

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

MVP-2022-01211-MMP

April 25, 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 2022-01211-MMP. 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.

MVP SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of Sackett v. EPA, 143 S. Ct. 1322 (2023), MVP-2022-01211-MMP

- 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 5, 0.02 acre. Non-jurisdictional, excluded water.
 - ii. Wetland 6, 0.01 acre. Non-jurisdictional, excluded water.
 - iii. Wetland 10, 0.09 acre. Non-jurisdictional.
 - iv. Wetland 11, 0.09 acre. Non-jurisdictional.
 - v. Wetland 12, 0.11 acre. Non-jurisdictional.
 - vi. Wetland 13, 0.006 acre. Non-jurisdictional, excluded water.
 - vii. Wetland 14, 0.01 acre. Non-jurisdictional, excluded water.
 - viii. Wetland 18, 0.13 acre. Non-jurisdictional.
 - ix. Wetland 19, 0.33 acre. Non-jurisdictional.
 - x. Wetland 20, 0.15 acre. Non-jurisdictional.
 - xi. Wetland 21, 0.02 acre. Non-jurisdictional, excluded water.
 - xii. Wetland 27, 0.04 acre. Non-jurisdictional.
 - xiii. Wetland 28, 0.02 acre. 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. 651, 143 S. Ct. 1322 (2023)
 - d. 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)
- REVIEW AREA. The review area of this determination includes 6 excluded features and 7 non-a(4) waters, as identified on the enclosed figures labeled MVP-2022-01211-MMP Figures 4, 5, 6, 7, and 8 of 9. The review area is located in Sections 8, 17, and 18, Township 23 North, Range 21 East and in Sections 13, 22, and 24, Township 23 North, Range 20 East. The review area is located within the Z26 69 kV

MVP SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of Sackett v. EPA, 143 S. Ct. 1322 (2023), MVP-2022-01211-MMP

transmission line utility ROW between approximately beginning Latitude: 44.4782, Longitude: -87.9787 and ending Latitude: 44.4552, Longitude: -88.0612.

- 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.
 - 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

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.

- 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

The excluded features within the review area include Wetlands 5, 6, 13, 14, and 21, as shown on Figure 4, 5, and 8 of 9 on the attached figures, which are being evaluated as excluded features since they meet the definition of a b(3) water since the features were constructed in upland, drain only upland, do not carry relatively permanent flow, and are not relocated tributaries.

Wetlands 5 and 6 are roadside ditches that were constructed in upland to convey runoff along Lane Road according to a wetland identification completed by Stantec staff, on behalf of the applicant, and desktop resources, including the USA Soils Hydric Class and the National Wetland Inventory (NWI), which do not identify wetlands or hydric soils in the area of Wetland 5 and 6. Additionally, a USGS topographic map from 1954 identifies the area of Wetlands 5 and 6 as upland. Each of these features are surrounded by upland and were constructed in upland. In a review of aerial photos, Lane Road has been constructed since at least 1992. Other resources reviewed to support this determination include, 3DEP 2-ft, and 5-ft Contour maps.

Wetlands 13 and 14 are roadside ditches that were constructed in upland to convey runoff along Bellevue Street according to a wetland identification completed by Stantec staff, on behalf of the applicant, and desktop resources, including the USA Soils Hydric Class and the NWI, which do not identify wetlands or hydric soils in the area of Wetland 13 and 14. Additionally, a USGS

⁷ 88 FR 3004 (January 18, 2023)

topographic map from 1954 identifies the area of Wetlands 13 and 14 as upland. In a review of aerial photos, Lane Road has been constructed since at least 1992. Other resources reviewed to support this determination include 3DEP 2-ft, and 5-ft Contour maps.

Wetland 21 is a roadside ditch that was constructed along the east side of the Fox River Trail to convey runoff according to a wetland identification completed by Stantec staff, on behalf of the applicant, and desktop resources, including the NWI, which does not identify wetlands in the area of Wetland 21. The USA Soils Hydric Class identifies this area as being partially hydric, the wetland identification did not identify wetland characteristics outside of the ditch area. Additionally, a USGS topographic map from 1954 identifies the area of Wetland 21 as upland. Other resources reviewed to support this determination include 3DEP 2-ft, and 5-ft Contour maps.

Considering the information above, Wetlands 5, 6, 13, 14, and 21 have been determined to be excluded waters 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).

Wetlands 10, 11, 12, 18, 19, 20, 27, and 28 are not traditionally navigable waters (TNW), territorial seas, or interstate waters and therefore are not (a)(1) waters.

Based on the wetland delineation report completed by Stantec, LiDAR imagery, Wisconsin Wetland Inventory, contour maps, USA Soils Hydric Class, and USFWS NWI maps indicate Wetland 10 is a linear depressional basin and Wetland 11 is located in a depressional basin both surrounded entirely by upland. The wetland delineation report identified a waterway adjacent to Wetland 10, this feature is not identified as a waterway by the Wisconsin Department of Natural Resources, NWI, nor on a 2022 topographic map. Additionally, LiDAR imagery and topographic maps show a minor depression approximately 1-2 feet lower in elevation than the surrounding landscape, the feature has a break and there is a rise in elevation before the nearest downstream feature. Wetlands 10 and 11 do not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary. The nearest paragraph (a)(2) water, the East River, is approximately 0.3 miles northwest of the features.

