



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT
332 MINNESOTA STREET, SUITE E1500
ST. PAUL, MINNESOTA 5501*1323

MVP-2023-00075-MWM

26 APRIL 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) ,¹ MVP-2023-00075-MWM. 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.² 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.³

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

1. SUMMARY OF CONCLUSIONS.

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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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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- 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. Wet Ditch 6, 1,511 square feet. Excluded water, not a Water of the US.
 - ii. Wet Ditch 9, 300 square feet. Excluded water, not a Water of the US.
 - iii. Wet Ditch 10, 1,552 square feet. Excluded water, not a Water of the US.

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)

3. REVIEW AREA. The features within the review area include Wet Ditch 6, 9, and 10, identified in Section 1(a) of this MFR and as shown on the attached figures labeled MVP 2023-00075-MWM: figures 4, 5, and 6 of 7 identified in black. These wet ditches are immediately adjacent to the proposed Brighton Beach Roadway and the existing recreational trail. The review area is in Section 8, Township 50 North, Range 13 West, St. Louis County, Minnesota. Latitude: 46.8421, Longitude: -91.9953.

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

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

6. SECTION 10 JURISDICTIONAL WATERS⁵: 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

⁵ 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.

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resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁶ 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.

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

⁶ 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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within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁷

The features identified within the review area are Wet Ditch 6, 9, and 10. These features only drain upland and do not carry relatively permanent flow. Additionally, none of the features relocate a tributary.

The National Wetland Inventory layer was assessed on the National Regulatory Viewer (NRV) which does not identify wetlands in the review area. An aerial photo from 2005 was reviewed from Google Earth that does not show wetness signatures or other wetland indicators near the aquatic feature. Other resources reviewed to support this determination include MNDNR Hillshade – 2016 accessed from the NRV.

In conclusion, Wet Ditch 6, 9, and 10 each fit under the definition of a (b)(3) excluded ditch as they were created by excavating dry land and the features don't carry relatively permanent flow, nor are they relocated tributaries. Thus, these features are not subject to Section 404 of the Clean Water Act (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. Wetland delineation figures submitted with the request for action by Heidi Bringman, LHB Inc.
- b. Google Earth Imagery from 2005
- c. MNDNR Hillshade – 2016 and National Wetland Inventory (NWI) accessed on the NRV

10. OTHER SUPPORTING INFORMATION. N/A

⁷ 88 FR 3004 (January 18, 2023)

