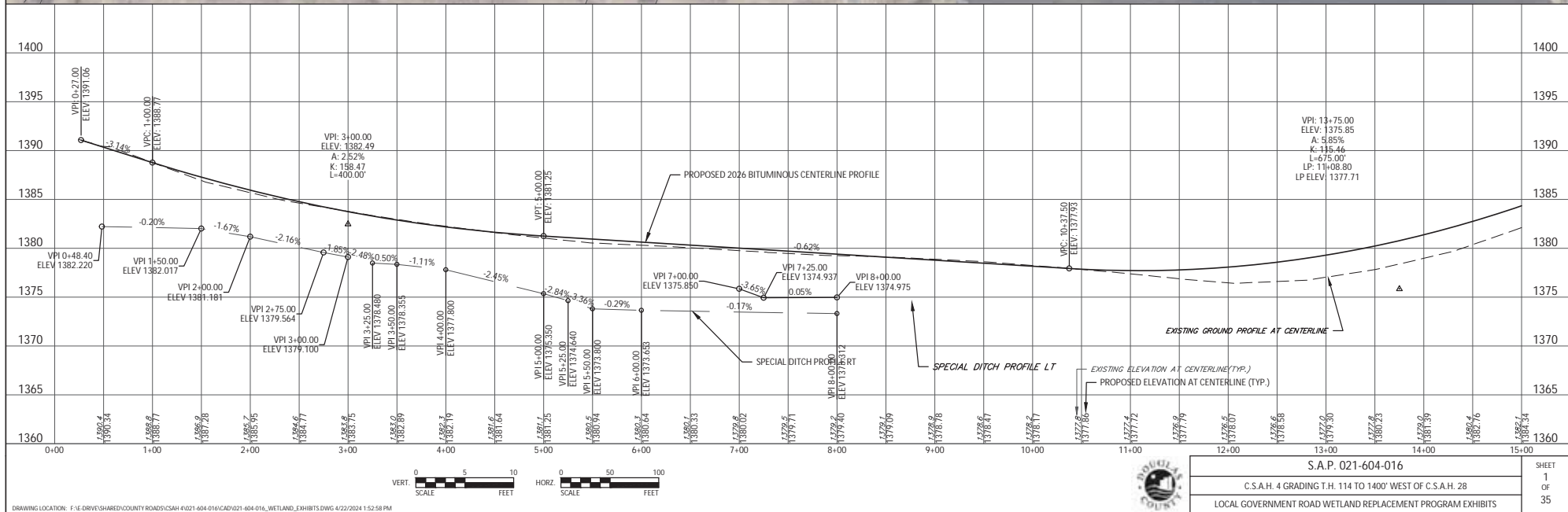
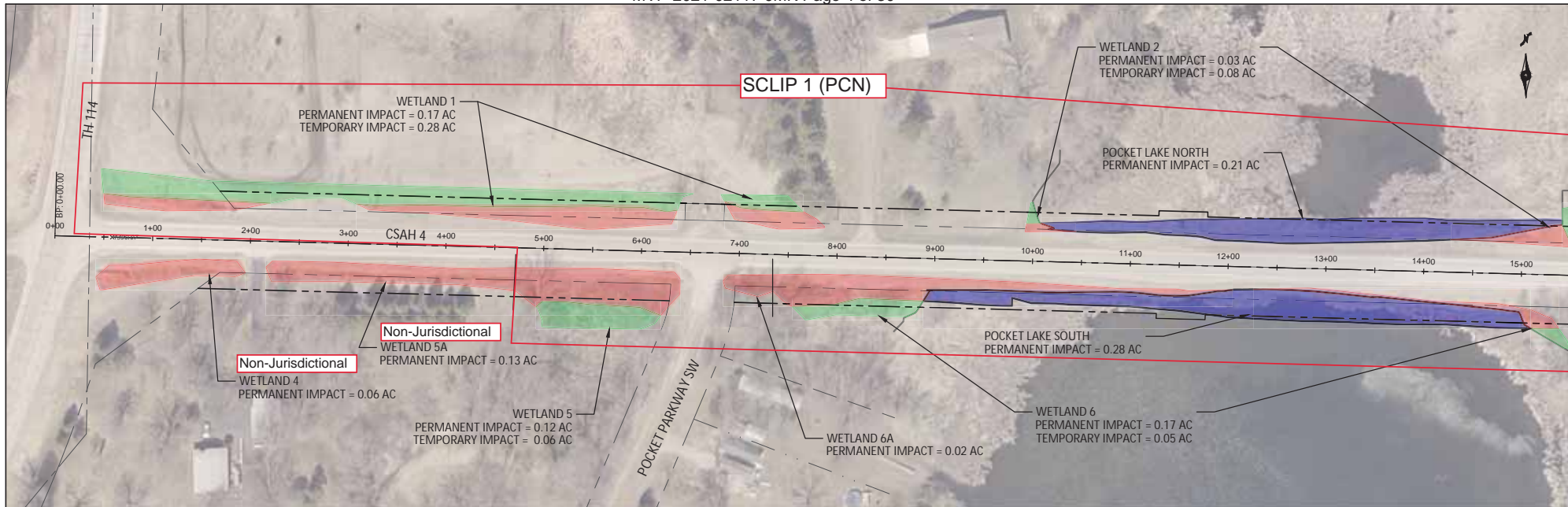
DOUGLAS COUNTY PUBLIC WORKS

