



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

MVP-2023-01491-JMK (SP 5614-117)

5 January 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-2023-01491-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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SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2023-01491-JMK

## 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 1, non-jurisdictional
  - ii. Wet Ditch 2, non-jurisdictional
  - iii. Wet Ditch 3, non-jurisdictional
  - iv. Wet Ditch 4, non-jurisdictional
  - v. Wet Ditch 5, non-jurisdictional
  - vi. Wet Ditch 6, non-jurisdictional
  - vii. Wet Ditch 7, non-jurisdictional
  - viii. Wet Ditch 8, non-jurisdictional
  - ix. Wet Ditch 9, non-jurisdictional
  - x. Wet Ditch 10, non-jurisdictional
  - xi. Wet Ditch 13, non-jurisdictional
  - xii. Wet Ditch 14, non-jurisdictional
  - xiii. Wet Ditch 15, 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 10 roadside ditches identified in Section 1(a) of this MFR and on the attached figures labeled MVP-2023-01491-JMK Pages 1-17 of 17. The review area is located at 46.5712 N, -96.0835 W in the City of Pelican Rapids, Otter Tail 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>
  - Wet Ditch 1 (5,430 square feet), Wet Ditch 2 (1,749 square feet), Wet Ditch 3 (654 square feet), Wet Ditch 4 (301 square feet), Wet Ditch 5 (521 square feet), Wet Ditch 6 (1,016 square feet), Wet Ditch 7 (1,102 square feet), Wet Ditch 8 (54 square feet), Wet Ditch 9 (516 square feet), Wet Ditch 10 (60 square feet), Wet Ditch 13 (302 square feet), Wet Ditch 14 (7,044 square feet), and Wet Ditch 15 (885 square feet) within the review area are linear roadside drainage ditches constructed in upland and drain only upland based on a review of aerial imagery from 1939 and 1963; US Geological Service 3DEP Hillshade and DEM maps; MNDNR 2-foot contour maps; NWI maps; NHD data; and NRCS hydric soil data. Recent aerial photos do not show relatively permanent flow in the aforementioned aquatic resources. Based on the desktop resources reviewed Wet Ditches 1 – 10, 13, 14, and 15 are linear roadside drainage ditches constructed in upland. Therefore, Wet Ditches 1 – 10, 13, 14, and 15 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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SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2023-01491-JMK

- 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

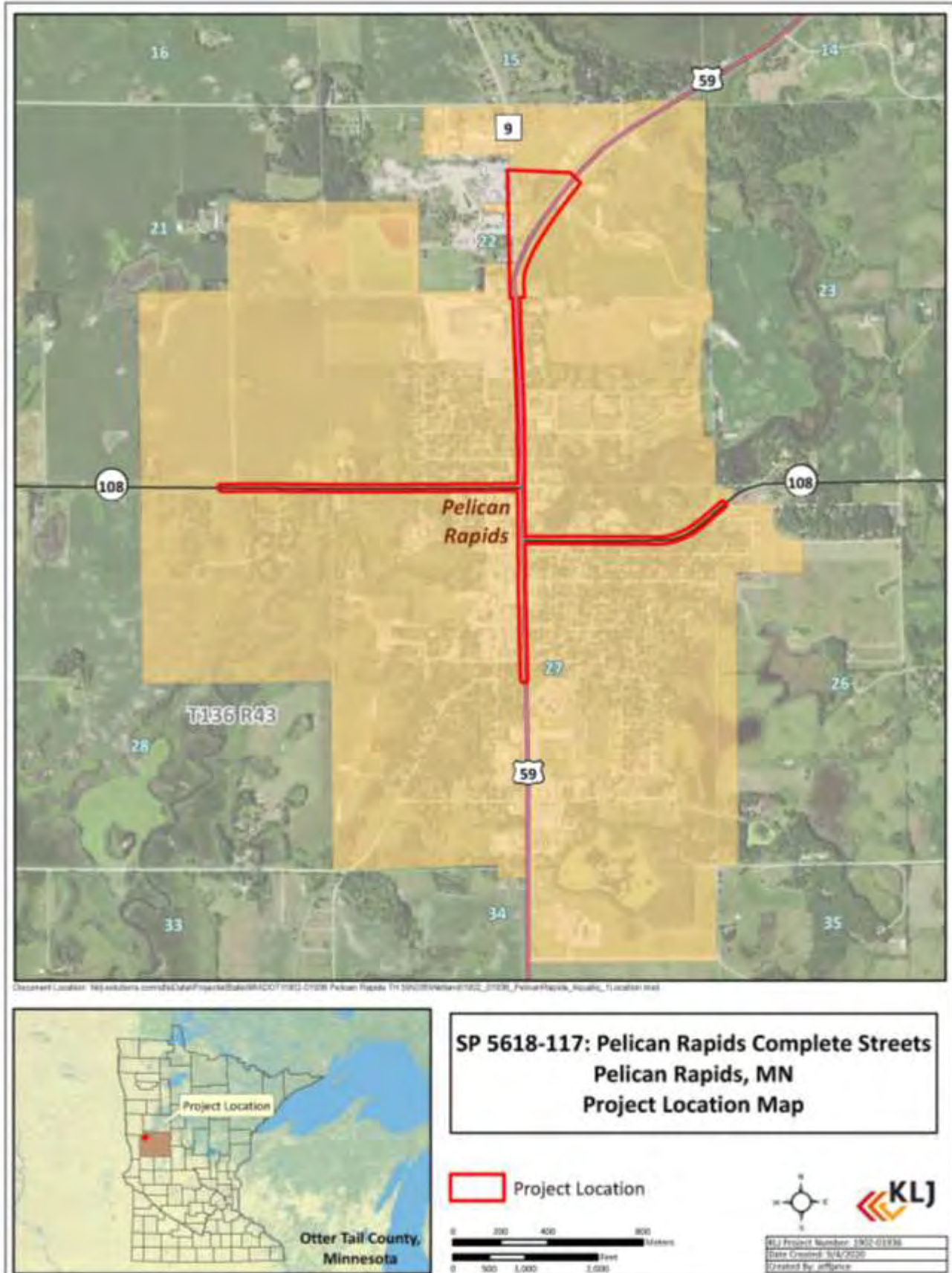
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

- a. Wetland Permit Application for TH 59 & TH 108 Reconstruction dated September 2023.
- b. Attached figures labeled MVP-2023-01491-JMK Pages 1-17 of 17.
- c. Aerial imagery dated 1939 and 1963 submitted as part of the Wetland Permit Application.
- d. 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.