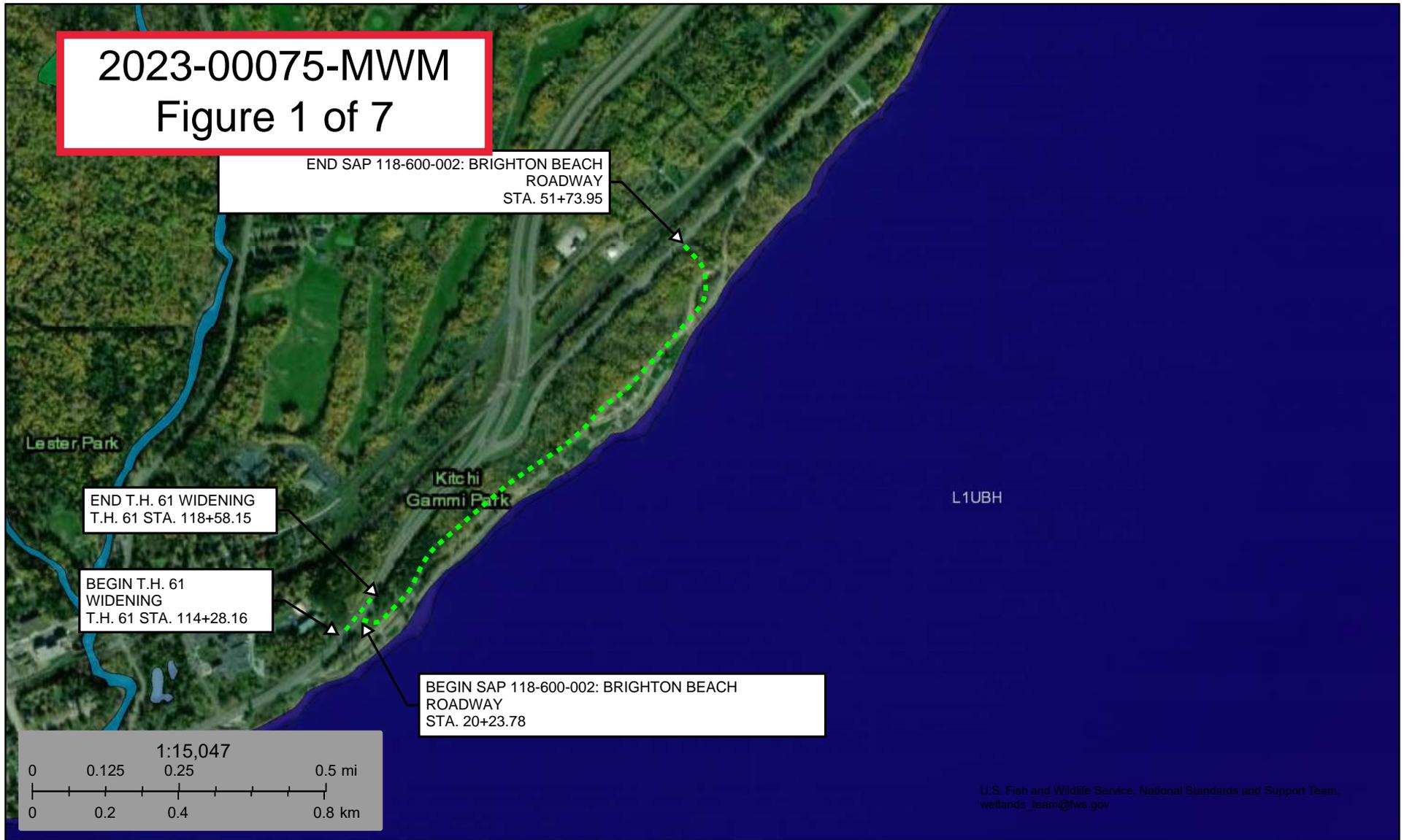
MVP

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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.



