



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

MVP-2023-01085-JMK (SAP 027-712-003 and 152-101-017)

27 March 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-2023-01085-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.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 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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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. Wet Ditch 2 (0.13 acre), non-jurisdictional
- ii. Wet Ditch 3 (0.03 acre), non-jurisdictional
- iii. Wet Ditch 5 (0.02 acre), non-jurisdictional
- iv. Wet Ditch 6 (0.02 acre), non-jurisdictional
- v. Wet Ditch 7 (0.04 acre), non-jurisdictional
- vi. Wet Ditch 8 (0.14 acre), non-jurisdictional
- vii. Wet Ditch 9 (0.01 acre), non-jurisdictional
- viii. Wet Ditch 11 (0.19 acre), non-jurisdictional
- ix. Wet Ditch 13 (0.01 acre), non-jurisdictional
- x. Wet Ditch 15 (0.19 acre), non-jurisdictional
- xi. Wet Ditch 17 (0.08 acre), non-jurisdictional
- xii. Wet Ditch 18 (215 sq.ft.), 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 the 12 roadside ditches identified in Section 1(a) of this MFR and on the attached Figures 1 of 6 through 6 of 6 titled, MVP-2023-01085-JMK AJD. The review area is located between 44.9895 N, -93.6089 W and 44.9893 N, -93.5835 W in the City of Orono, Hennepin 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 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 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.

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.

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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- 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).⁷
 - Wet Ditches identified in Section 1(a) of this MFR within the review area have been determined to be linear roadside drainage ditches constructed in upland and drain only upland based on the following:
 - The US Geological Service 3DEP Hillshade and DEM maps and MNDNR 2-foot contour maps display the ditches were constructed in areas of higher elevation supportive of upland;
 - NWI maps do not show any wetlands that coincide with the location of these ditches; and
 - NHD data displays none of the ditches are relocated or captured streams.

In addition, recent aerial photos do not show relatively permanent flow in the aforementioned aquatic resources. Therefore, Wet Ditches 2, 3, 5, 6, 7, 8, 9, 11, 13, 15, 17, and 18 have been determined to be Paragraph (b)(3) excluded ditches and not subject to Section 404 of the Clean Water Act (CWA).

⁷ 88 FR 3004 (January 18, 2023)

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- 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 Investigation Hennepin County CSAH 112 dated September 7, 2023.
- b. Minnesota Regulatory Viewer: US Geological Service 3DEP Hillshade and Digital Elevation Model (DEM) and NHD layers, MNDNR 2-foot contour layer, USFWS NWI layer, and NRCS hydric soil data layer.

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.

Project Location



Legend

- Environmental Clearance Boundary
- County Parcels
- Wetland
- Wet Ditch
- Stormwater Pond
- Sample Point
- Culvert
- Weir

Project Notes

Project No: 17549
Date: 10.30.2023
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Longitude: -93.608483