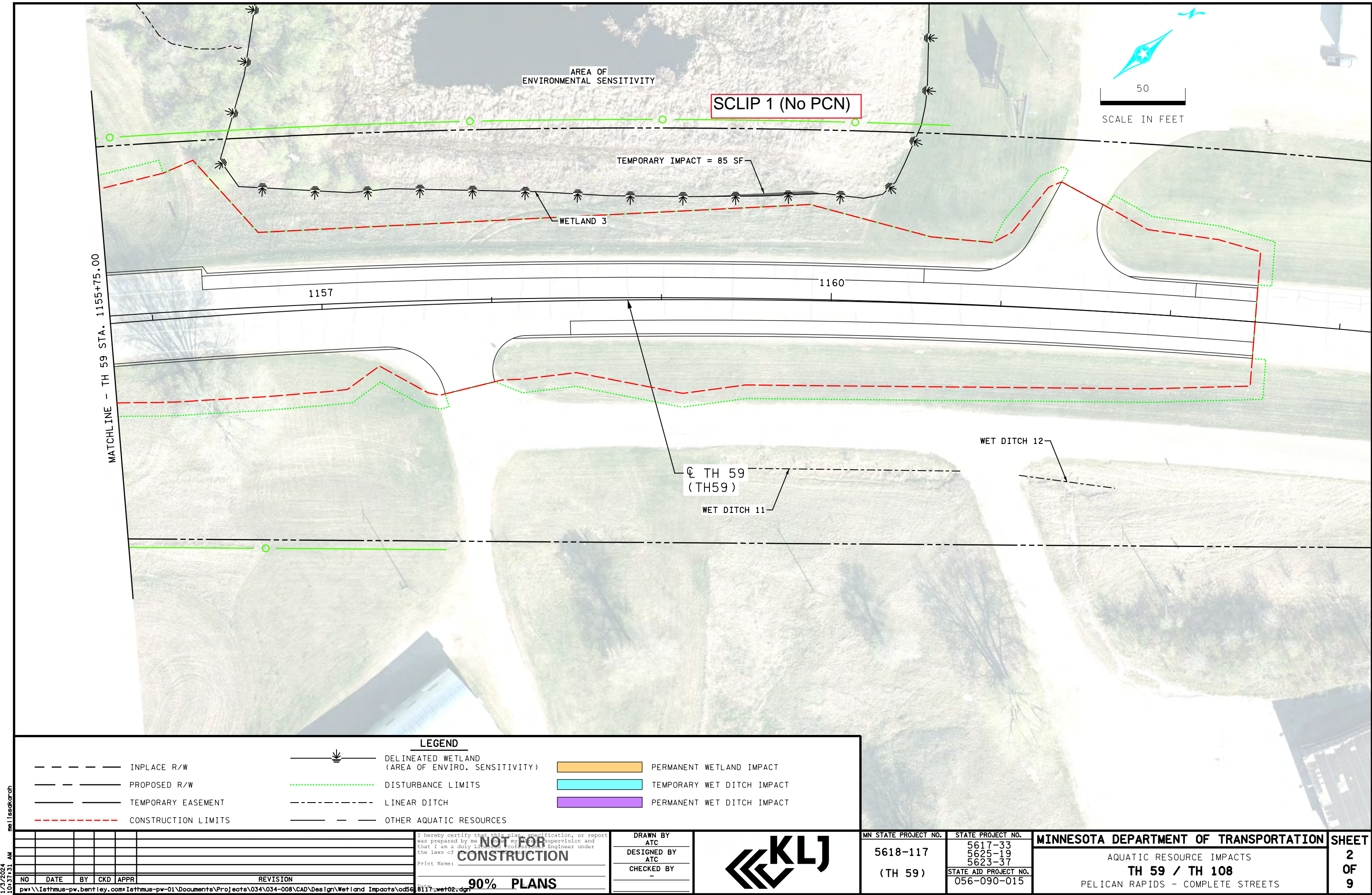
10. OTHER SUPPORTING INFORMATION. N/A

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.