Based on the wetland delineation report completed by Stantec, and LiDAR imagery, Wisconsin Wetland Inventory, contour maps, USA Soils Hydric Class, and USFWS NWI maps indicate Wetland 12 is positioned in a depressional basin surrounded by upland. Wetland 12 does not physically abut a relatively permanent paragraph (a)(2) impoundment or jurisdictional (a)(3) tributary. The nearest paragraph (a)(2) water, the East River, is approximately 0.2 miles west of the feature.

Based on the wetland delineation completed by Stantec, and desktop resources, including the Wisconsin Wetland Inventory, 3DEP 2-ft, and 5-ft Contour maps, USA Soils Hydric Class, and NWI maps indicate Wetland 18 is positioned in a depression surrounded by upland. No drainage features offer a connection to a downstream feature. Wetland 18 is approximately 8 feet lower in elevation than the surrounding landscape. Wetland 18 does not physically abut a relatively permanent paragraph (a)(2) impoundment or jurisdictional (a)(3) tributary. The nearest paragraph (a)(2) water, the East River, is approximately 230 feet southeast of the feature. The East River Trail is located between Wetland 18 and the East River.

Based on the wetland delineation completed by Stantec, and desktop resources, including the Wisconsin Wetland Inventory, 3DEP 2-ft, and 5-ft Contour maps, USA Soils Hydric Class, and NWI which indicate Wetland 19 is located in a field with characteristics of a minor swale that has a break before the nearest downstream feature The feature is completely surrounded by upland. Wetland 19 does not physically abut a relatively permanent paragraph (a)(2) impoundment or jurisdictional (a)(3) tributary. The nearest paragraph (a)(2) water, the Fox River, is approximately 0.35 miles to the northwest of the feature.

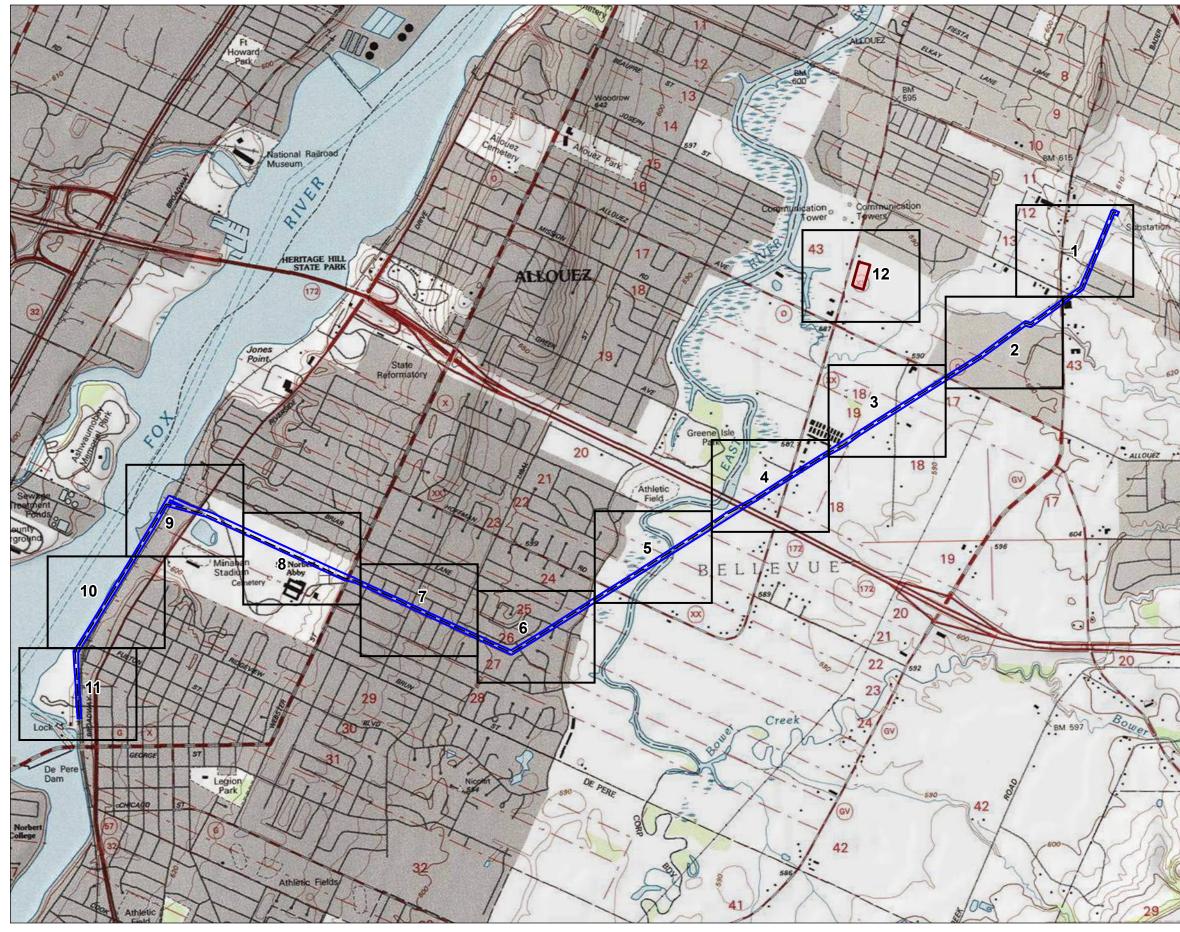
Based on the wetland delineation completed by Stantec, and desktop resources, including the Wisconsin Wetland Inventory, 3DEP 2-ft, and 5-ft Contour maps, USA Soils Hydric Class, and NWI which indicate Wetland 20 is associated with the fringe of a storm water pond near North Broadway Street. In a review of a USGS Topographic map from 1954, this area was identified as a gravel pit with no wetland identifiers in the immediately surrounding area. The feature is completely surrounded by upland. Wetland 20 does not physically abut a relatively permanent paragraph (a)(2) impoundment or jurisdictional (a)(3) tributary. The nearest paragraph (a)(2) water, the Fox River, is approximately 0.2 miles to the northwest of the feature.