CSAH 4 - Site Location Map

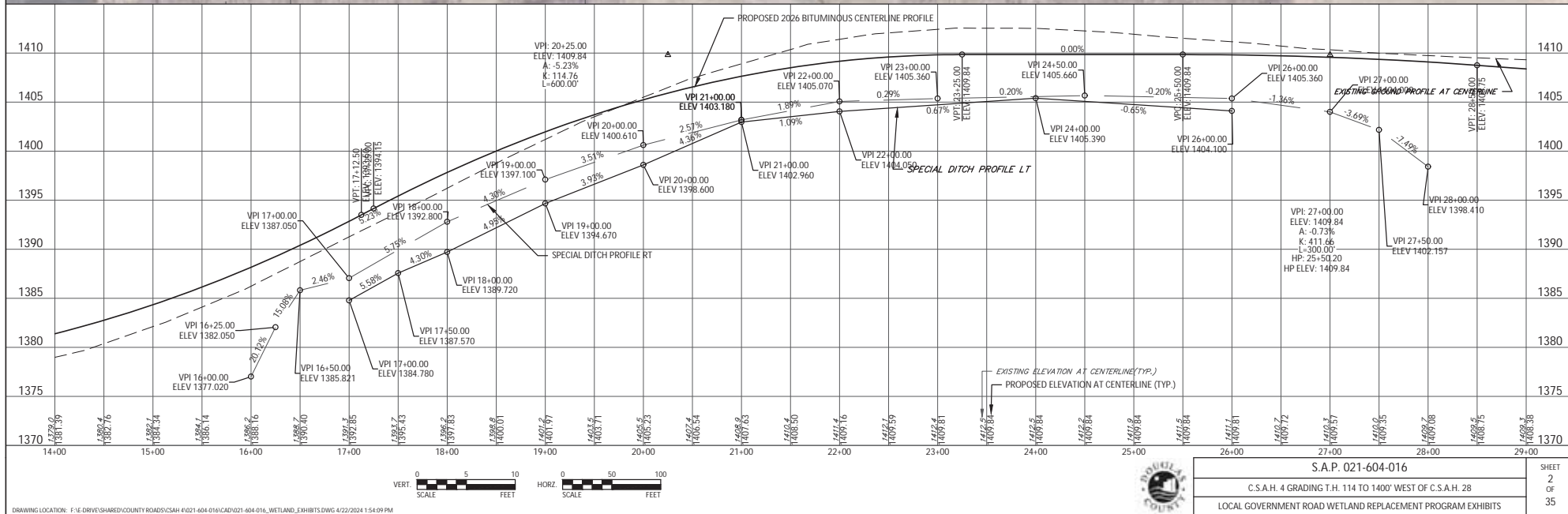
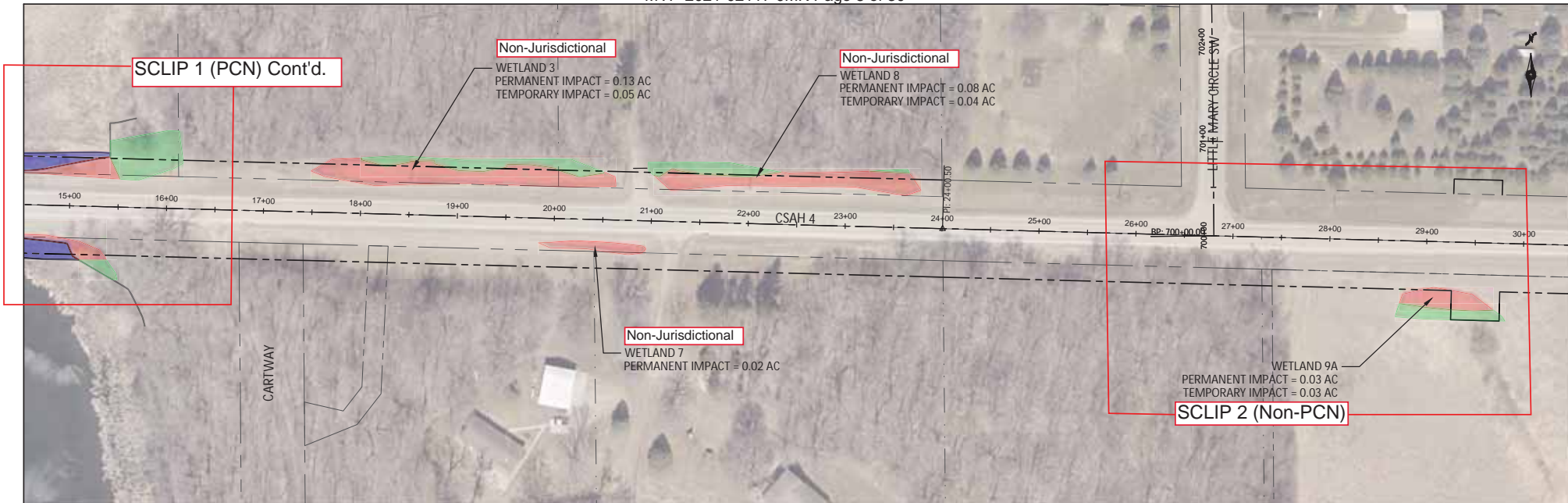