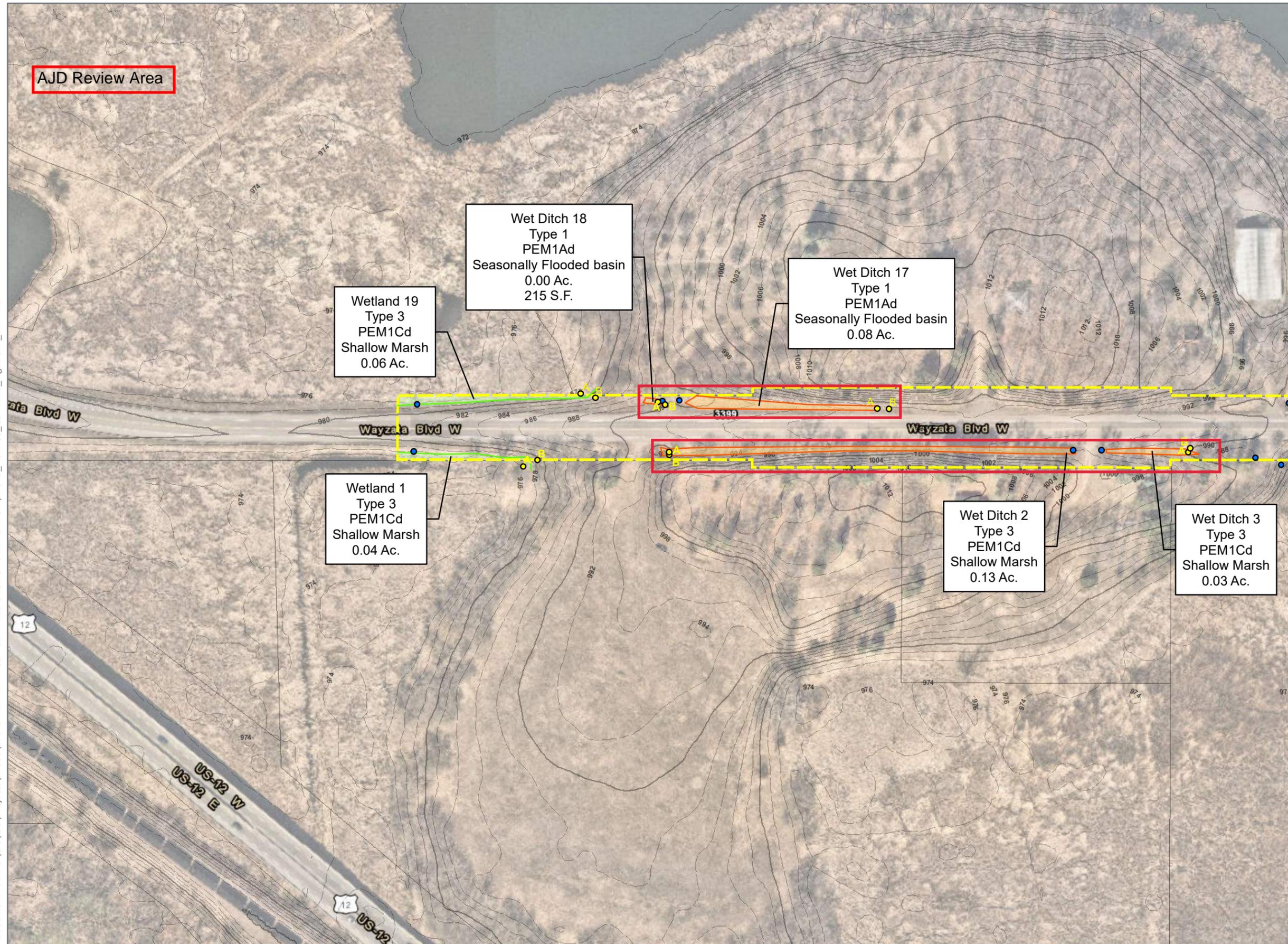
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TIGER, Bing, Hennepin Co.,
Anderson Engineering