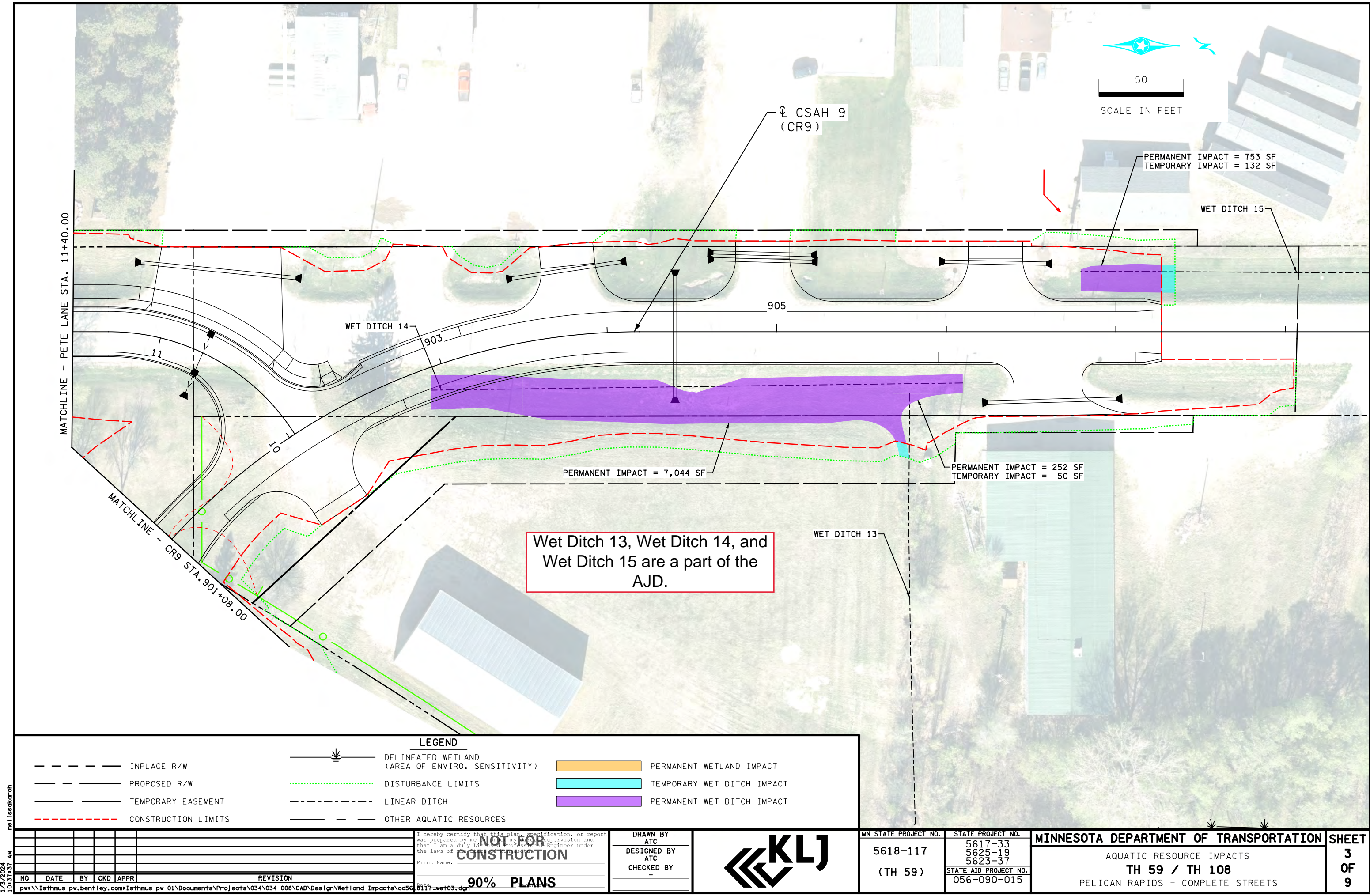
Figure 1. Project Location Map



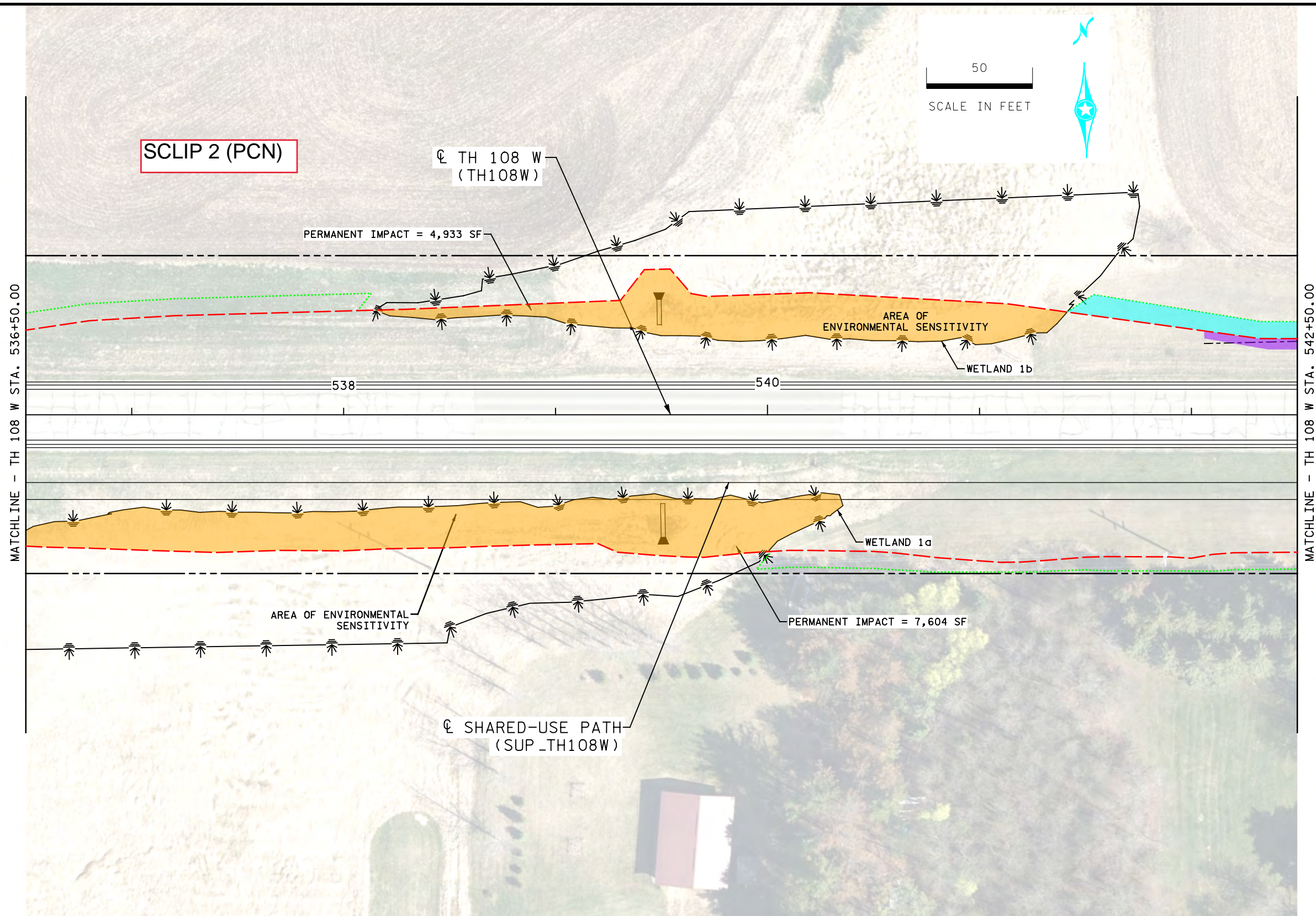












LEGEND

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|-------|---------------------|-----|--|--|----------------------------|
| ---   | INPLACE R/W         |     | DELINEATED WETLAND (AREA OF ENVIRO. SENSITIVITY) |  | PERMANENT WETLAND IMPACT   |
| - - - | PROPOSED R/W        |     | DISTURBANCE LIMITS                               |  | TEMPORARY WET DITCH IMPACT |
| ---   | TEMPORARY EASEMENT  | --- | LINEAR DITCH                                     |  | PERMANENT WET DITCH IMPACT |
| - - - | CONSTRUCTION LIMITS | --- | OTHER AQUATIC RESOURCES                          |  |                            |

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Date: **90% PLANS**

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MN STATE PROJECT NO.	STATE PROJECT NO.
5618-117	5617-33
(TH 59)	5625-19
	5623-37
	STATE AID PROJECT NO.
	056-090-015

MINNESOTA DEPARTMENT OF TRANSPORTATION
AQUATIC RESOURCE IMPACTS
TH 59 / TH 108
PELICAN RAPIDS - COMPLETE STREETS

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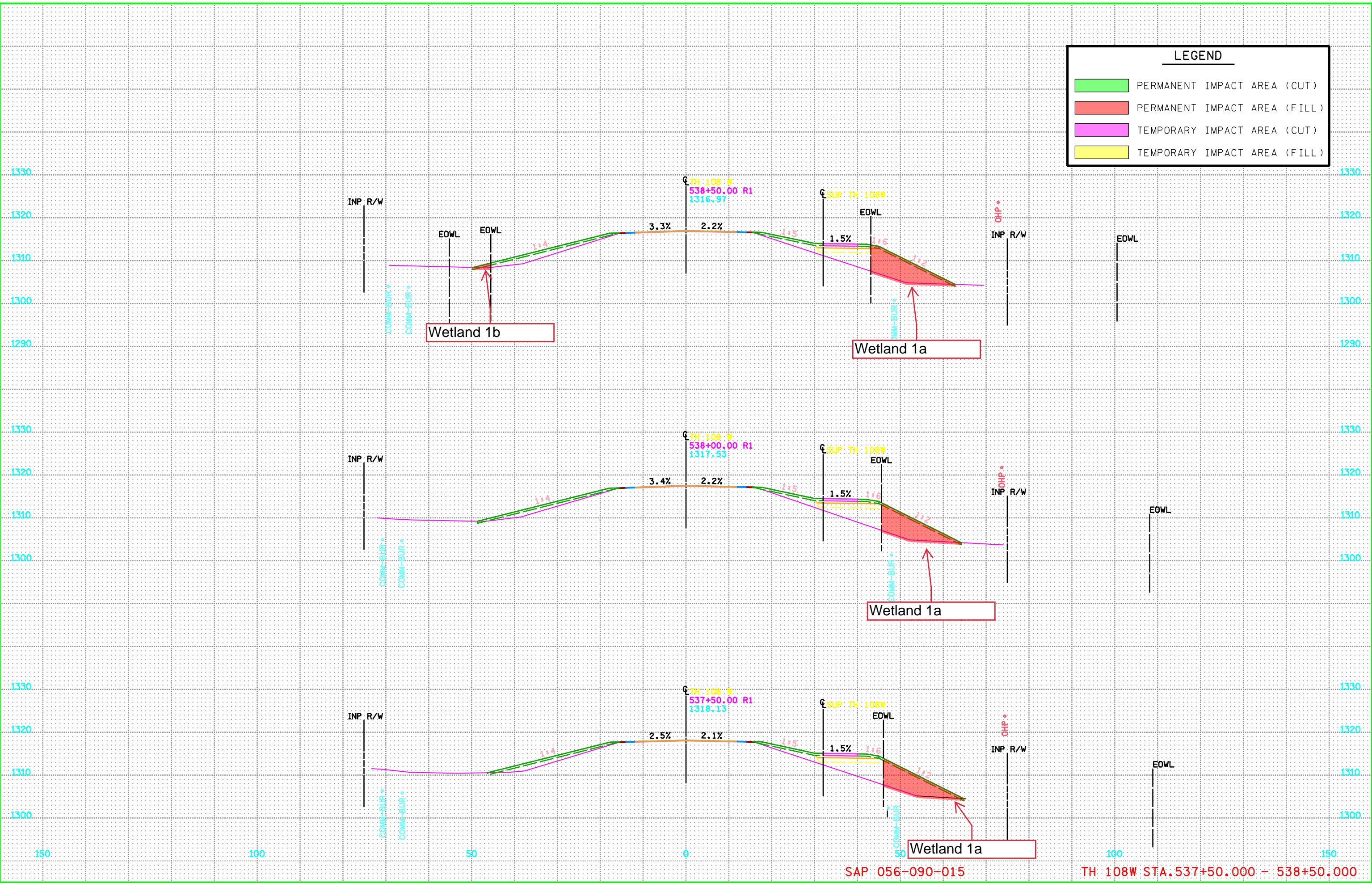
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PERMANENT IMPACT AREA (CUT)

PERMANENT IMPACT AREA (FILL)

TEMPORARY IMPACT AREA (CUT)

TEMPORARY IMPACT AREA (FILL)