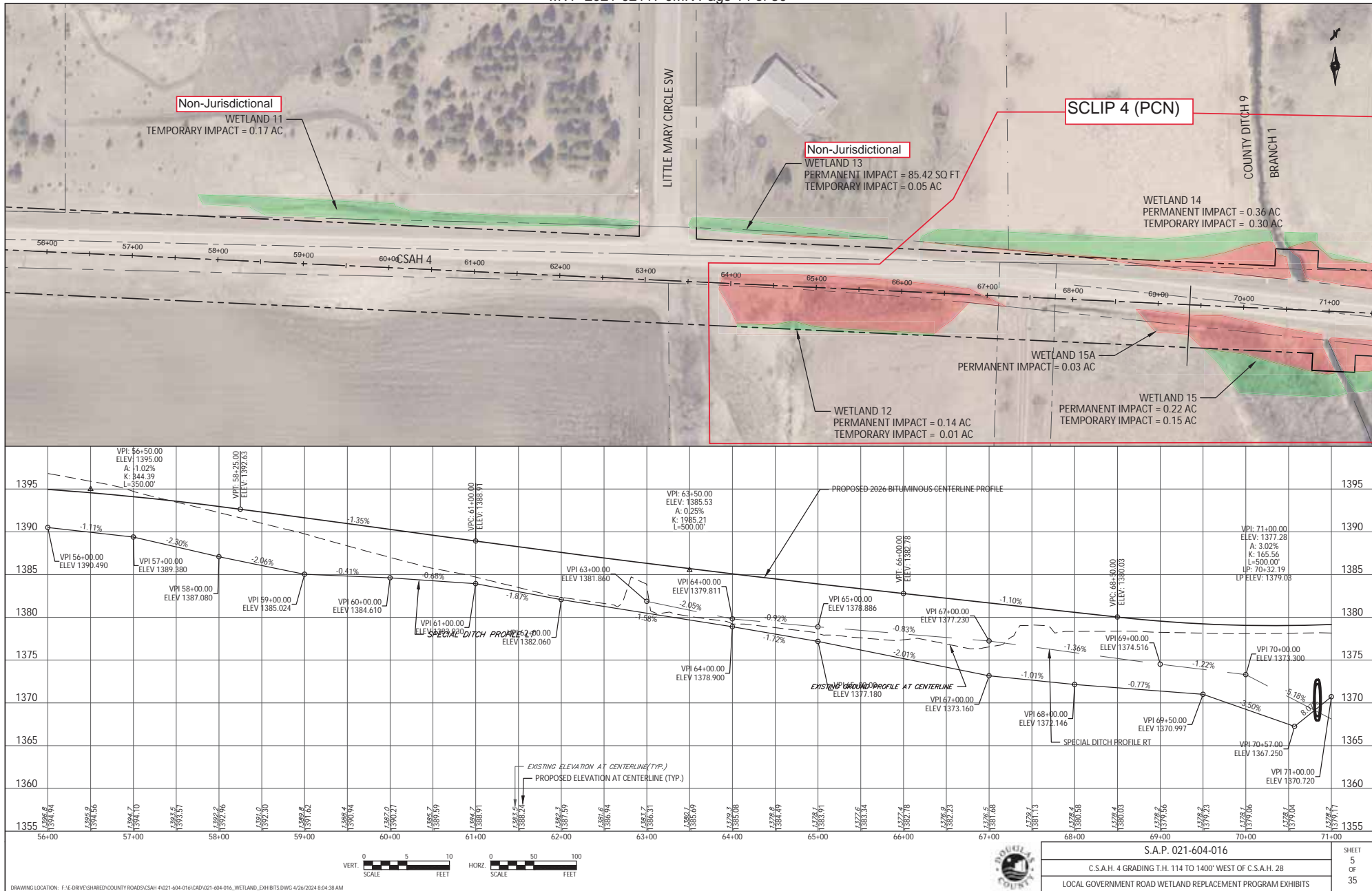
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