2023-00075-MWM
Figure 1 of 7



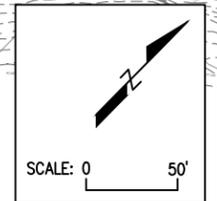
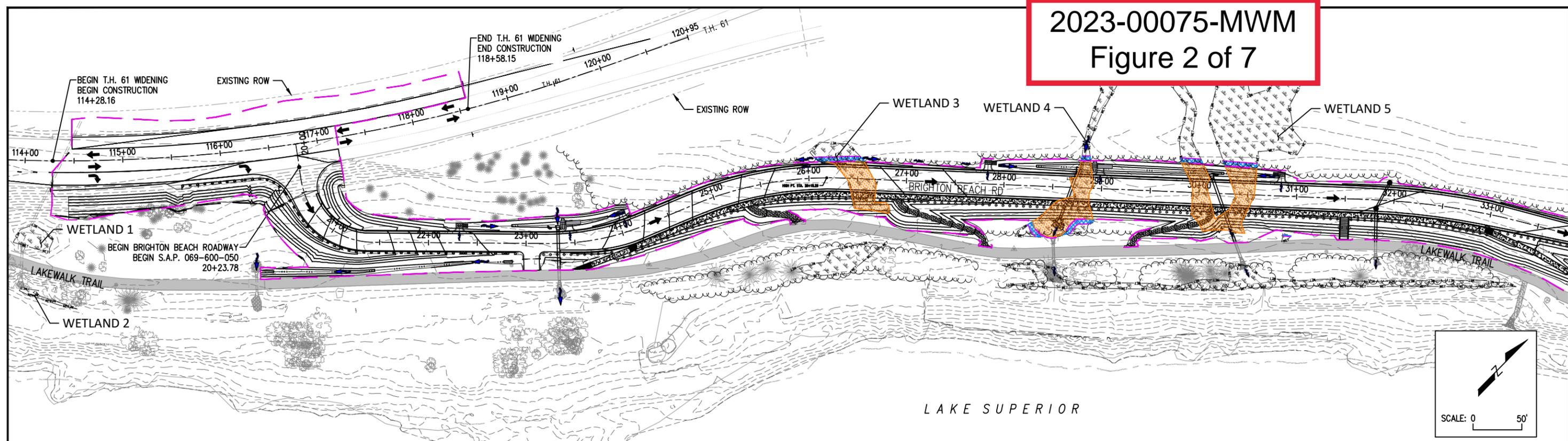
December 13, 2023