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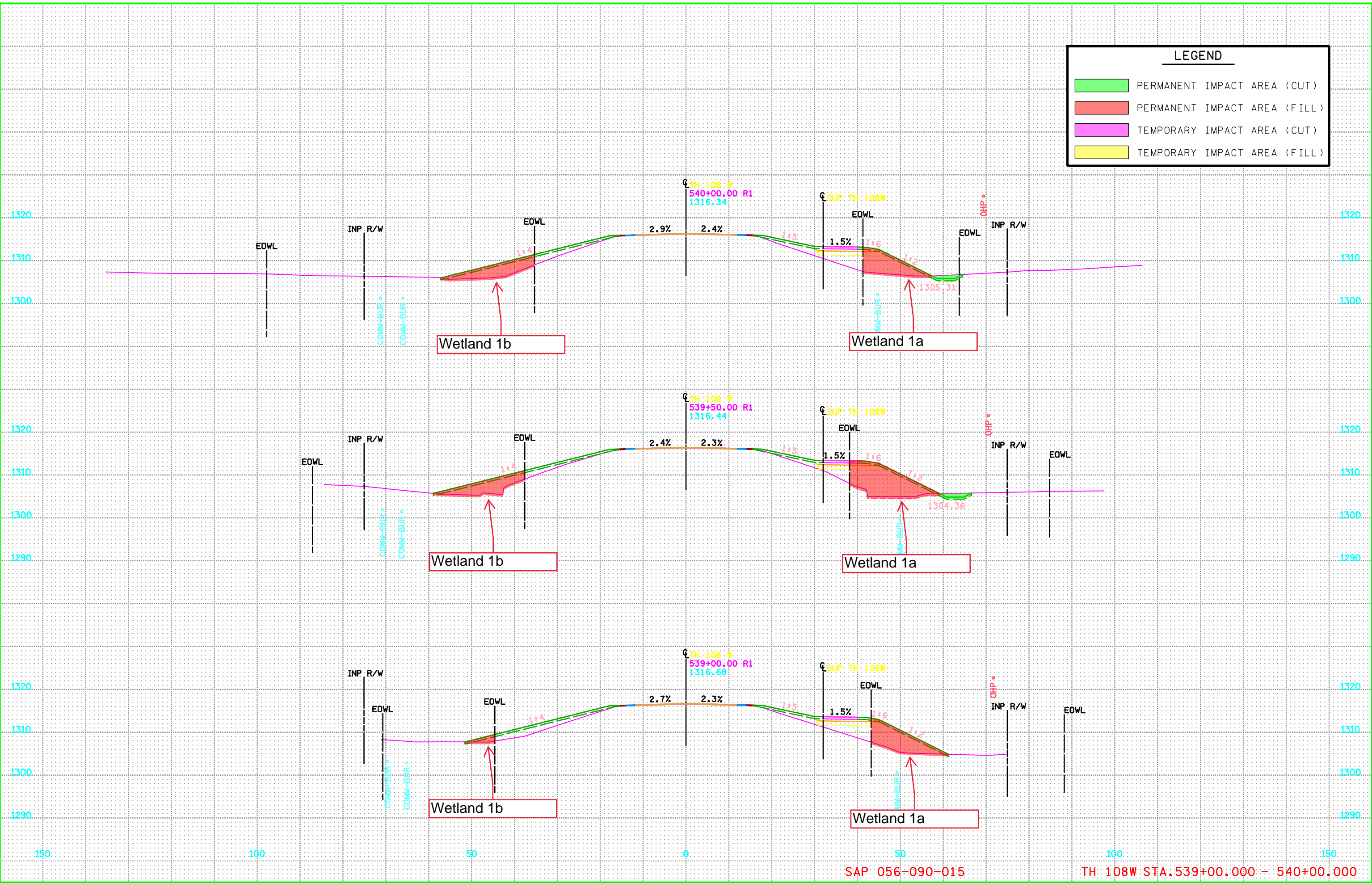
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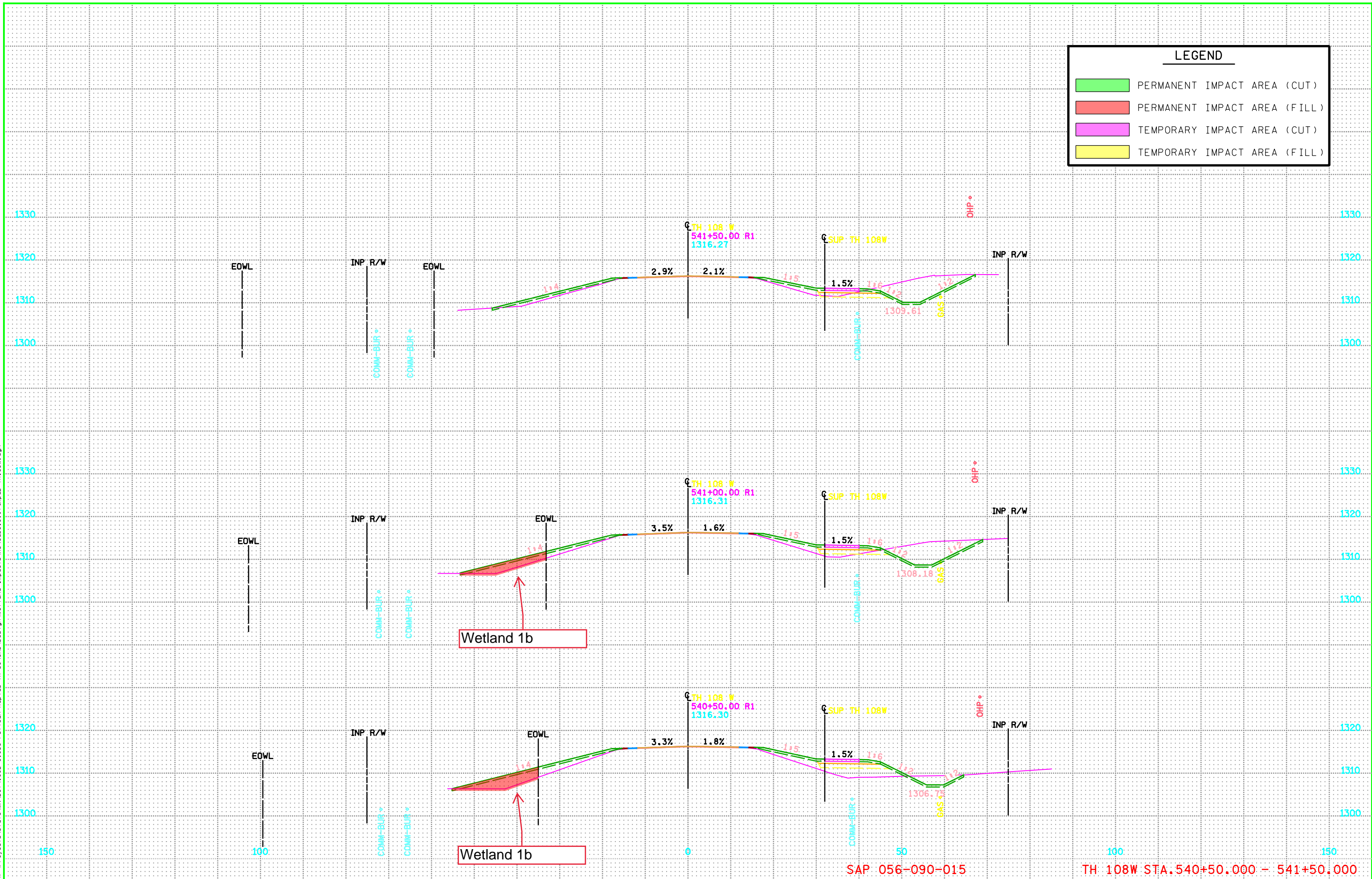
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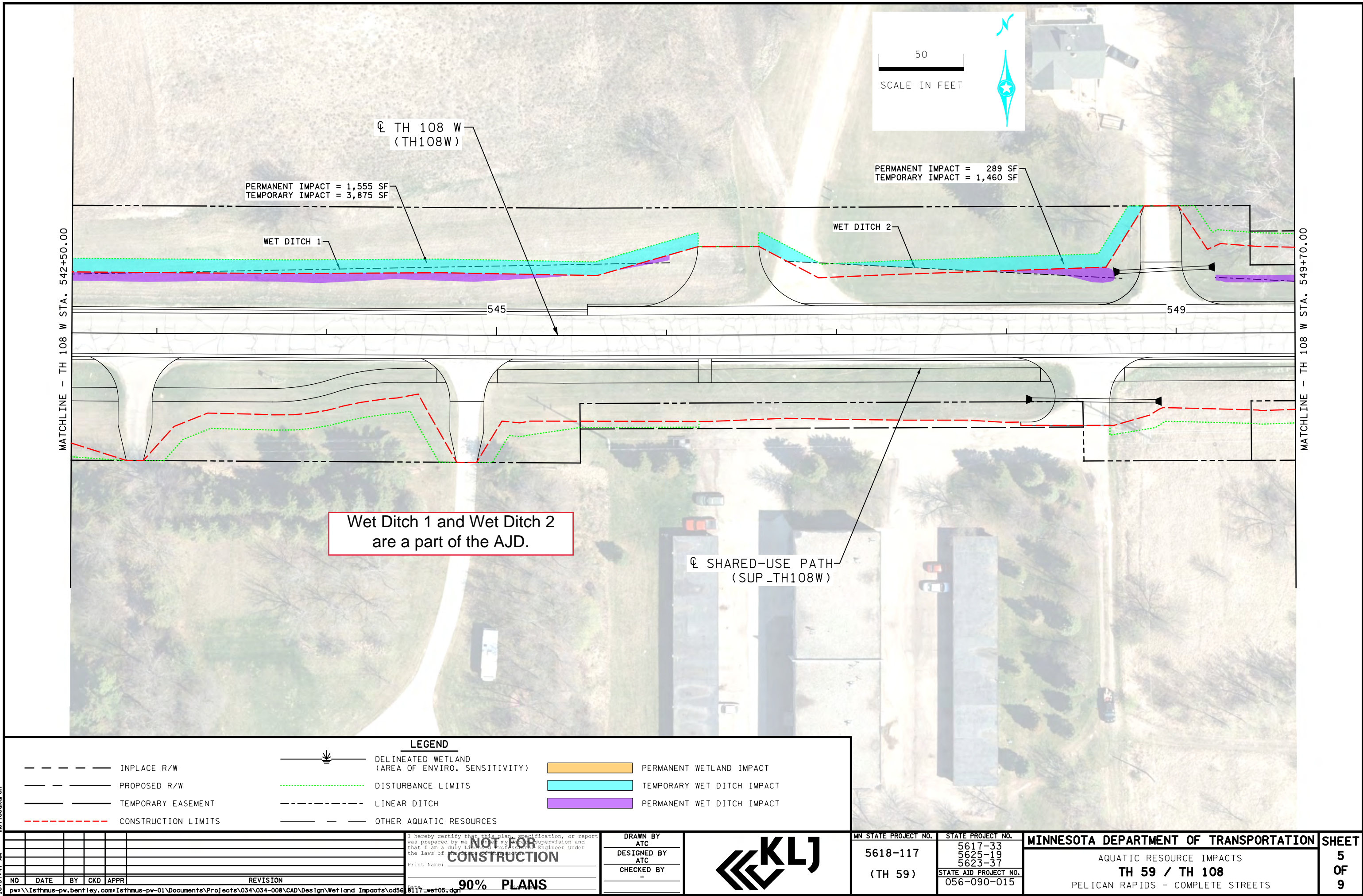
TEMPORARY IMPACT AREA (FILL)