1 inch = 150 feet

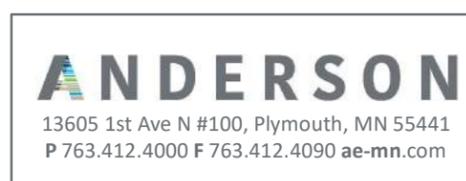
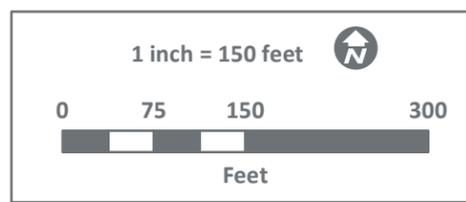
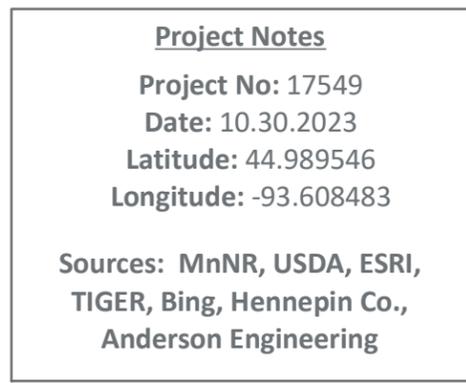
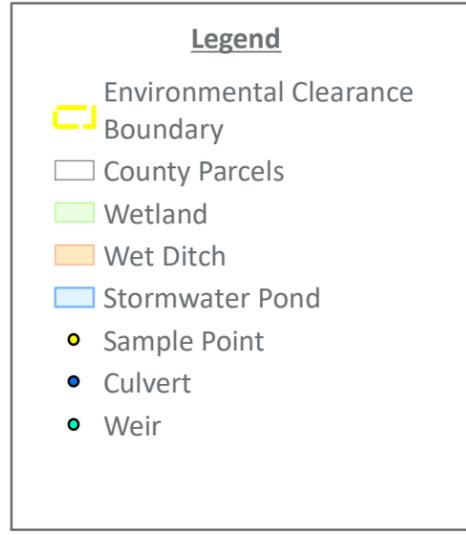
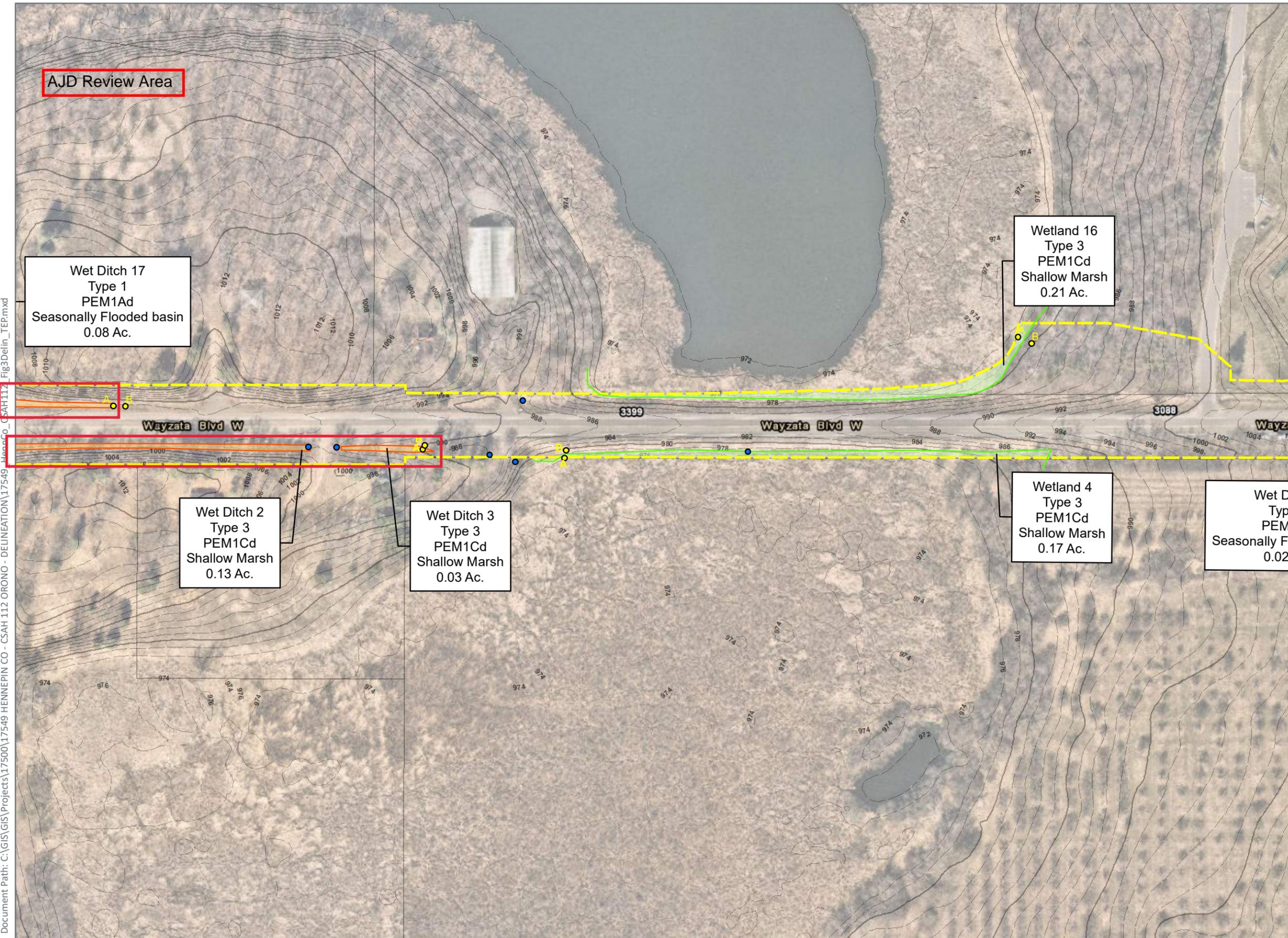
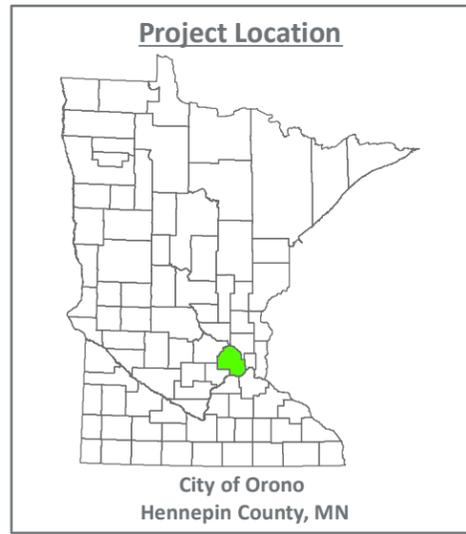