Wetlands

- | | | |
|--------------------------------|-----------------------------------|----------|
| Estuarine and Marine Deepwater | Freshwater Emergent Wetland | Lake |
| Estuarine and Marine Wetland | Freshwater Forested/Shrub Wetland | Other |
| | Freshwater Pond | Riverine |

This map is for general reference only. The US Fish and Wildlife Service is not responsible for the accuracy or currentness of the base data shown on this map. All wetlands related data should be used in accordance with the layer metadata found on the Wetlands Mapper web site.

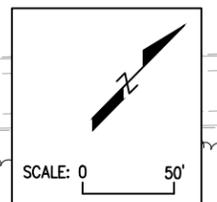
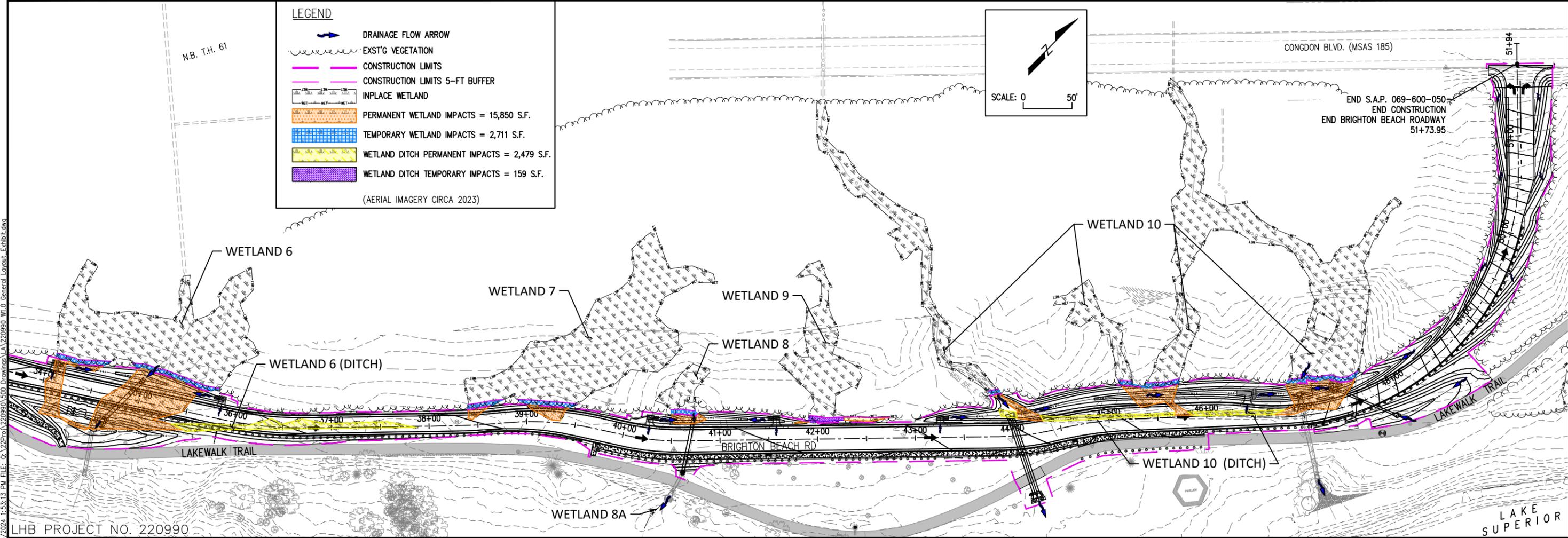
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LEGEND