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Wet Ditch 1 and Wet Ditch 2  
are a part of the AJD.

LEGEND

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INPLACE R/W

PROPOSED R/W

TEMPORARY EASEMENT

CONSTRUCTION LIMITS
- DELINEATED WETLAND  
(AREA OF ENVIRO. SENSITIVITY)

DISTURBANCE LIMITS

LINEAR DITCH

OTHER AQUATIC RESOURCES
- PERMANENT WETLAND IMPACT

TEMPORARY WET DITCH IMPACT

PERMANENT WET DITCH IMPACT

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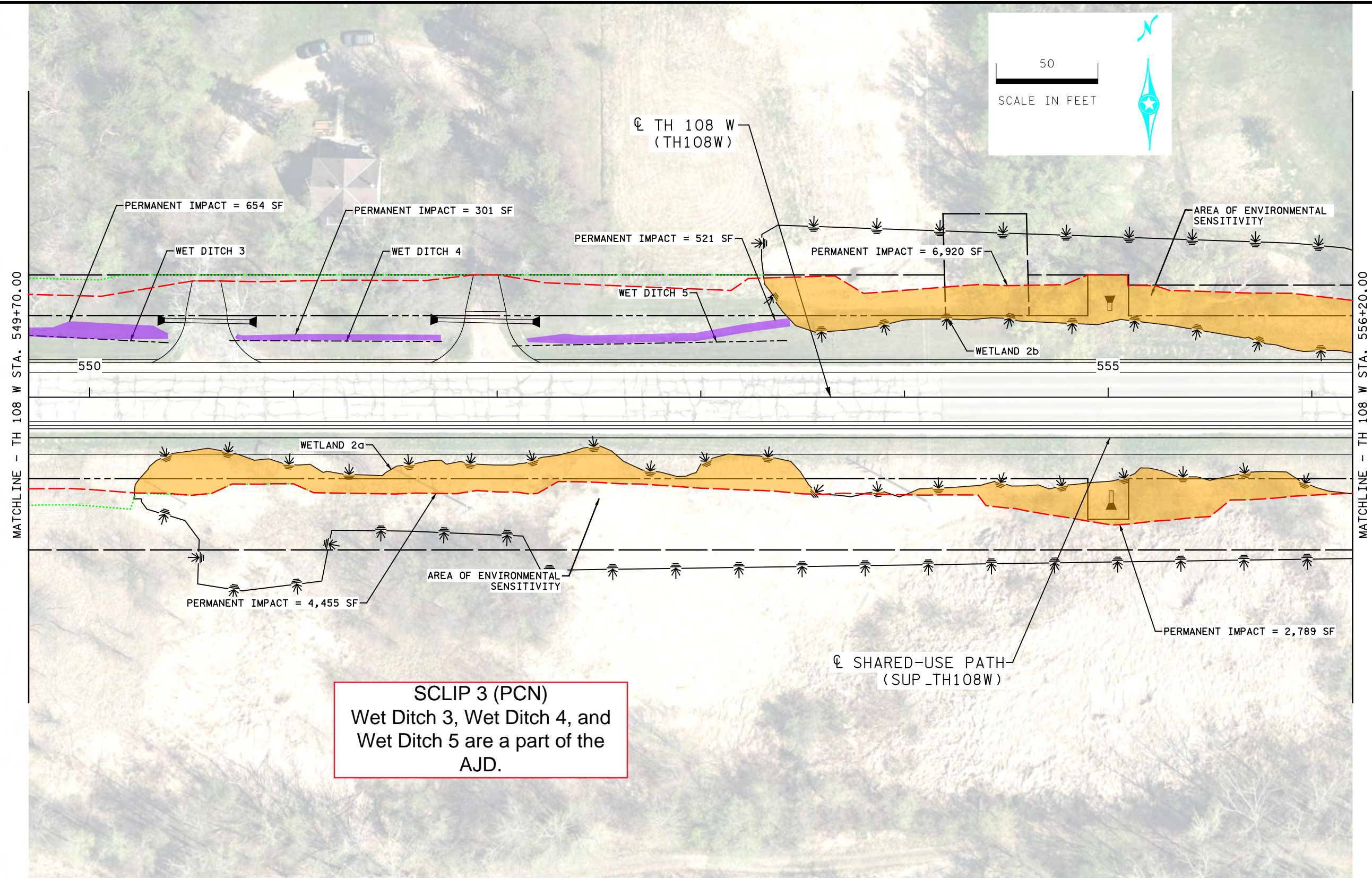


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AQUATIC RESOURCE IMPACTS
TH 59 / TH 108
PELICAN RAPIDS - COMPLETE STREETS

SHEET  
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SCLIP 3 (PCN)  
Wet Ditch 3, Wet Ditch 4, and  
Wet Ditch 5 are a part of the  
AJD.