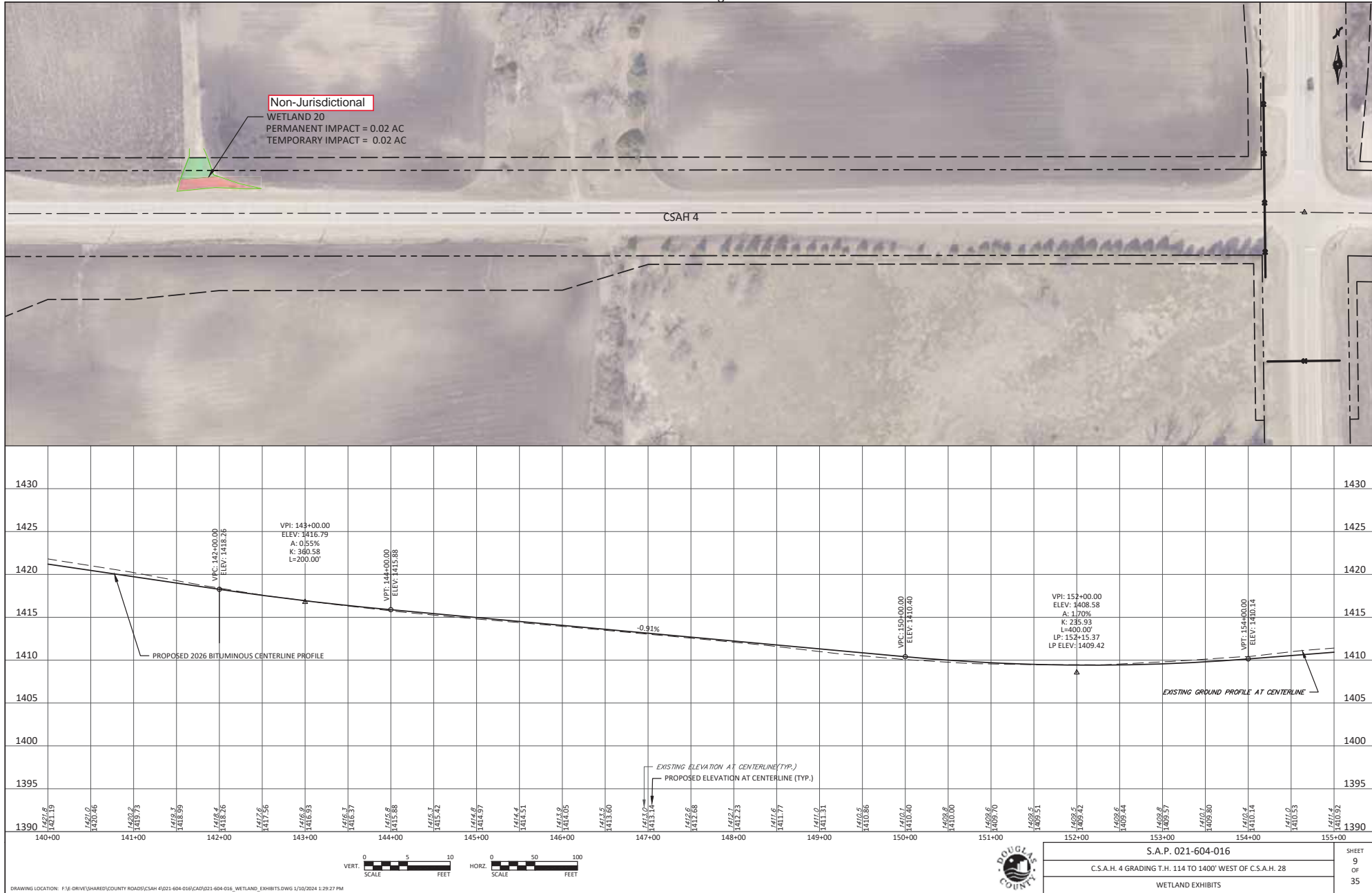
Figure 1

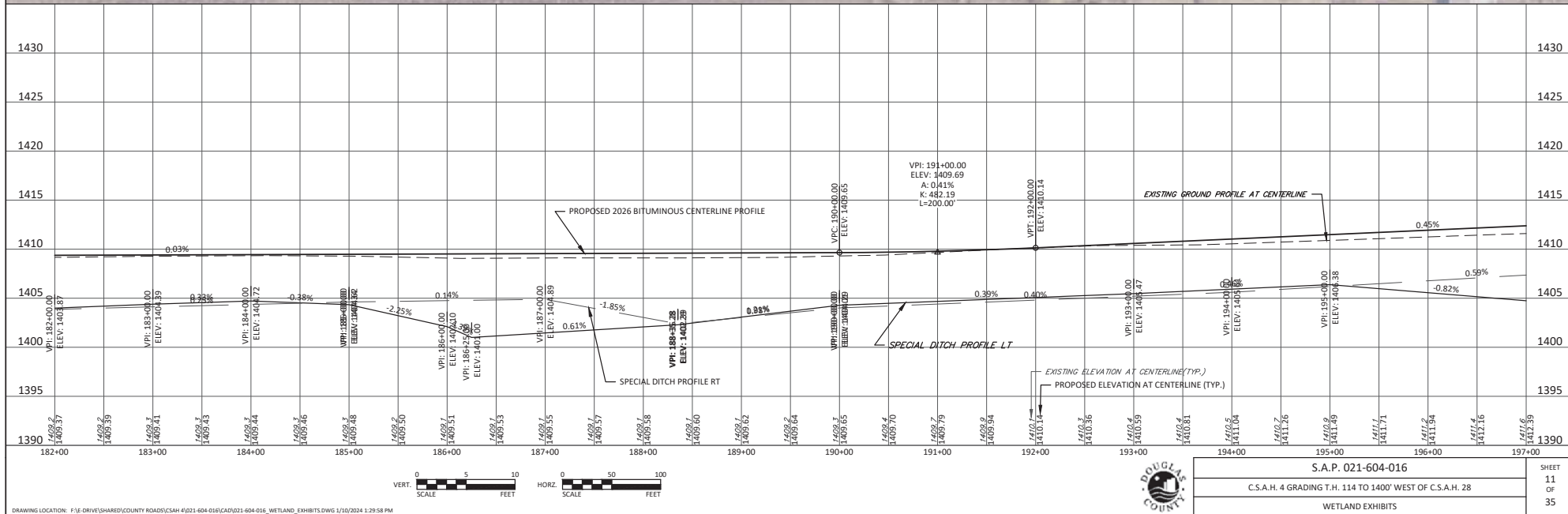
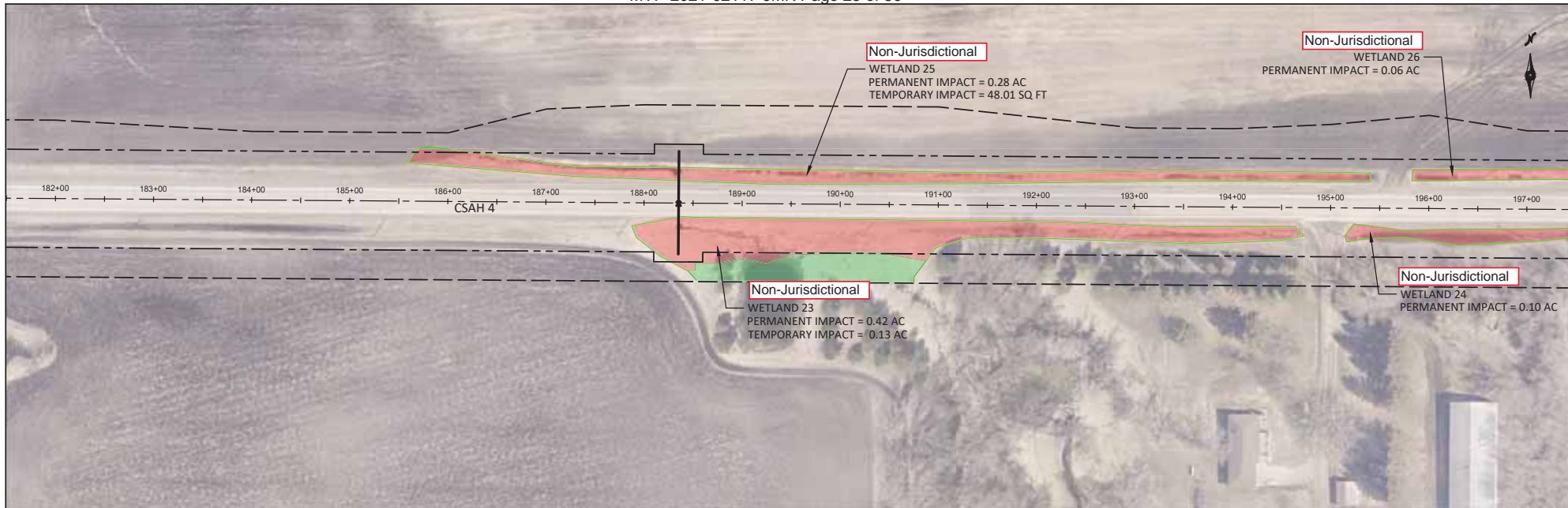