Based on the wetland delineation completed by Stantec, and desktop resources, including WWI, 3DEP 2-ft, and 5-ft Contour maps, USA Soils Hydric Class, and NWI Wetlands 27 and 28 are small wetlands positioned in minor depressional

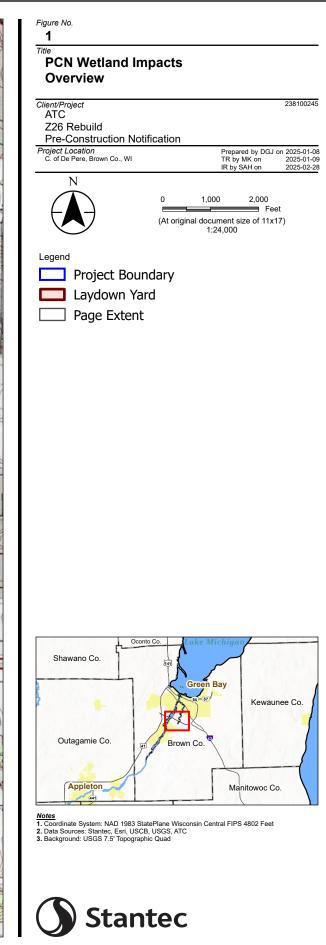
basins, both features are completely surrounded by upland. Wetlands 27 and 28 do not physically abut a relatively permanent paragraph (a)(2) impoundment or jurisdictional (a)(3) tributary. The nearest paragraph (a)(2) water, the East River, is approximately 0.1 mile to the northwest of the feature.

The areas labeled Wetlands 10, 11, 12, 18, 19, 20, 27, and 28 were evaluated as a potential (a)(4) waters but they do not physically abut a relatively permanent paragraph (a)(2) water and as such does not meet the definition of an (a)(4) water and cannot be evaluated as an (a)(4) wetland; therefore, Wetlands 10, 11, 12, 18, 19, 27, and 28 are non-tidal waters that are not jurisdictional under the 2023 "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 Final Rule.

- 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 Report completed by Stantec, on behalf of American Transmission Company (ATC), on May 28-29 and June 17, 2024.
 - b. USGS Topographic Maps from 1954 and 2022.
 - c. WWI, 3DEP 2-ft, and 5-ft Contour maps, Wisconsin DNR Hillshade, 3DEP Digital Elevation Model (DEM), USA Soils Hydric Class, and NWI accessed on the National Regulatory Viewer.
- 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.



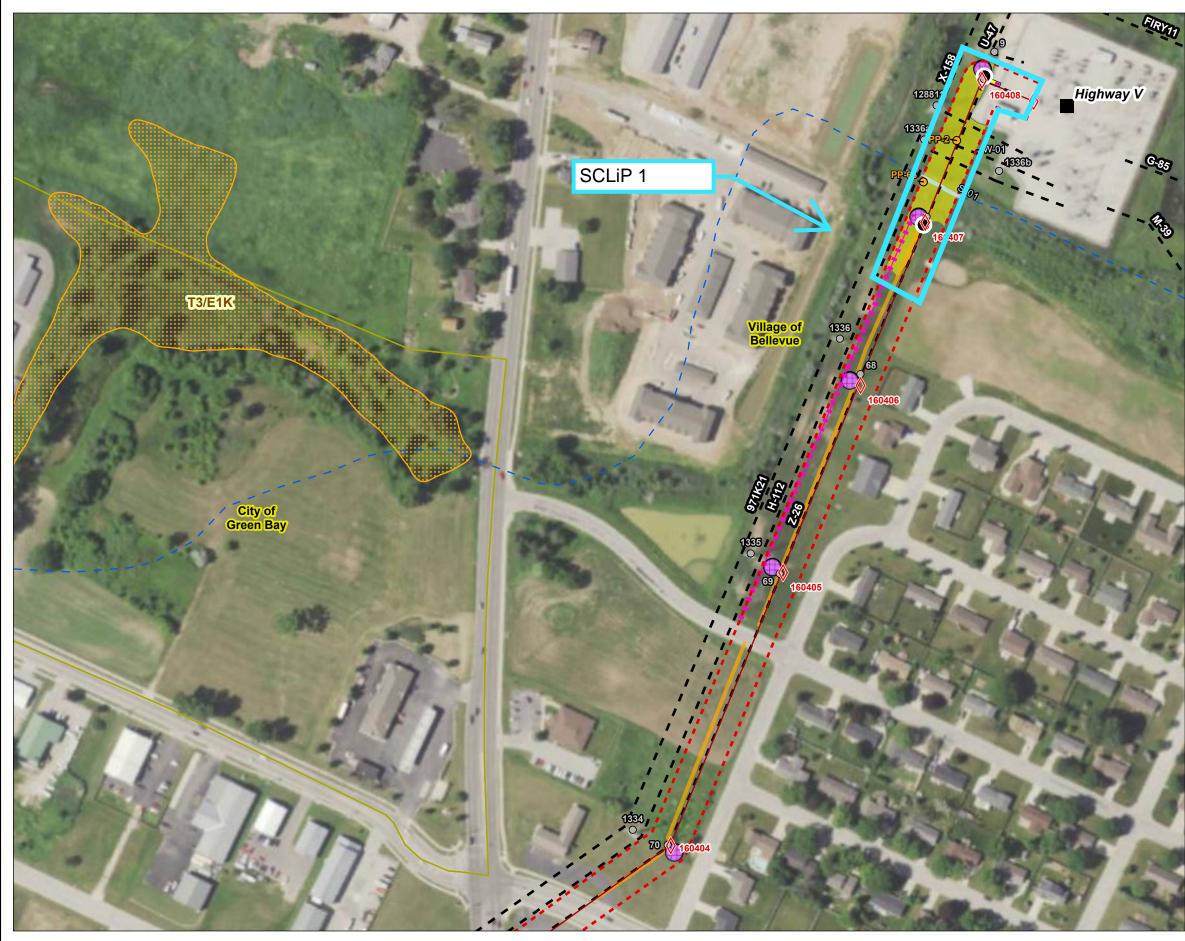
Disclaimer: This document has been prepared based on information provided by others as cited in the Notes section. Stantec has not verified the accuracy and/or completeness of the data.