- DRAINAGE FLOW ARROW
- EXST'G VEGETATION
- CONSTRUCTION LIMITS
- CONSTRUCTION LIMITS 5-FT BUFFER
- INPLACE WETLAND
- PERMANENT WETLAND IMPACTS = 15,850 S.F.
- TEMPORARY WETLAND IMPACTS = 2,711 S.F.
- WETLAND DITCH PERMANENT IMPACTS = 2,479 S.F.
- WETLAND DITCH TEMPORARY IMPACTS = 159 S.F.

(AERIAL IMAGERY CIRCA 2023)



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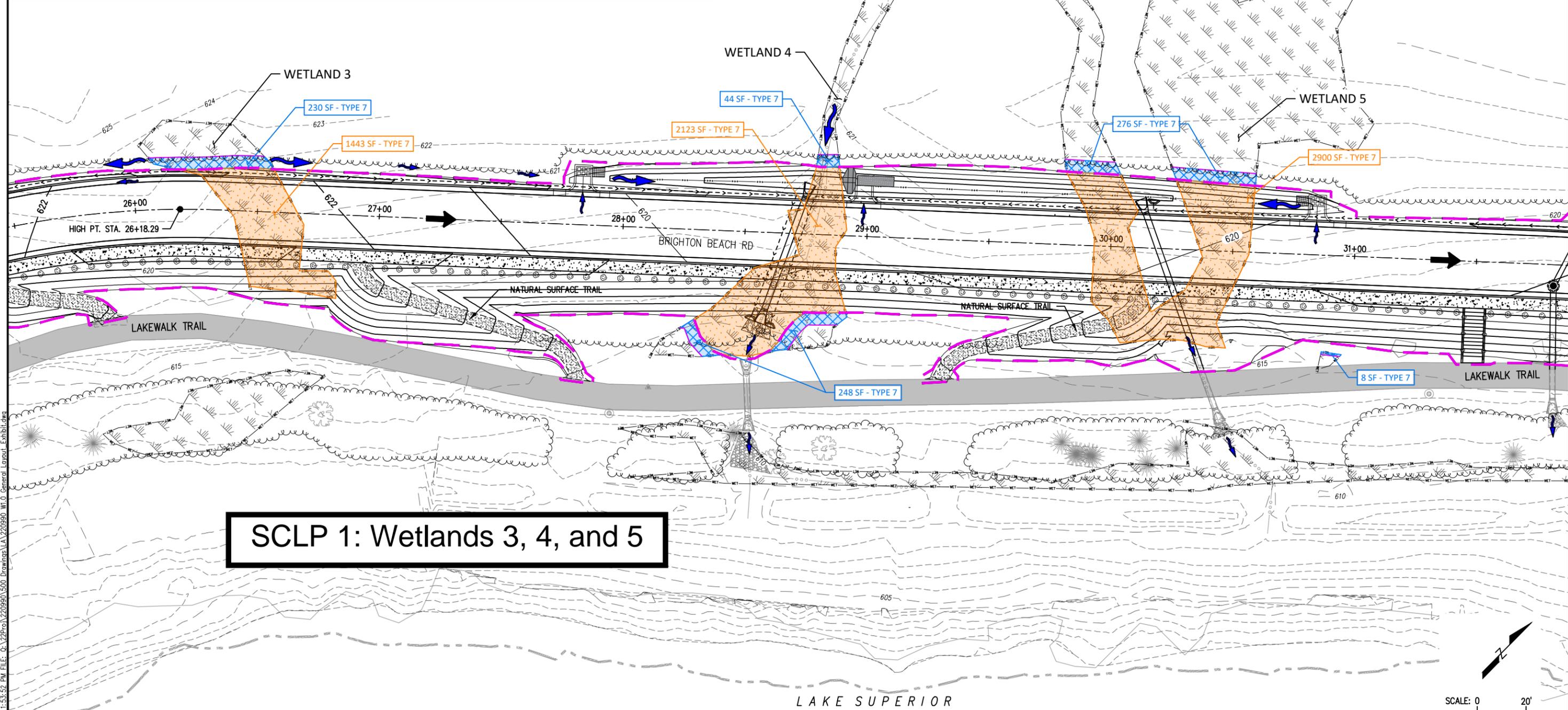
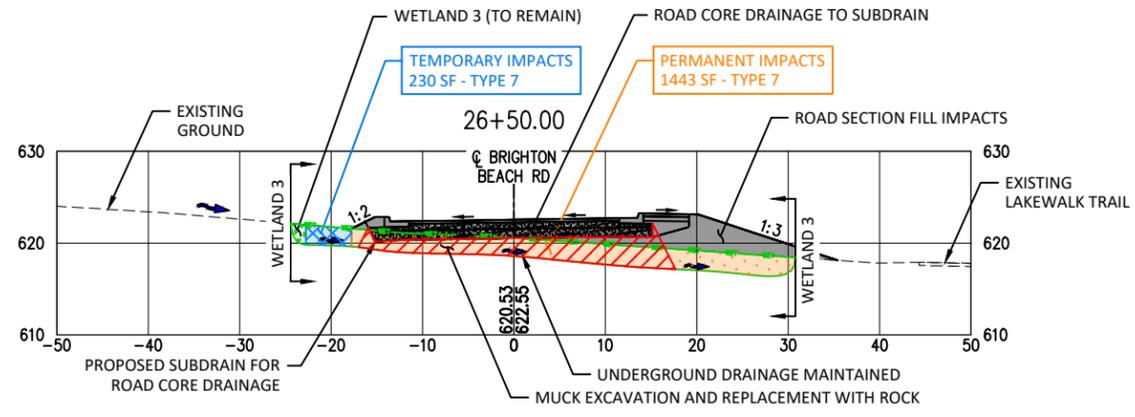
LHB PROJECT NO. 220990