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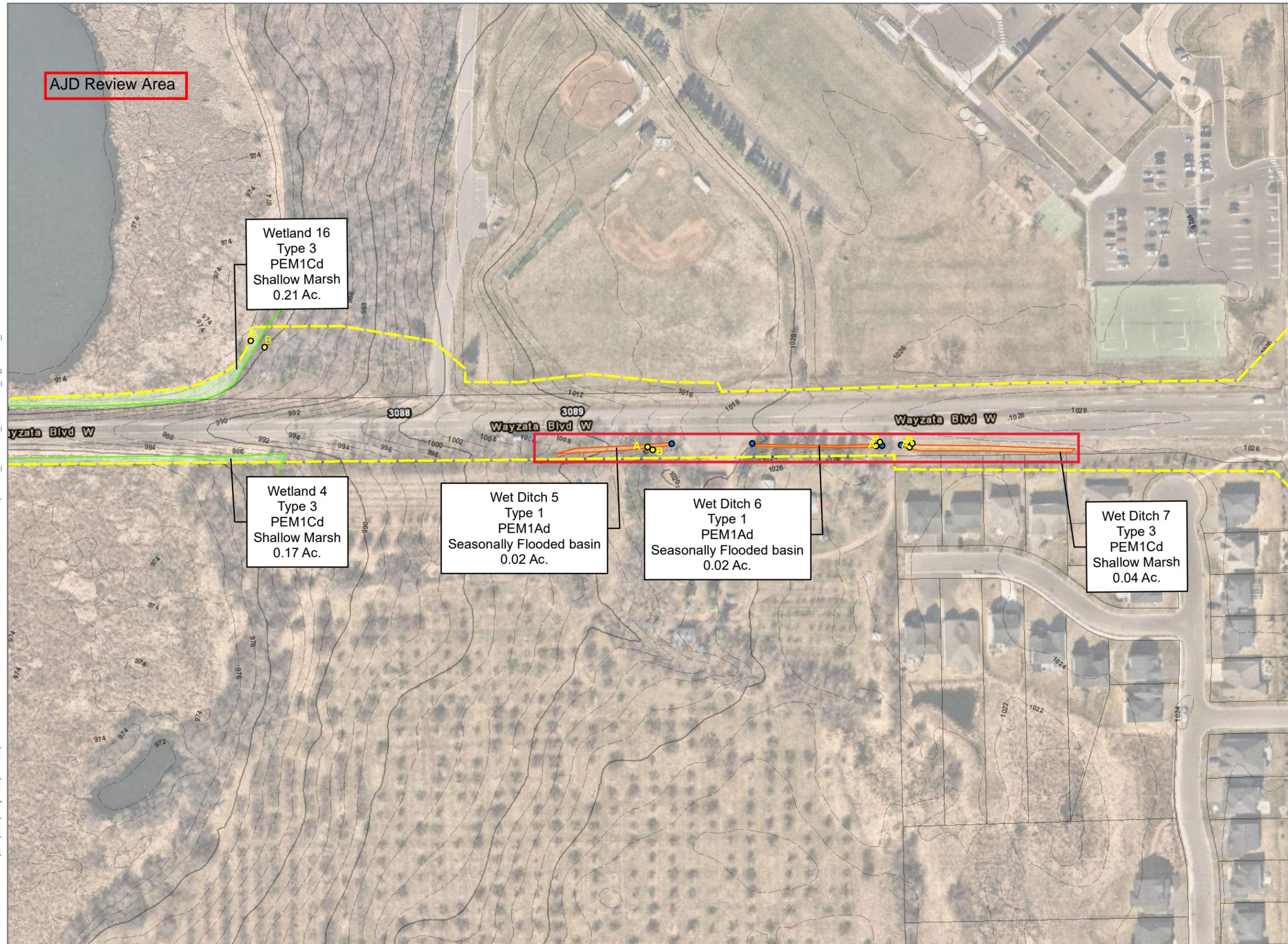
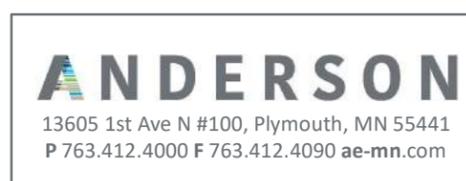
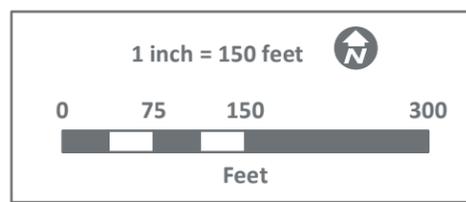