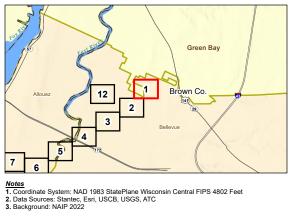
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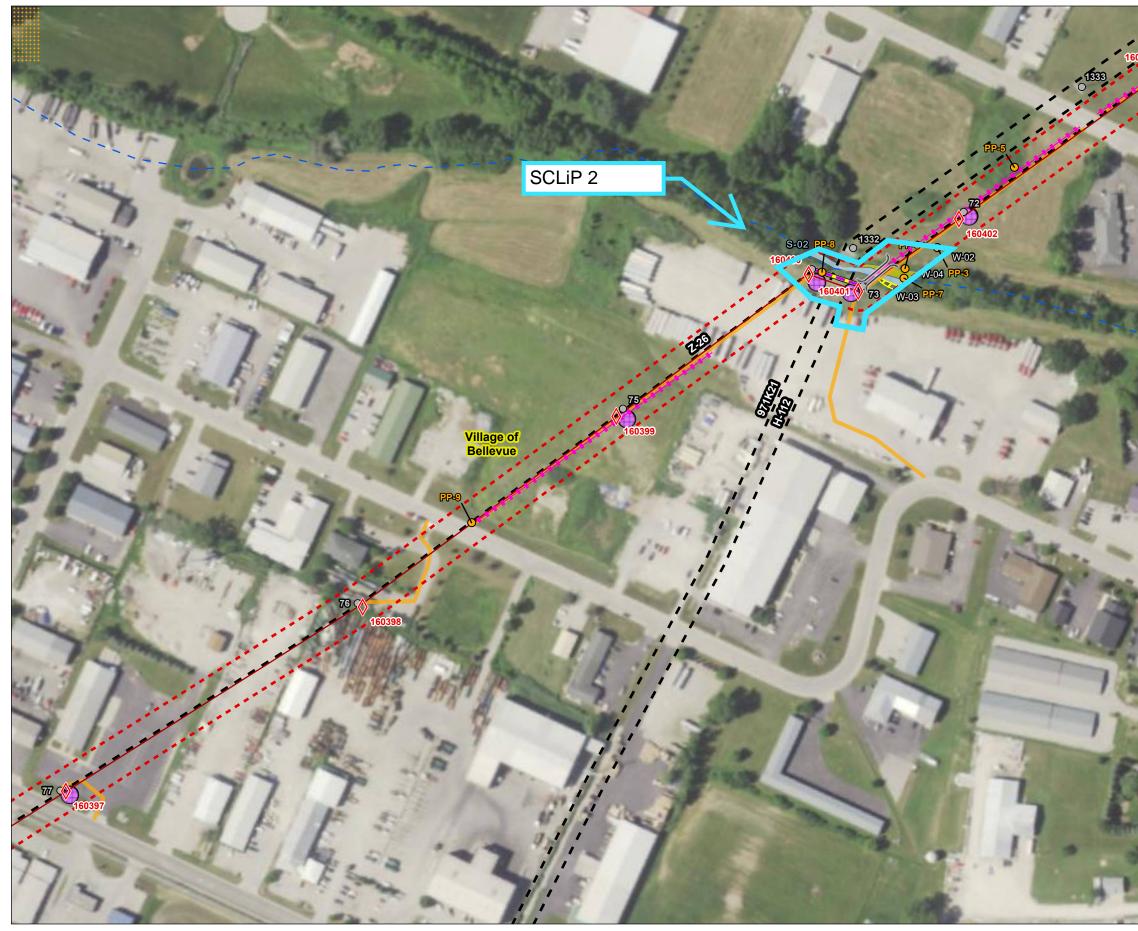
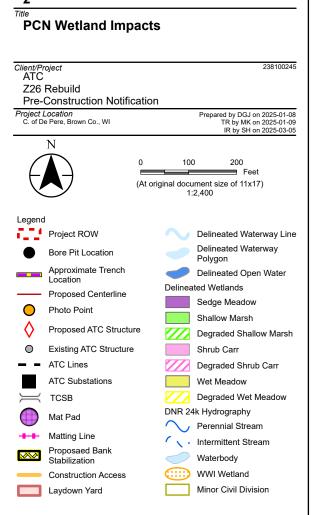
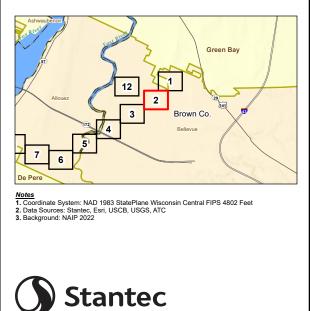
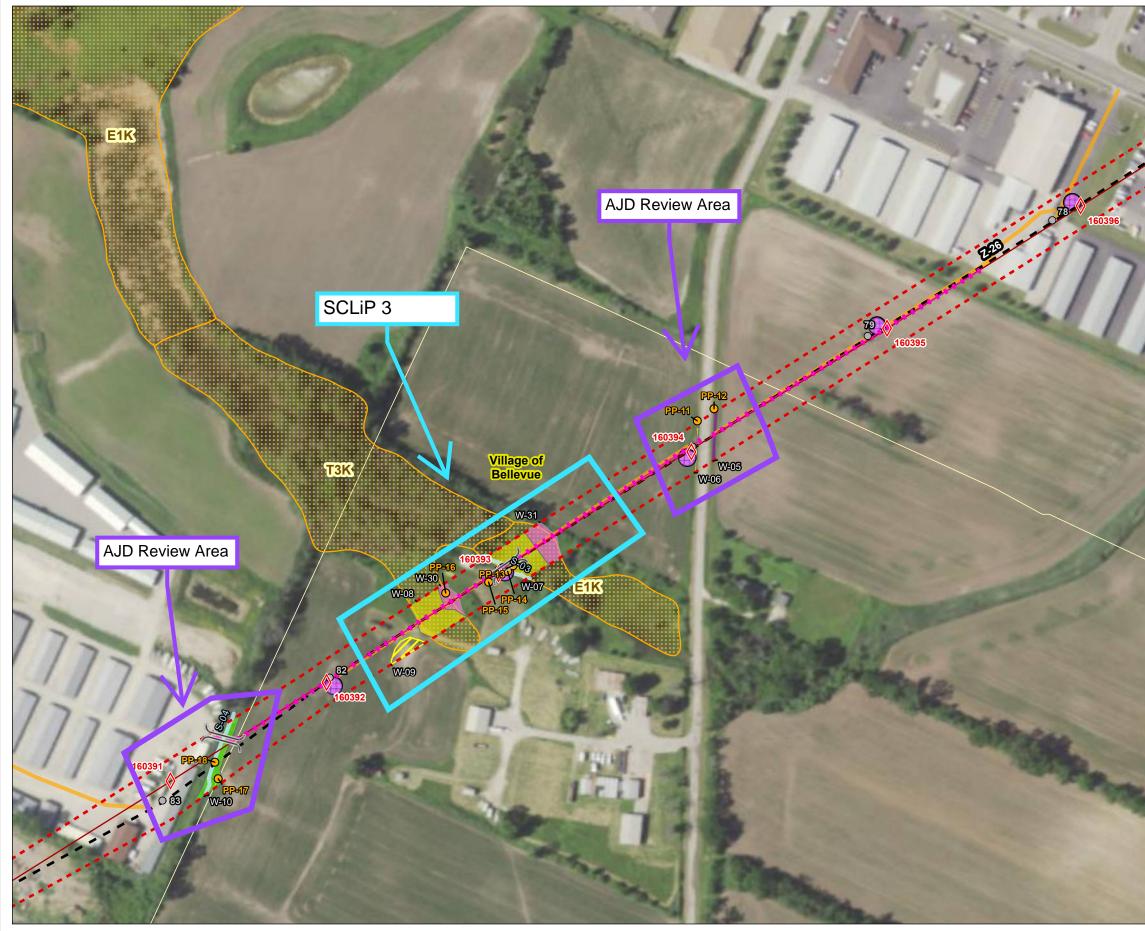