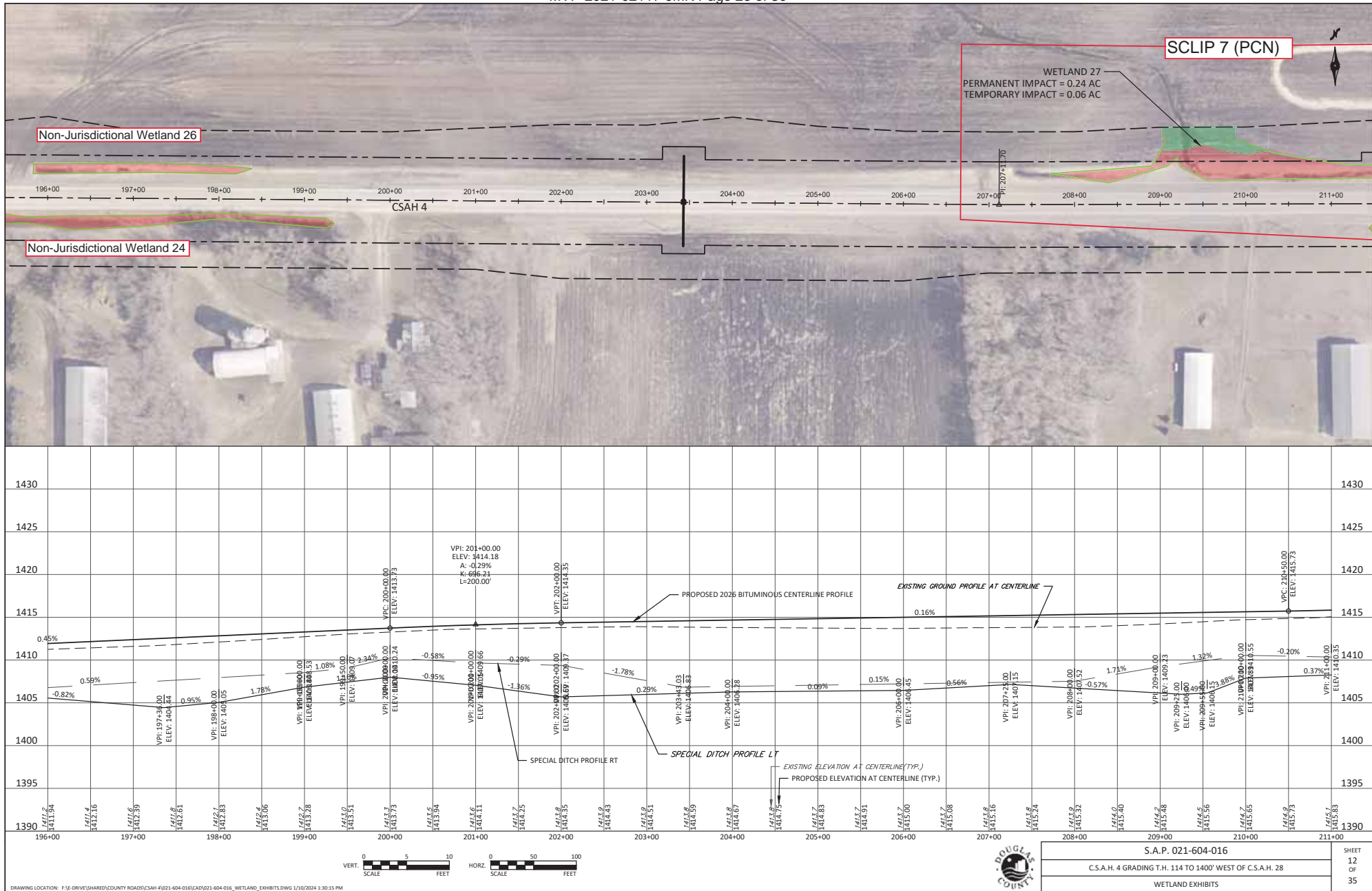
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