LEGEND

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|-----|---------------------|-----|---|-----|----------------------------|
| --- | INPLACE R/W         | --- | DELINEATED WETLAND<br>(AREA OF ENVIRO. SENSITIVITY) | --- | PERMANENT WETLAND IMPACT   |
| --- | PROPOSED R/W        | --- | DISTURBANCE LIMITS                                  | --- | TEMPORARY WET DITCH IMPACT |
| --- | TEMPORARY EASEMENT  | --- | LINEAR DITCH  | --- | PERMANENT WET DITCH IMPACT |
| --- | CONSTRUCTION LIMITS | --- | OTHER AQUATIC RESOURCES                             |     |                            |

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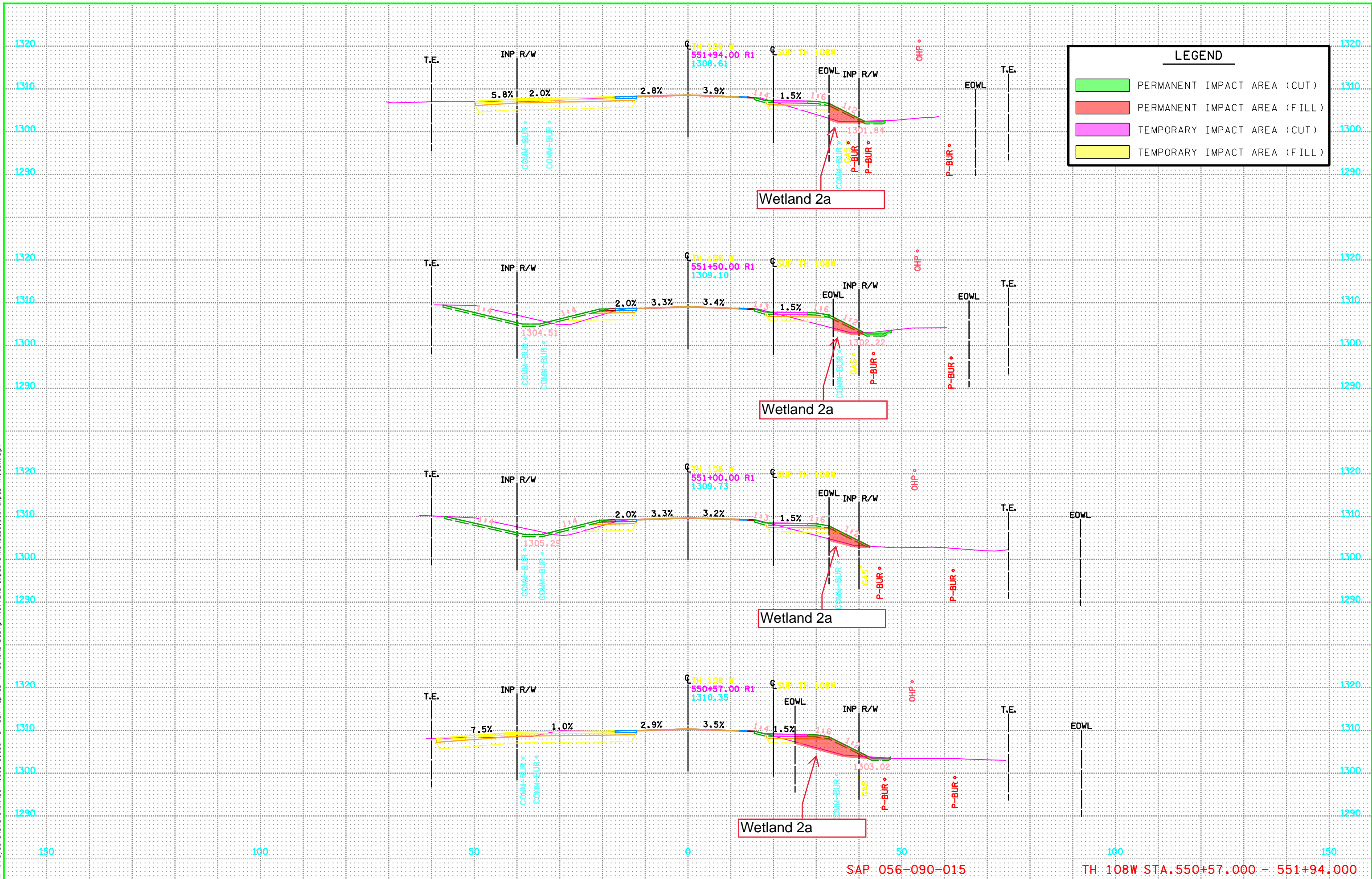
MINNESOTA DEPARTMENT OF TRANSPORTATION
AQUATIC RESOURCE IMPACTS <b>TH 59 / TH 108</b> PELICAN RAPIDS - COMPLETE STREETS

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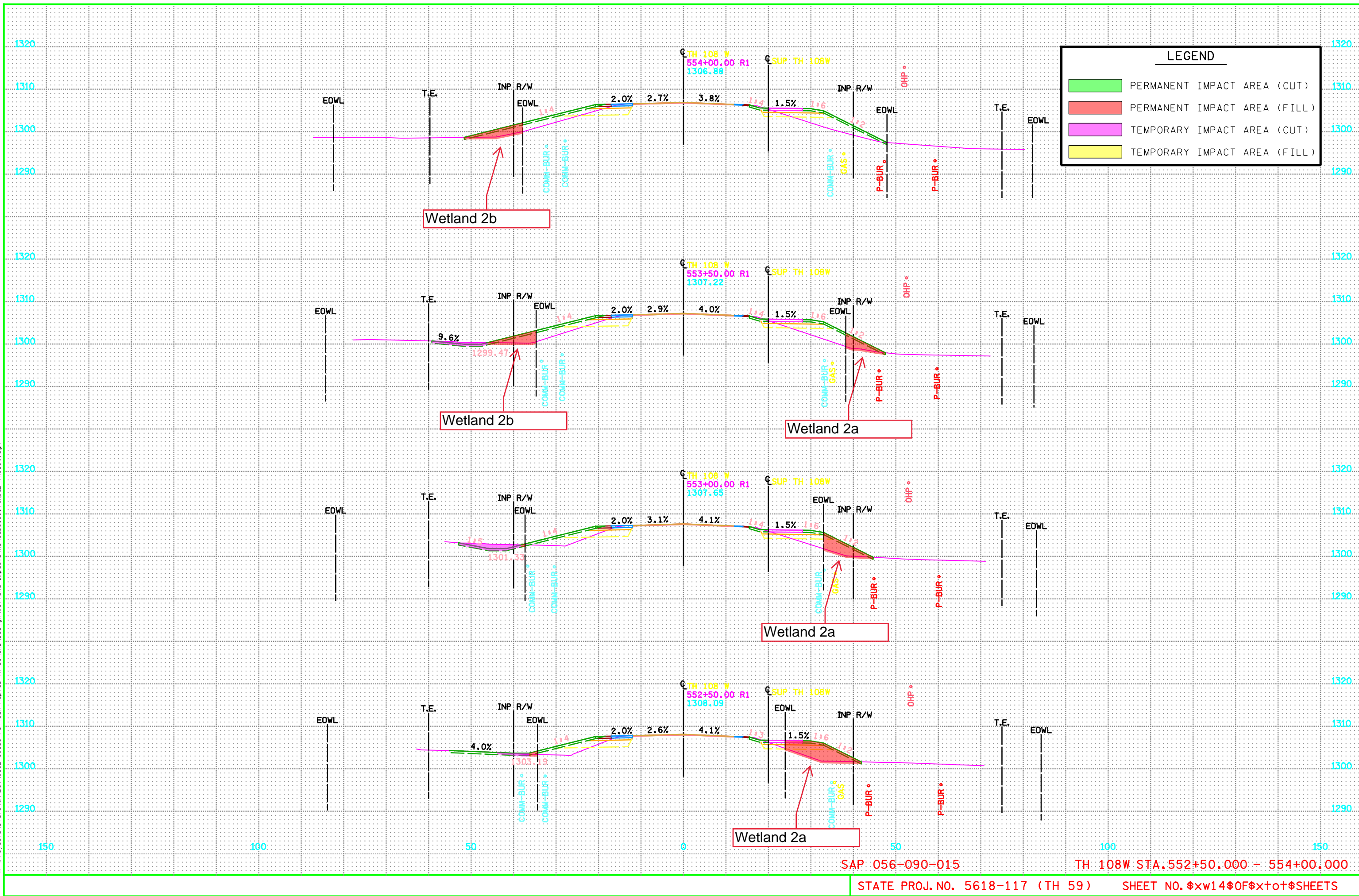