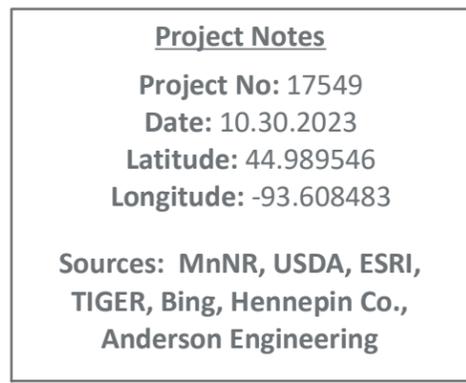
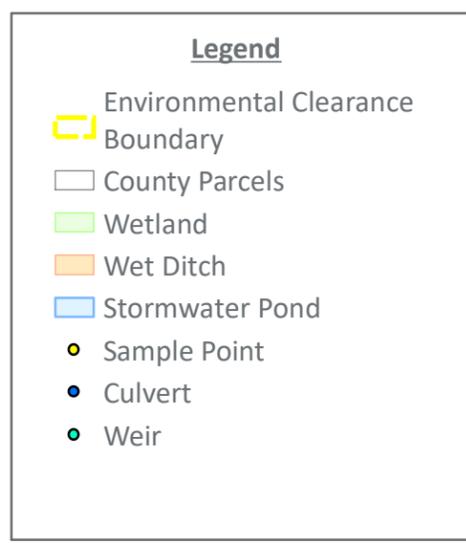
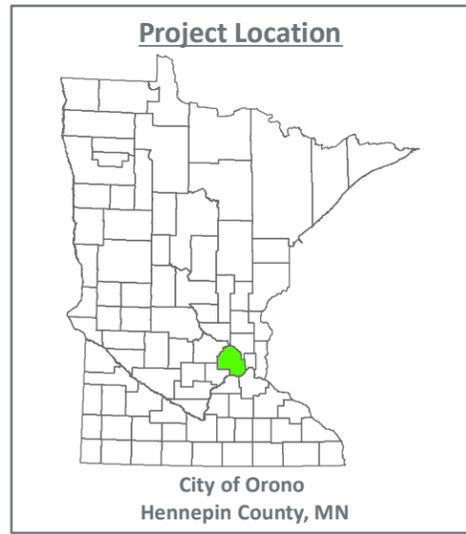
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