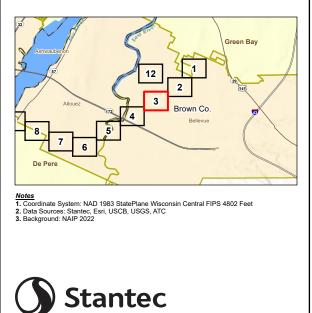
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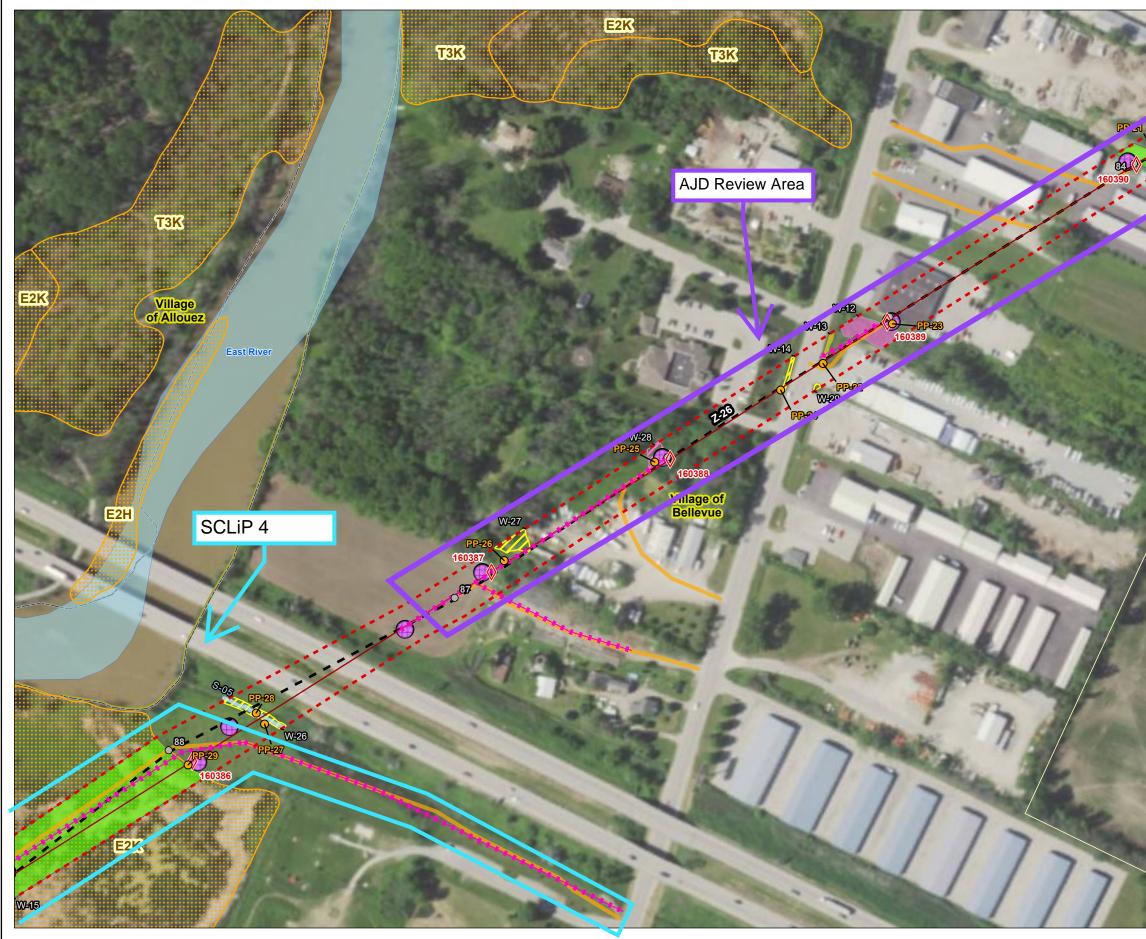