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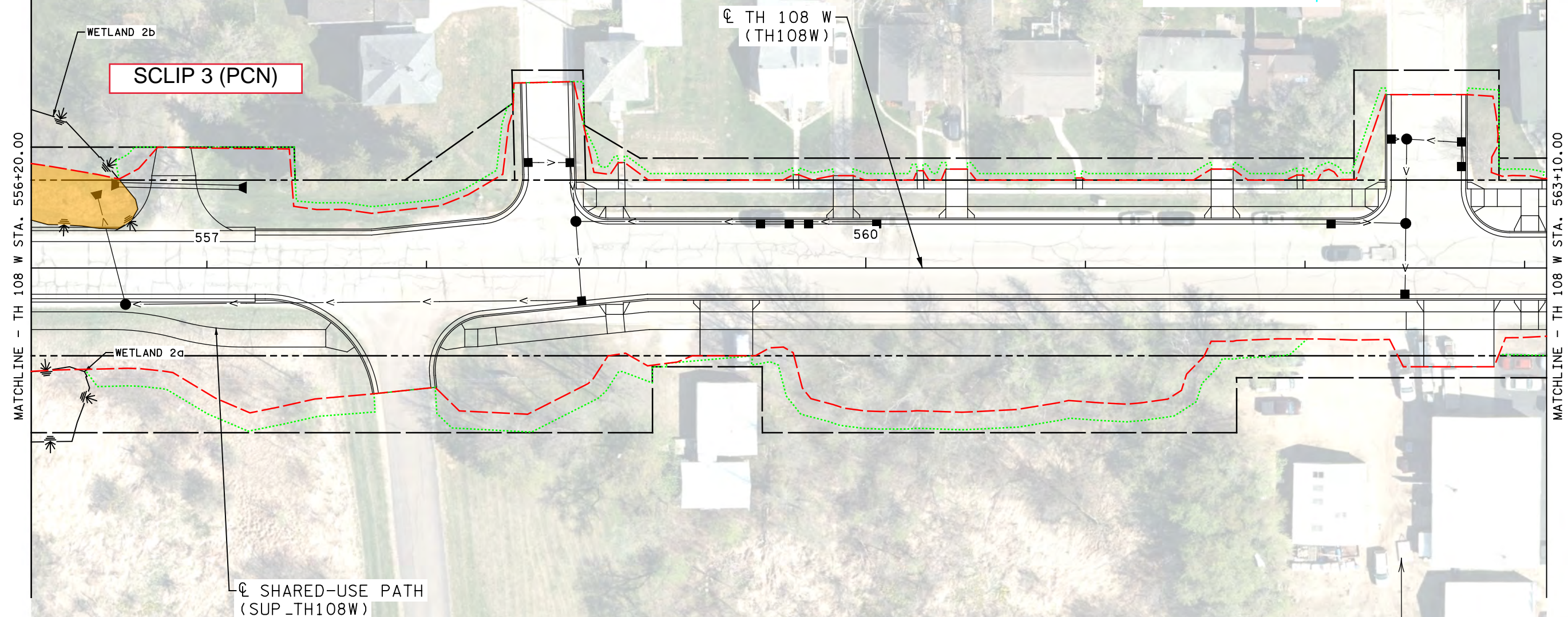


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NORTH ABUTMENT EXCAVATION AREA:

29 SQ FT X WIDTH OF FULL ROADWAY: 80')/27 = 181.60 CU YD  
EA: 199.73 SQ FT \* PANEL LENGTH: 20')/27 = 147.95 CU YD  
X 80')/27 + (199.73 X 20')/27 = 329.55  
TOTAL EXCAVATION: 329.55 CU YD

LEGEND			
	INPLACE R/W		DELINEATED WETLAND (AREA OF ENVIRO. SENSITIVITY)
	PROPOSED R/W		DISTURBANCE LIMITS
	TEMPORARY EASEMENT		LINEAR DITCH
	CONSTRUCTION LIMITS		OTHER AQUATIC RESOURCES
			PERMANENT WETLAND IMPACT
			TEMPORARY WET DITCH IMPACT
			PERMANENT WET DITCH IMPACT

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(TH 59)	STATE AID PROJECT NO.
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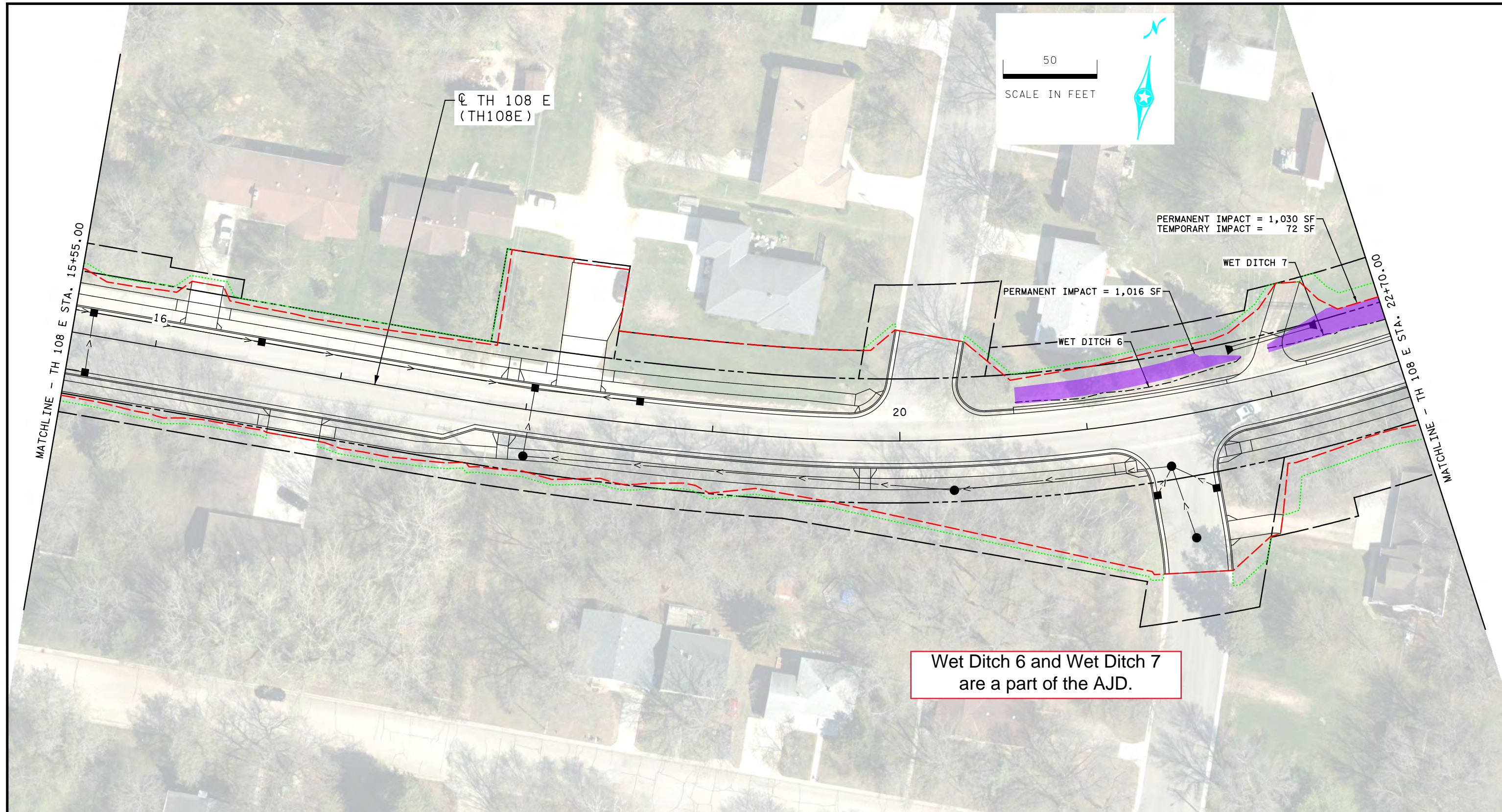
MINNESOTA DEPARTMENT OF TRANSPORTATION		SHEET
AQUATIC RESOURCE IMPACTS		7
TH 59 / TH 108		OF
PELICAN RAPIDS - COMPLETE STREETS		9