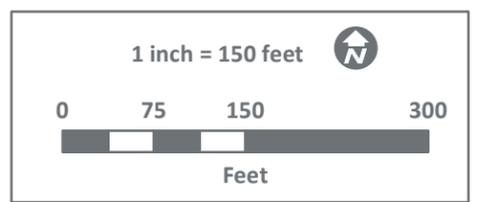
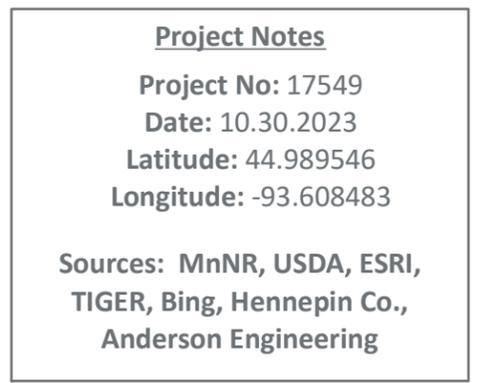
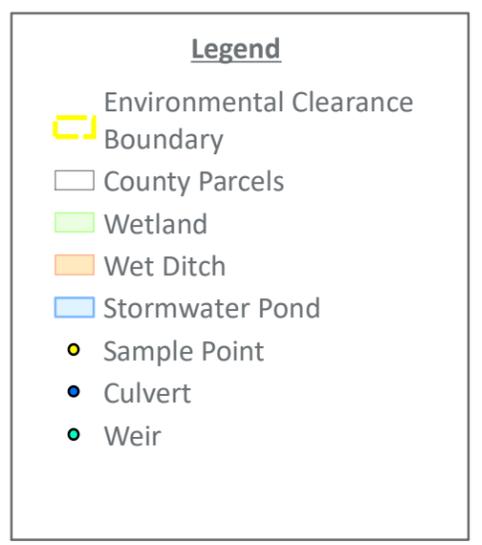