S.A.P. 069-600-050
CITY PROJECT NO. 1940

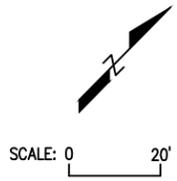
BRIGHTON BEACH ROADWAY

GENERAL LAYOUT - WETLAND IMPACTS
SHEET NO. 1 OF 5 SHEETS

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Figure 3 of 7



SCLP 1: Wetlands 3, 4, and 5



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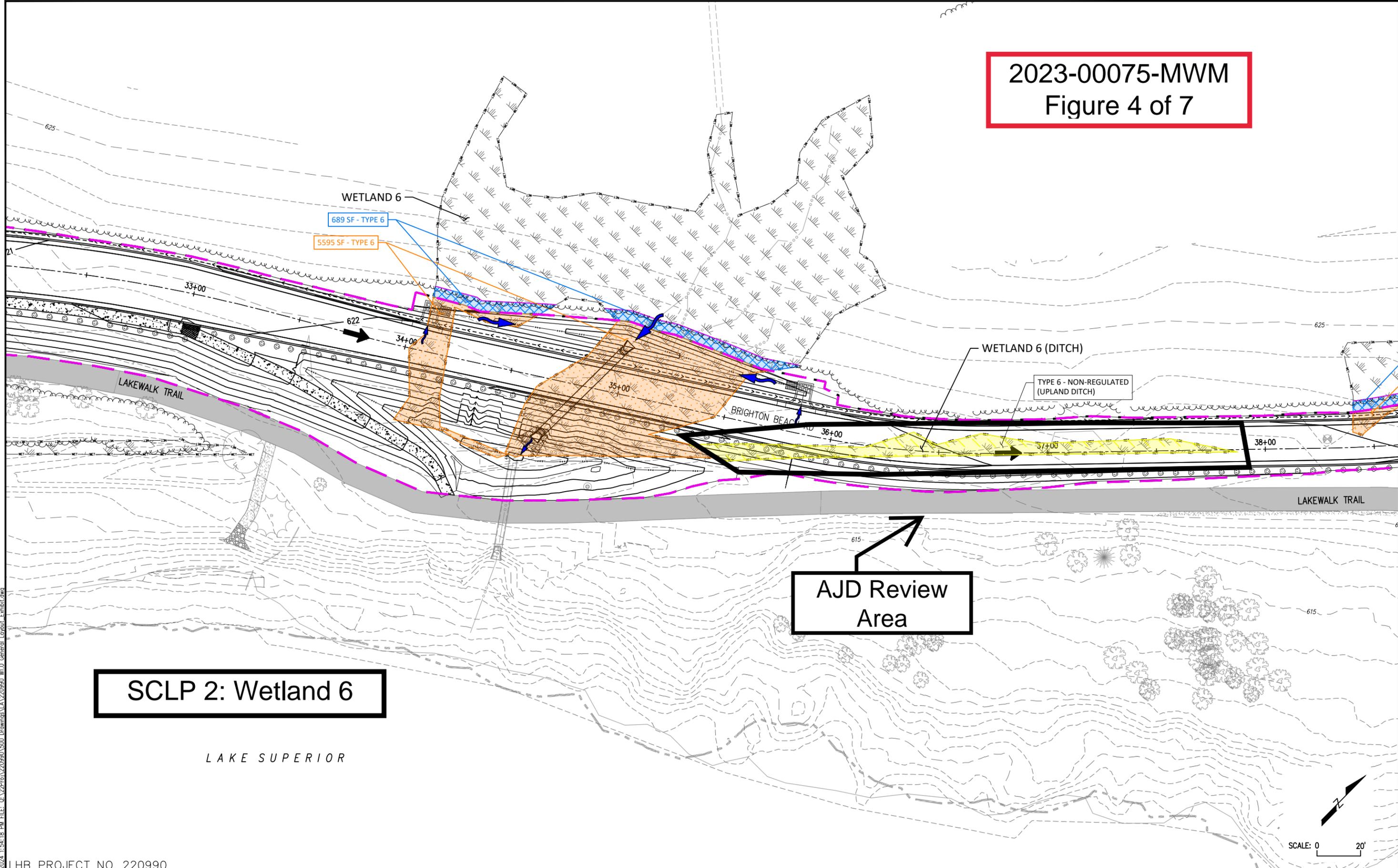
LHB PROJECT NO. 220990