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CL TH 108 E  
(TH108E)

PERMANENT IMPACT = 1,030 SF  
TEMPORARY IMPACT = 72 SF

PERMANENT IMPACT = 1,016 SF

WET DITCH 7

WET DITCH 6

Wet Ditch 6 and Wet Ditch 7  
are a part of the AJD.

**LEGEND**

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| ---   | INPLACE R/W         |     | DELINEATED WETLAND<br>(AREA OF ENVIRO. SENSITIVITY) |  | PERMANENT WETLAND IMPACT   |
| - - - | PROPOSED R/W        |     | DISTURBANCE LIMITS                                  |  | TEMPORARY WET DITCH IMPACT |
| ---   | TEMPORARY EASEMENT  | --- | LINEAR DITCH  |  | PERMANENT WET DITCH IMPACT |
| - - - | CONSTRUCTION LIMITS | --- | OTHER AQUATIC RESOURCES                             |  |                            |

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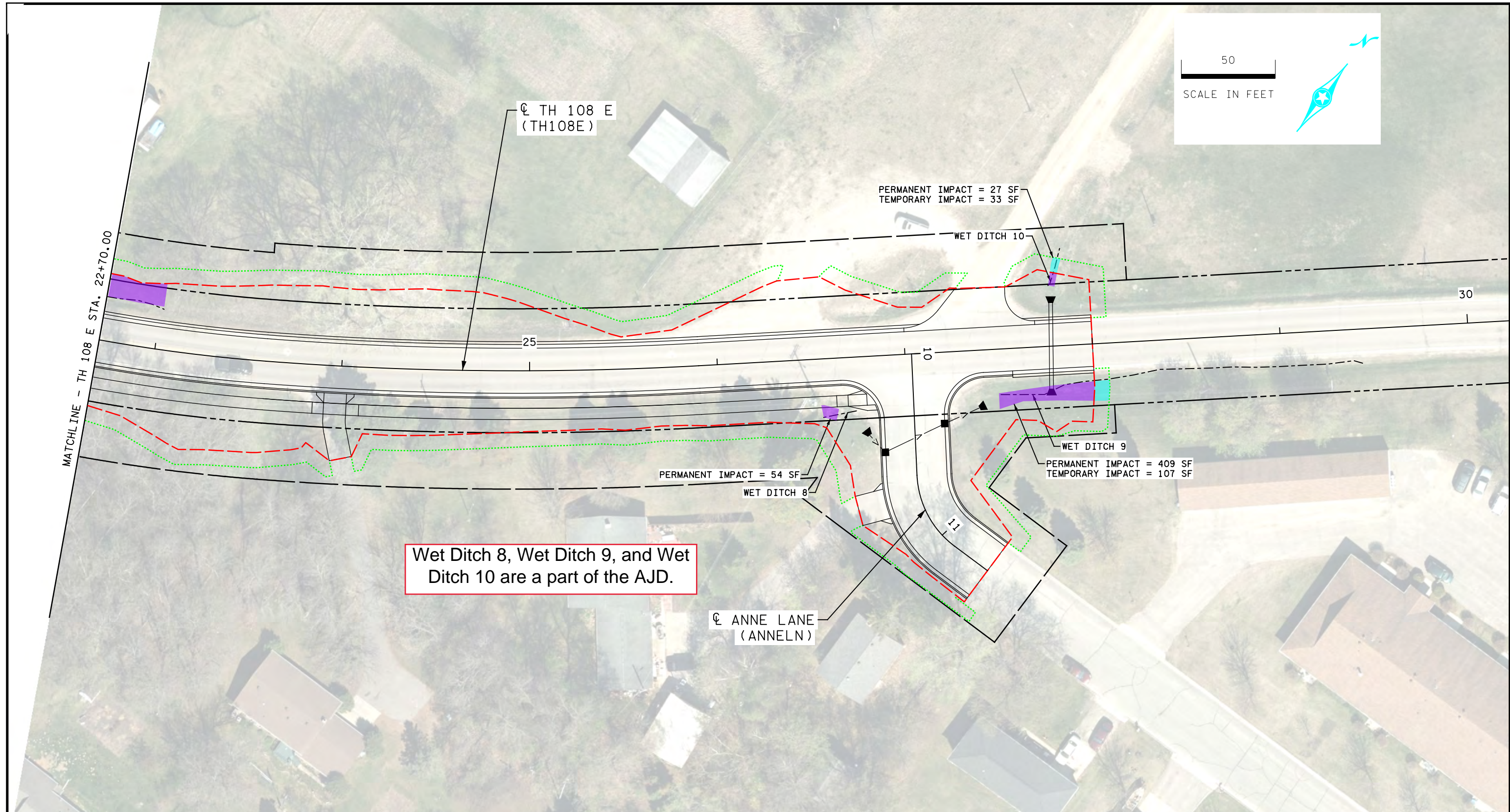
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AQUATIC RESOURCE IMPACTS  
**TH 59 / TH 108**  
PELICAN RAPIDS - COMPLETE STREETS

**SHEET**  
**8**  
**OF**  
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Wet Ditch 8, Wet Ditch 9, and Wet Ditch 10 are a part of the AJD.

LEGEND

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| ---   | INPLACE R/W         |     | DEL INEATED WETLAND<br>(AREA OF ENVIRO. SENSITIVITY) |  | PERMANENT WETLAND IMPACT   |
| - - - | PROPOSED R/W        |     | DISTURBANCE LIMITS                                   |  | TEMPORARY WET DITCH IMPACT |
| ---   | TEMPORARY EASEMENT  | --- | LINEAR DITCH   |  | PERMANENT WET DITCH IMPACT |
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AQUATIC RESOURCE IMPACTS  
**TH 59 / TH 108**  
PELICAN RAPIDS - COMPLETE STREETS

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