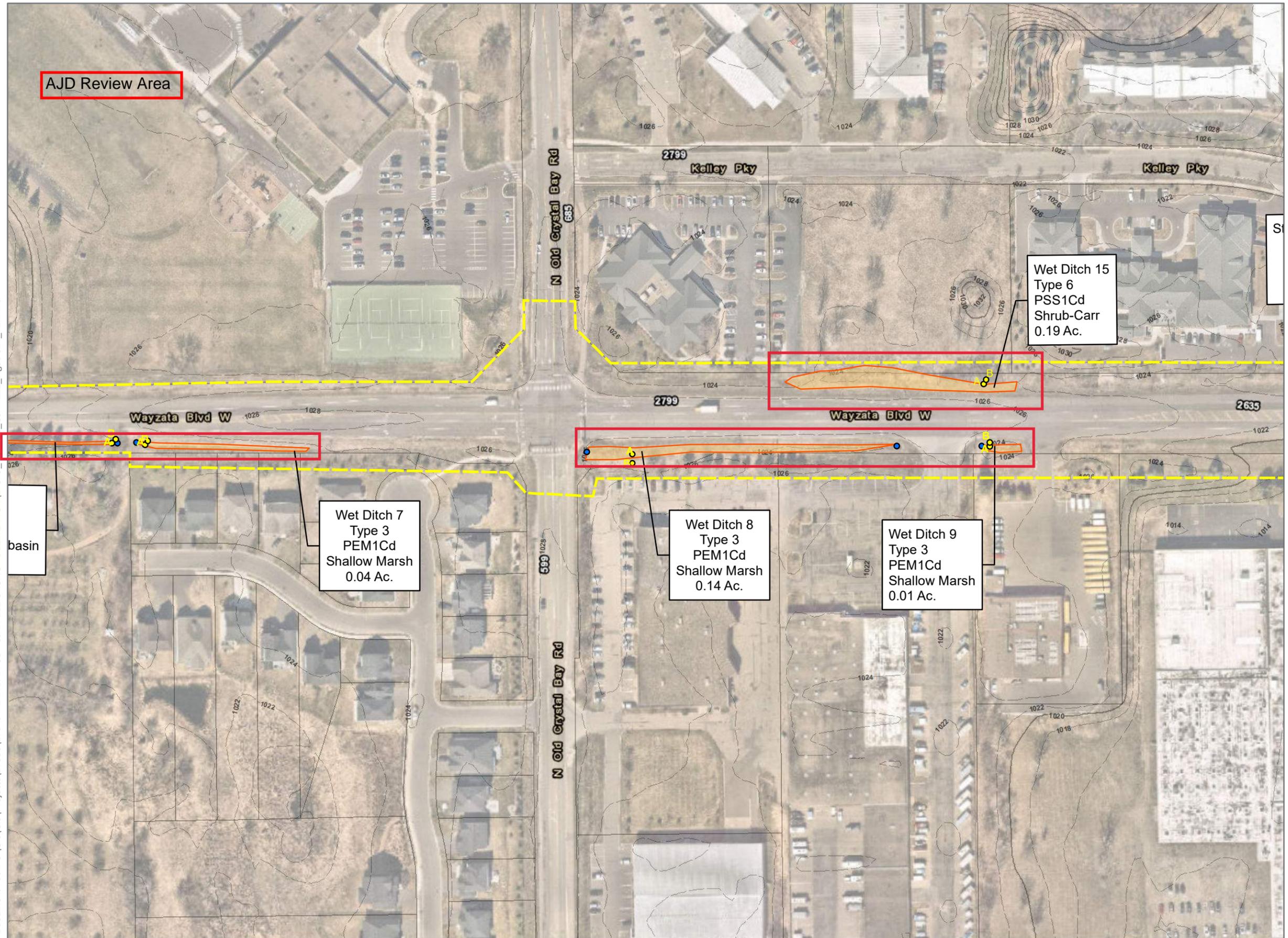
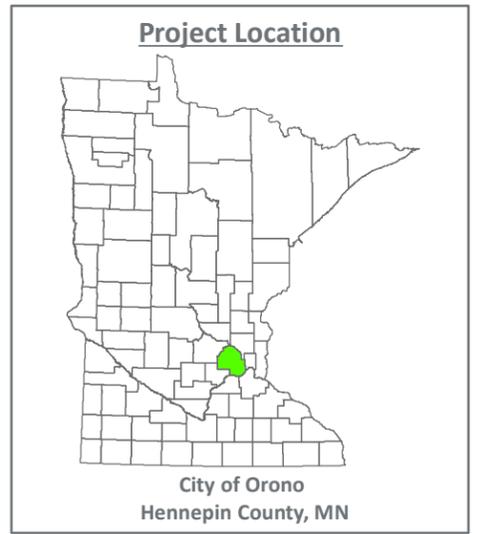
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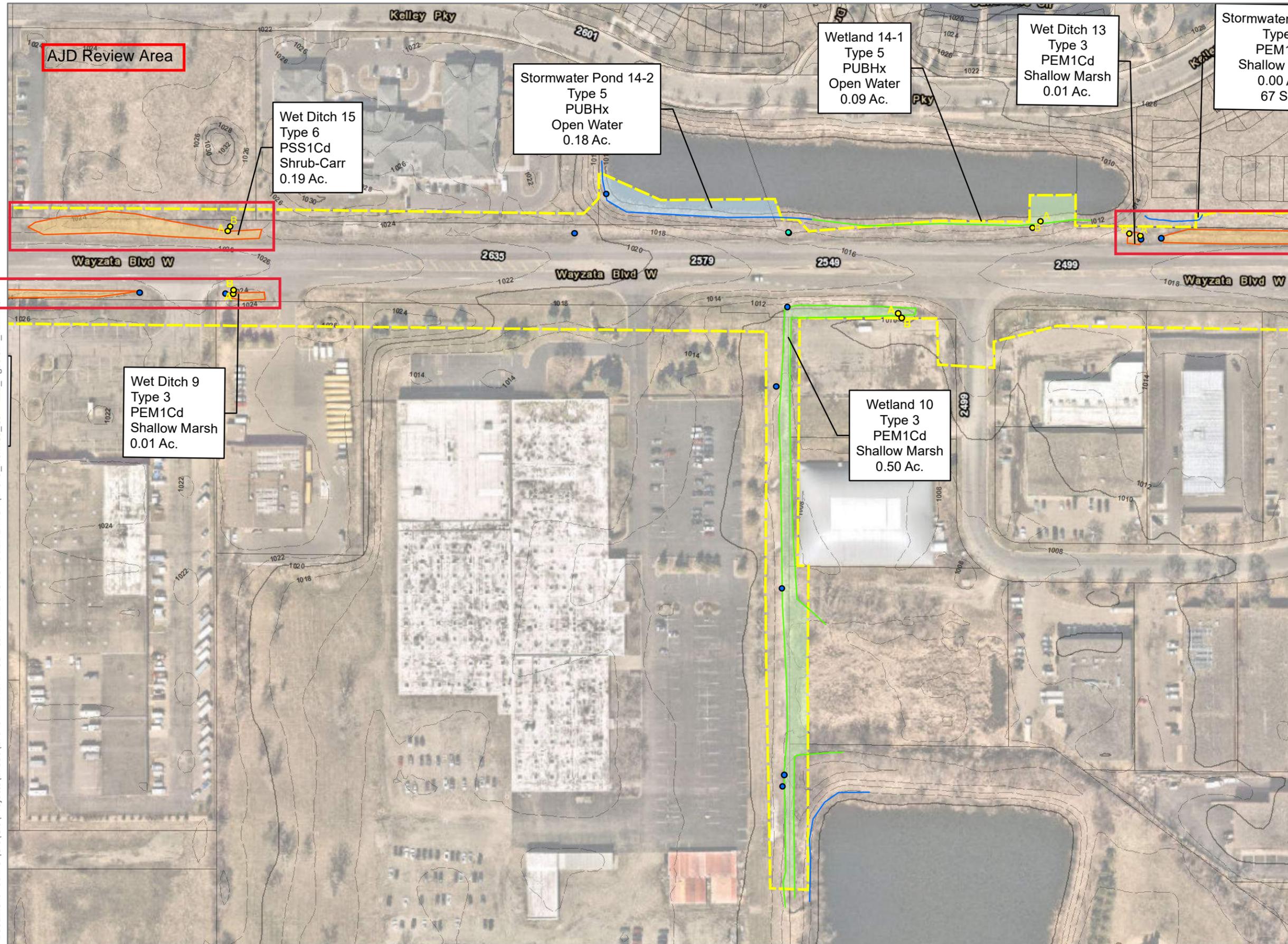