S.A.P. 069-600-050
CITY PROJECT NO. 1940

BRIGHTON BEACH ROADWAY

DETAIL - WETLAND IMPACTS
SHEET NO. 2 OF 5 SHEETS

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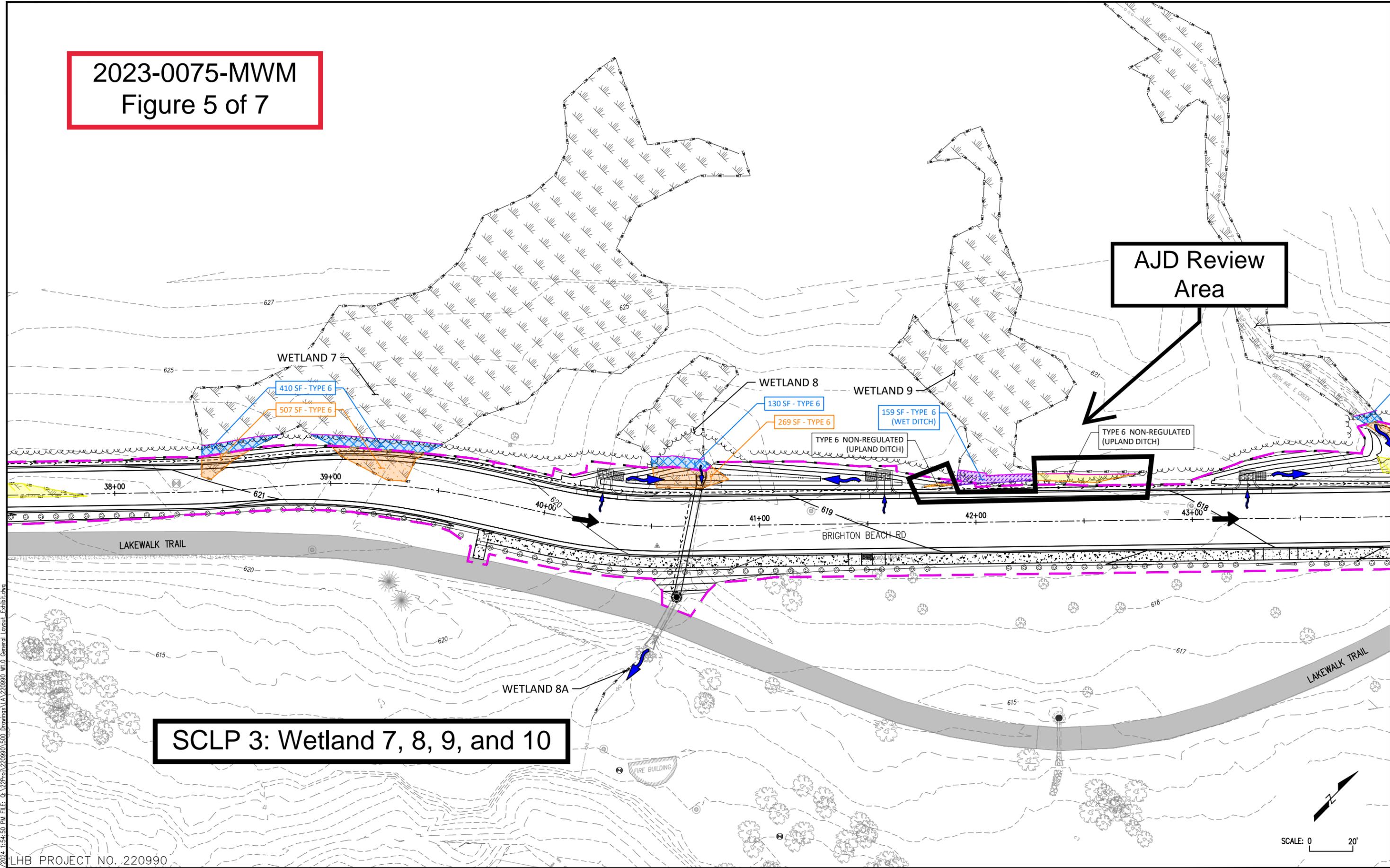


SCLP 2: Wetland 6

LAKE SUPERIOR

AJD Review Area

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SCLP 3: Wetland 7, 8, 9, and 10

AJD Review Area

SCALE: 0 20'