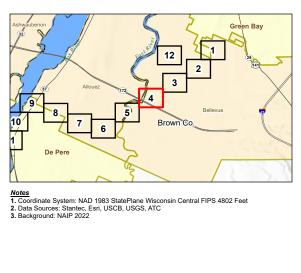
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Page 3 of 12



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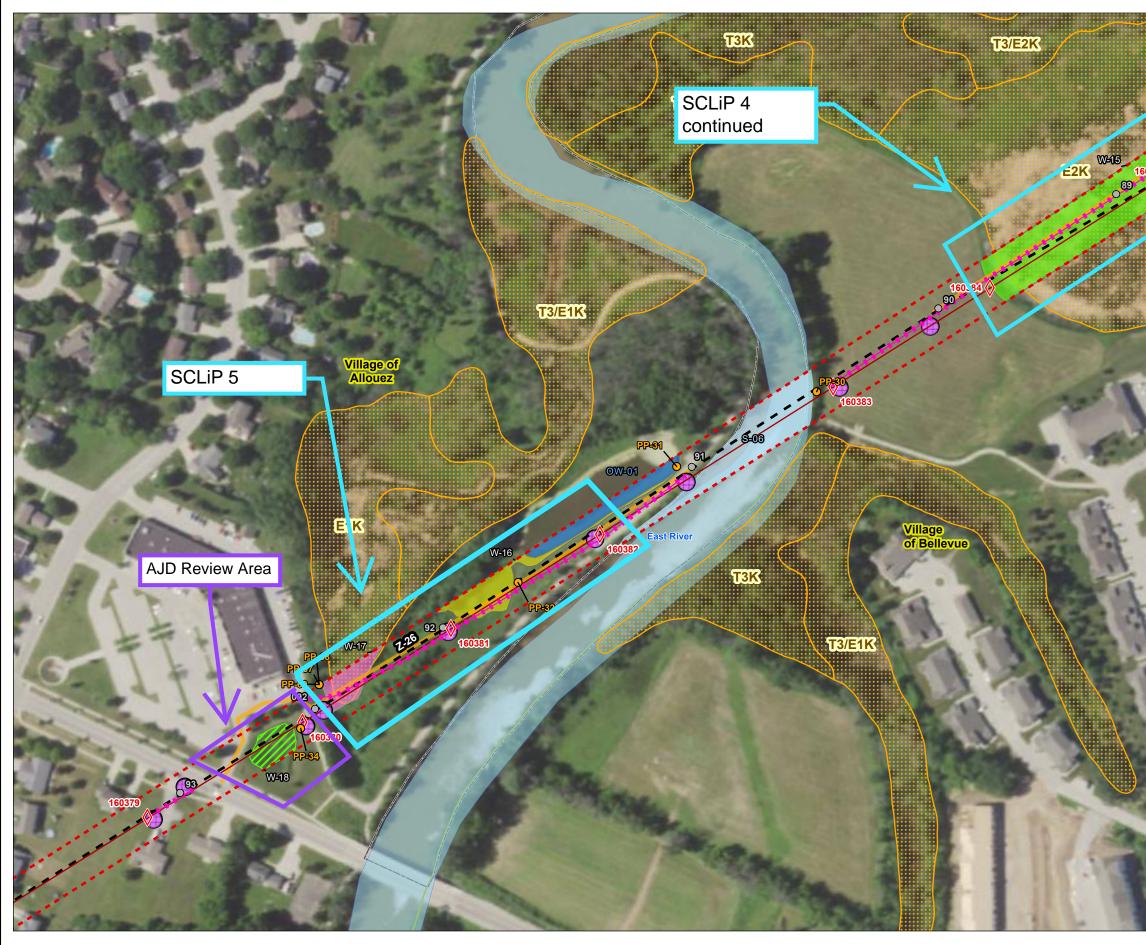
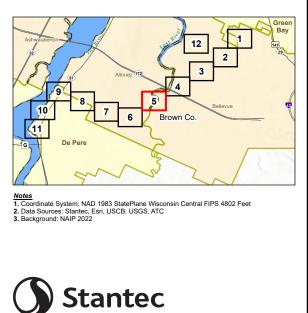