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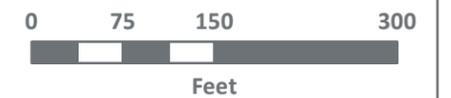
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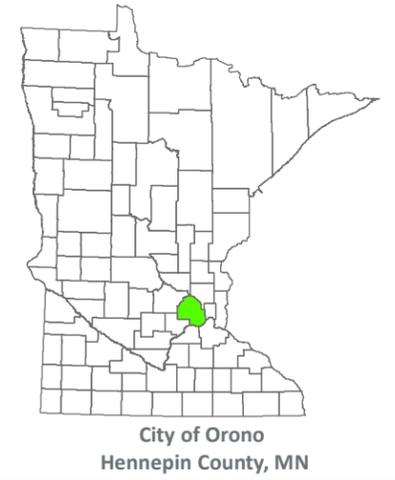
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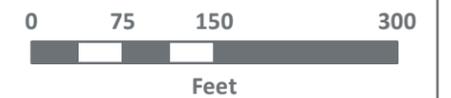
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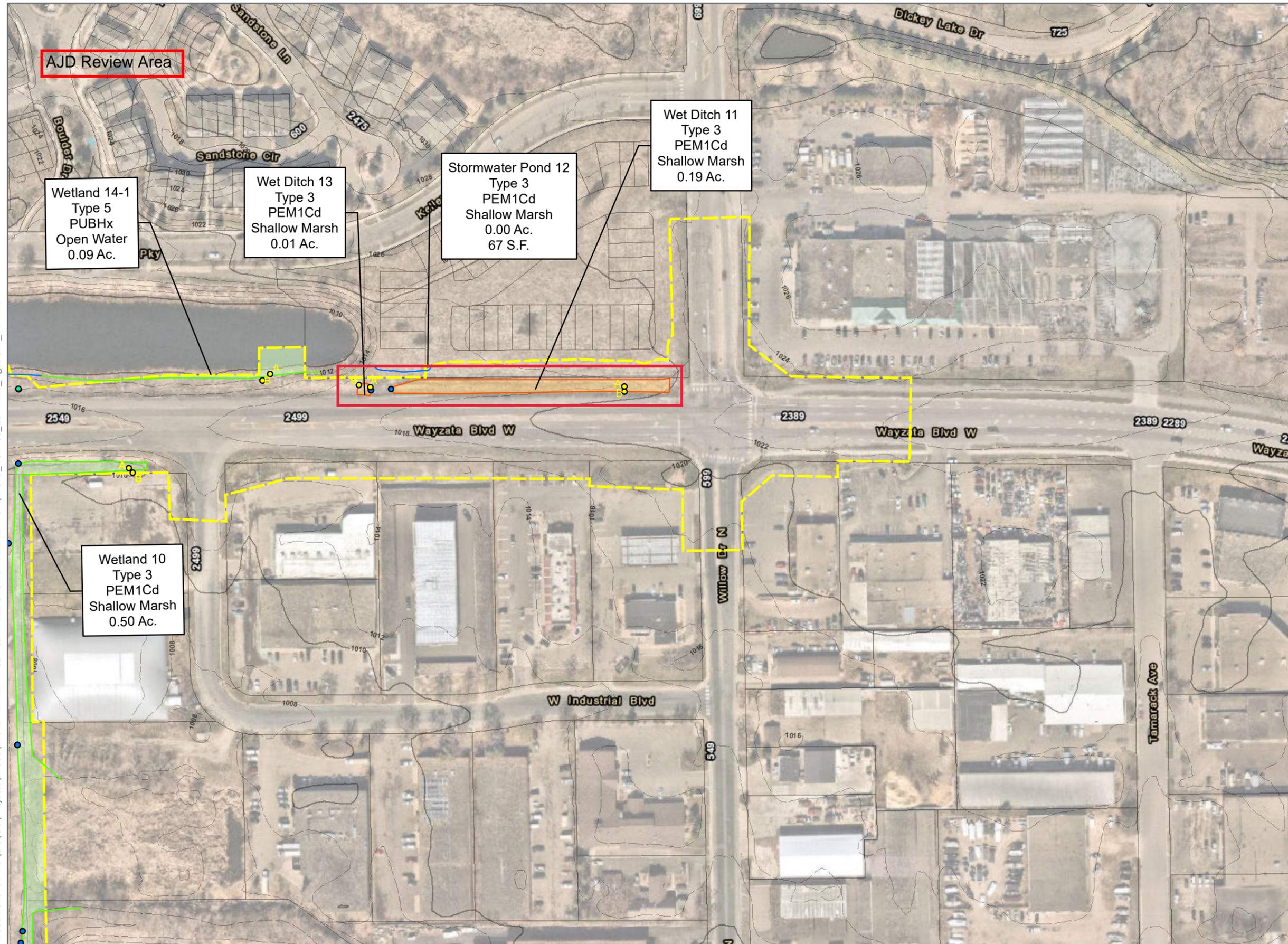
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