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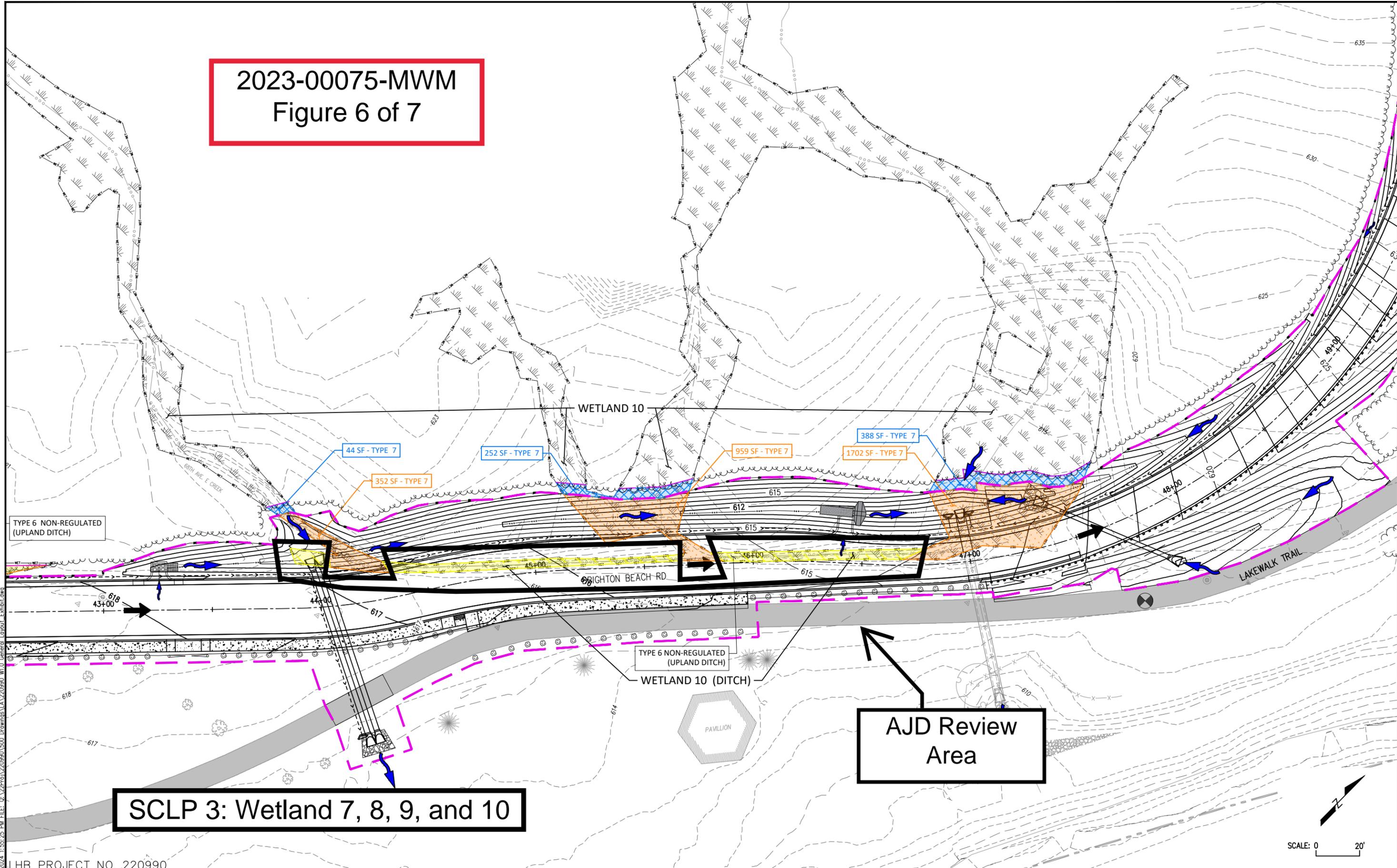
LHB PROJECT NO. 220990

S.A.P. 069-600-050
CITY PROJECT NO. 1940

BRIGHTON BEACH ROADWAY

DETAIL - WETLAND IMPACTS
SHEET NO. 4 OF 5 SHEETS

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SCLP 3: Wetland 7, 8, 9, and 10

AJD Review Area

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LHB PROJECT NO. 220990

S.A.P. 069-600-050

CITY PROJECT NO. 1940

BRIGHTON BEACH ROADWAY

DETAIL - WETLAND IMPACTS

SHEET NO. 5 OF 5 SHEETS

Aquatic Resource	Permanent Discharge (acres)	Temporary Discharge (acres)
SCLP 1		
Wetland 3	0.033126722	0.005280073
Wetland 4	0.048737374	0.006703398
Wetland 5	0.066574839	0.006519743
TOTAL	0.148438935	0.018503214

SCLP 2		
Wetland 6	0.128443526	0.015817264
TOTAL	0.128443526	0.015817264

SCLP 3		
Wetland 7	0.011639118	0.009412305
Wetland 8	0.00617539	0.002984389
Wetland 9	-	0.003650138
Wetland 10	0.069168962	0.015702479
TOTAL	0.086983471	0.031749311

AJD Aquatic Resources	
Wet Ditch 6	1,511 squ. feet
Wet Ditch 9	300 squ. feet
Wet Ditch 10	1,552 squ. feet

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Figure 7 of 7