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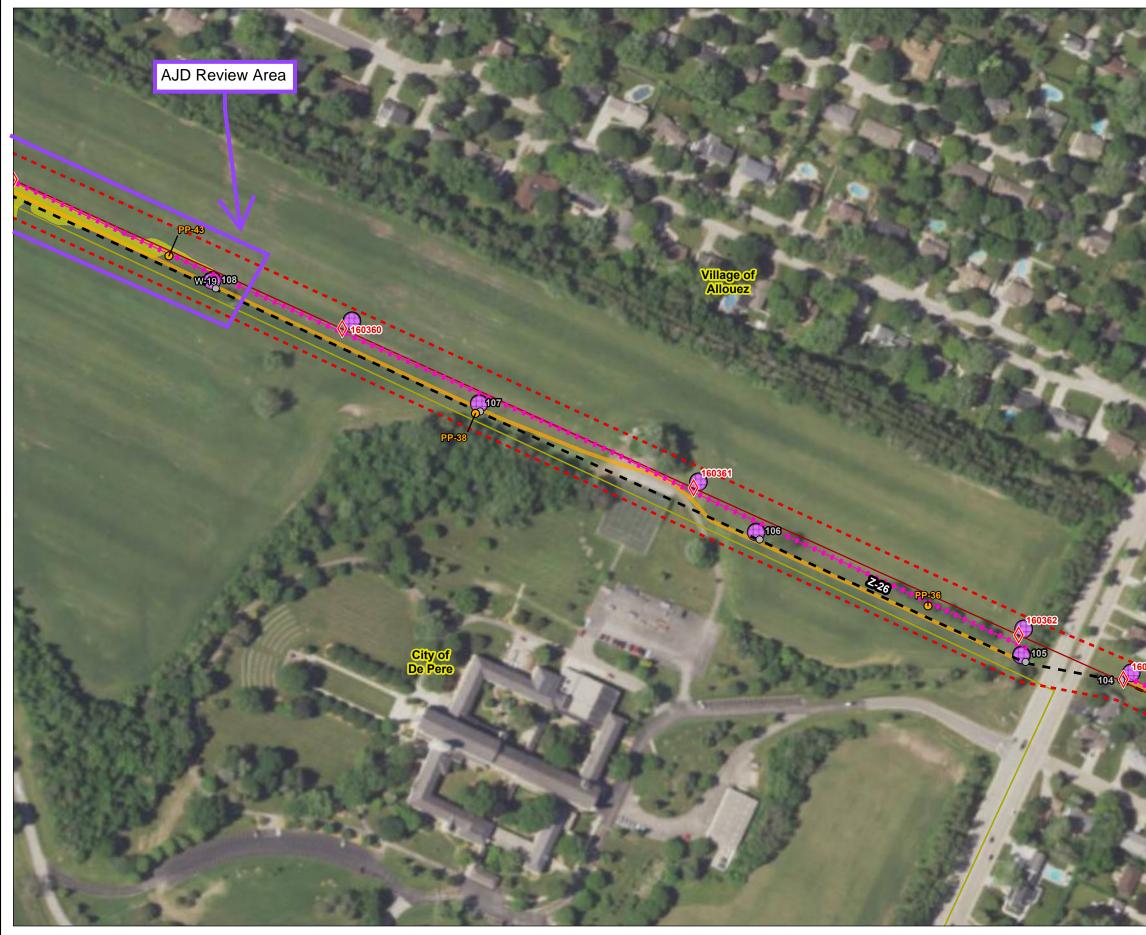