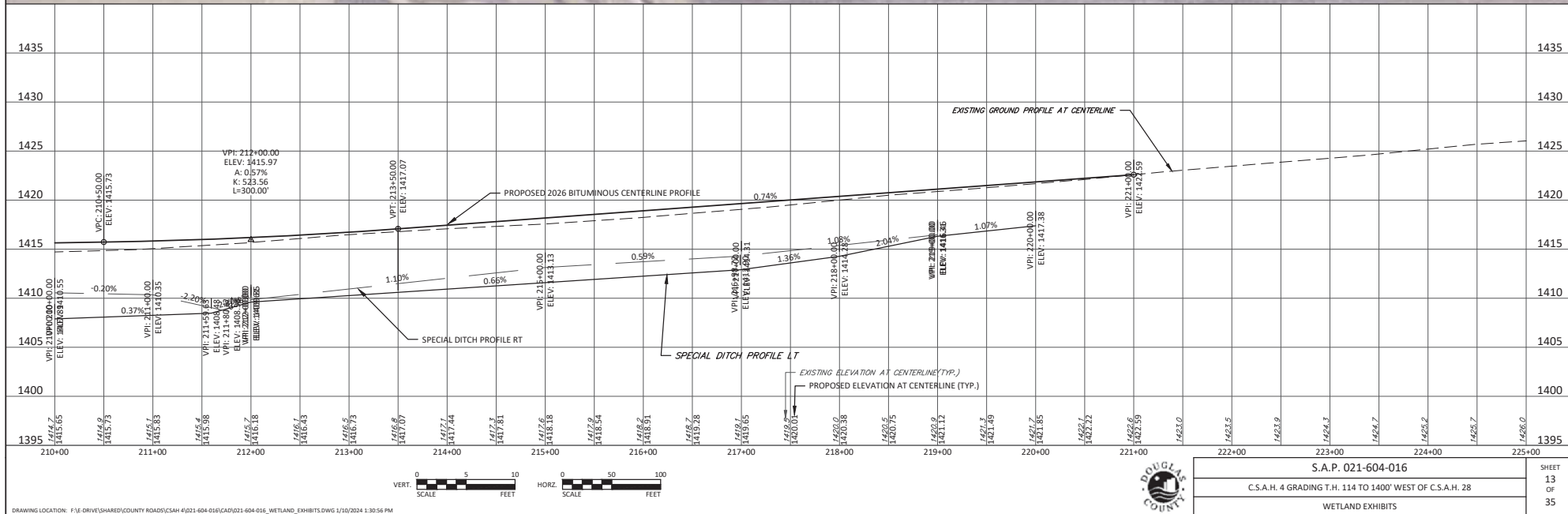
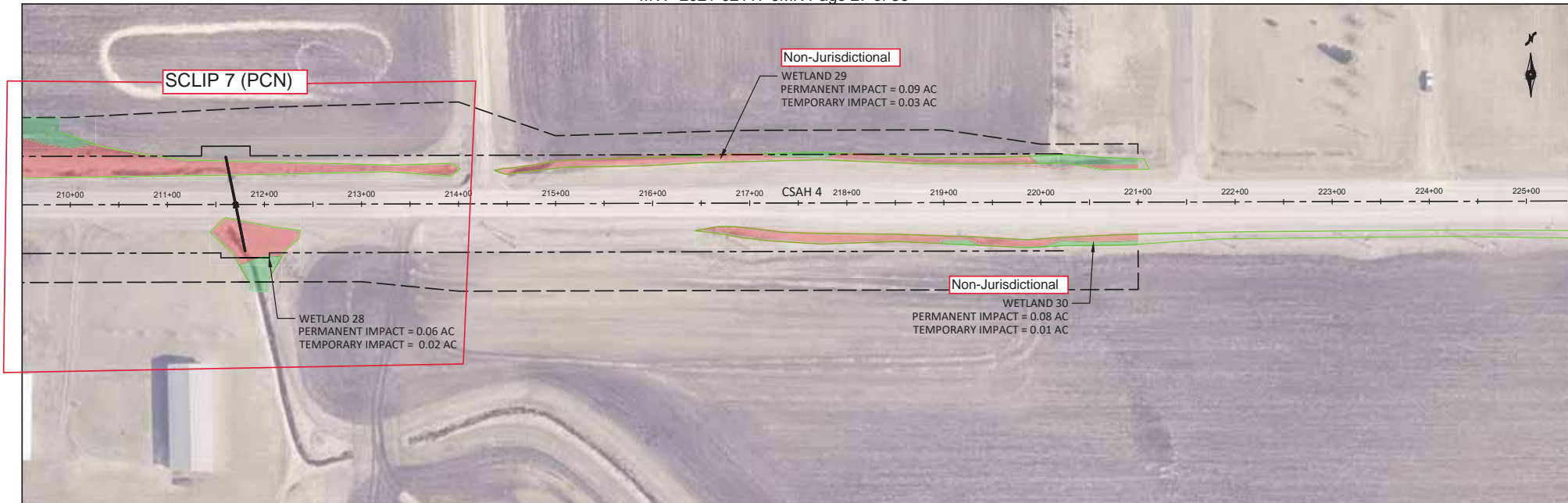


S.A.P. 021-604-016  
C.S.A.H. 4 GRADING T.H. 114 TO 1400' WEST OF C.S.A.H. 28  
WETLAND EXHIBITS

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WETLAND EXHIBITS

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