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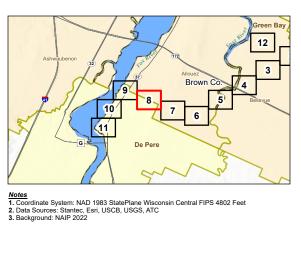
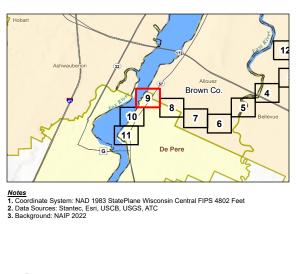






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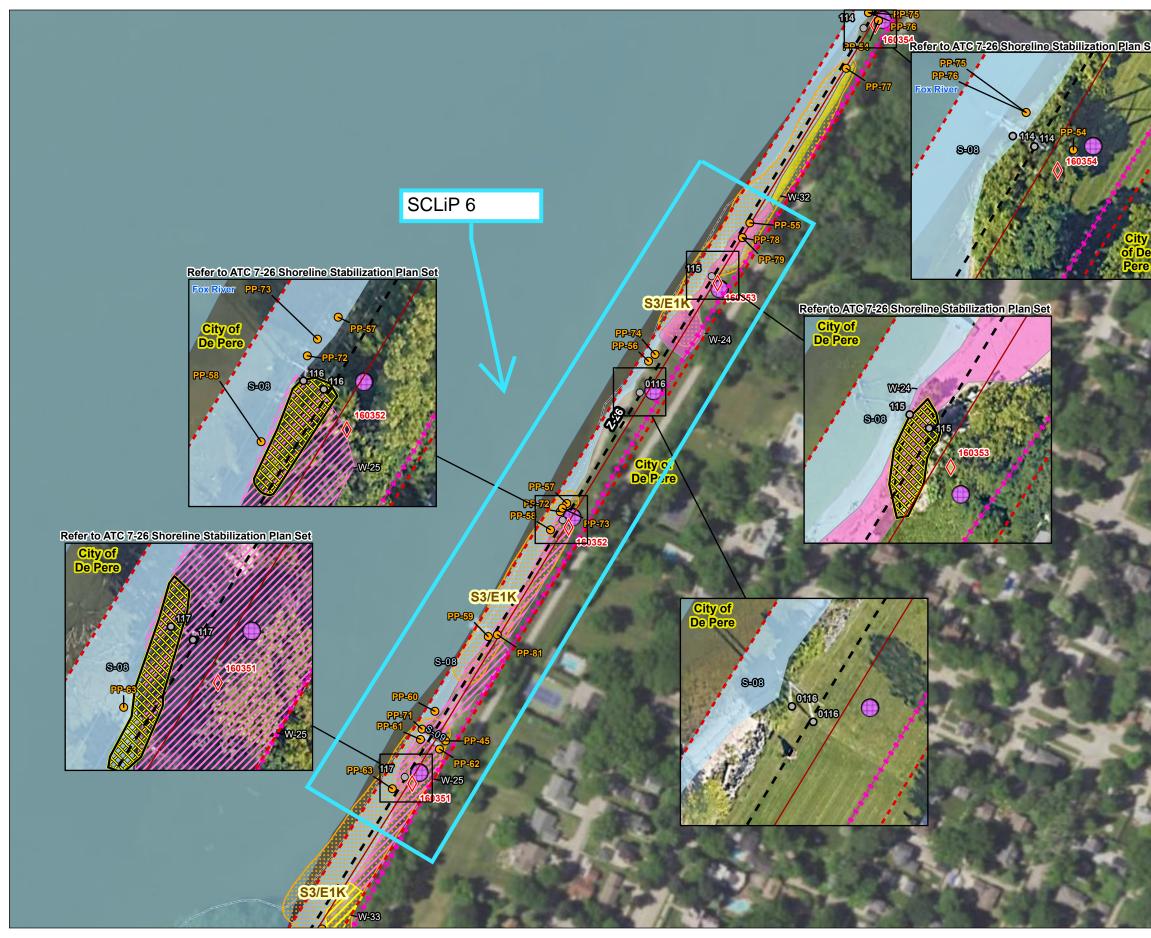
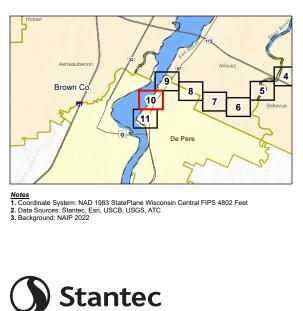


Figure No. 2			
Title PCN Wetland Imp	acts		
Client/Project ATC			238100245
Z26 Rebuild Pre-Construction Notific	cation		
Project Location C. of De Pere, Brown Co., WI			Prepared by DGJ on 2025-01-08 TR by MK on 2025-01-09 IR by SH on 2025-03-05
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Approximate Trench			Delineated Open Water
Proposed Centerline		Delinea	ted Wetlands
Photo Point			Sedge Meadow
Proposed ATC Structu	Iro		Shallow Marsh
•			Degraded Shallow Marsh
Existing ATC Structure	9		Shrub Carr
 ATC Lines 			Degraded Shrub Carr
ATC Substations			Wet Meadow
TCSB			Degraded Wet Meadow Ik Hydrography
Mat Pad			Perennial Stream
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Proposaed Bank Stabilization		\sim	Waterbody
Construction Access			WWI Wetland
Laydown Yard		\widecheck	Minor Civil Division



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