



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

MVP-2024-00840-JMK

26 August 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-2024-00840-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 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

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 review area for this determination includes nine non-jurisdictional roadside ditches, as identified in Section 1(a) of this MFR and on the attached figures labeled 2024-00840-JMK Page 1-10 of 10. The review area is located at 44.7658 N, -87.5266 W in the Towns of Brussels and Nasewaupee, Door County, Wisconsin. There are no other JDs associated with the review area.

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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
 - d. Impoundments (a)(2): 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.

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- 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 Ditch 1 (0.318 acre), Wet Ditch 2 (0.109 acre), Wet Ditch 3 (0.094 acre), Wet Ditch 4 (0.087 acre), Wet Ditch 5 (0.040 acre), Wet Ditch 6 (0.210 acre), Wet Ditch 7 (0.003 acre), Wet Ditch 8 (0.017 acre), and Wet Ditch 9 (0.017 acre) within the review area are linear roadside drainage ditches constructed in upland and drain only upland based on a review of the wetland delineation report and desktop resources including US Geological Service 3DEP Hillshade and DEM maps. Recent aerial photos do not show relatively permanent flow in the aforementioned aquatic resources. Based on the wetland delineation and desktop resources reviewed Wet Ditches 1 – 9 are linear roadside drainage ditches constructed in upland, drain only upland, and do not carry a relatively permanent flow of water. Therefore, Wet Ditches 1 – 9 have been determined to be Paragraph (b)(3) excluded ditches and 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.

⁷ 88 FR 3004 (January 18, 2023)

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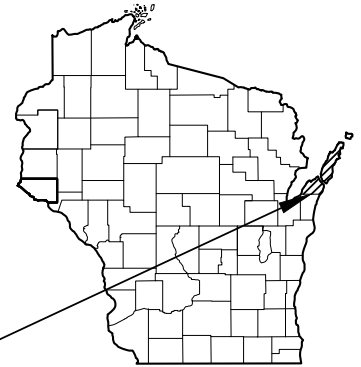
- a. Delineation Figures Map 1a, 1b, 1c, 2a, 2b, 2c, and 3 (added) submitted as part of the permit application.
- b. Minnesota Regulatory Viewer: 3DEP Hillshade and DEM layer.

10. OTHER SUPPORTING INFORMATION. N/A

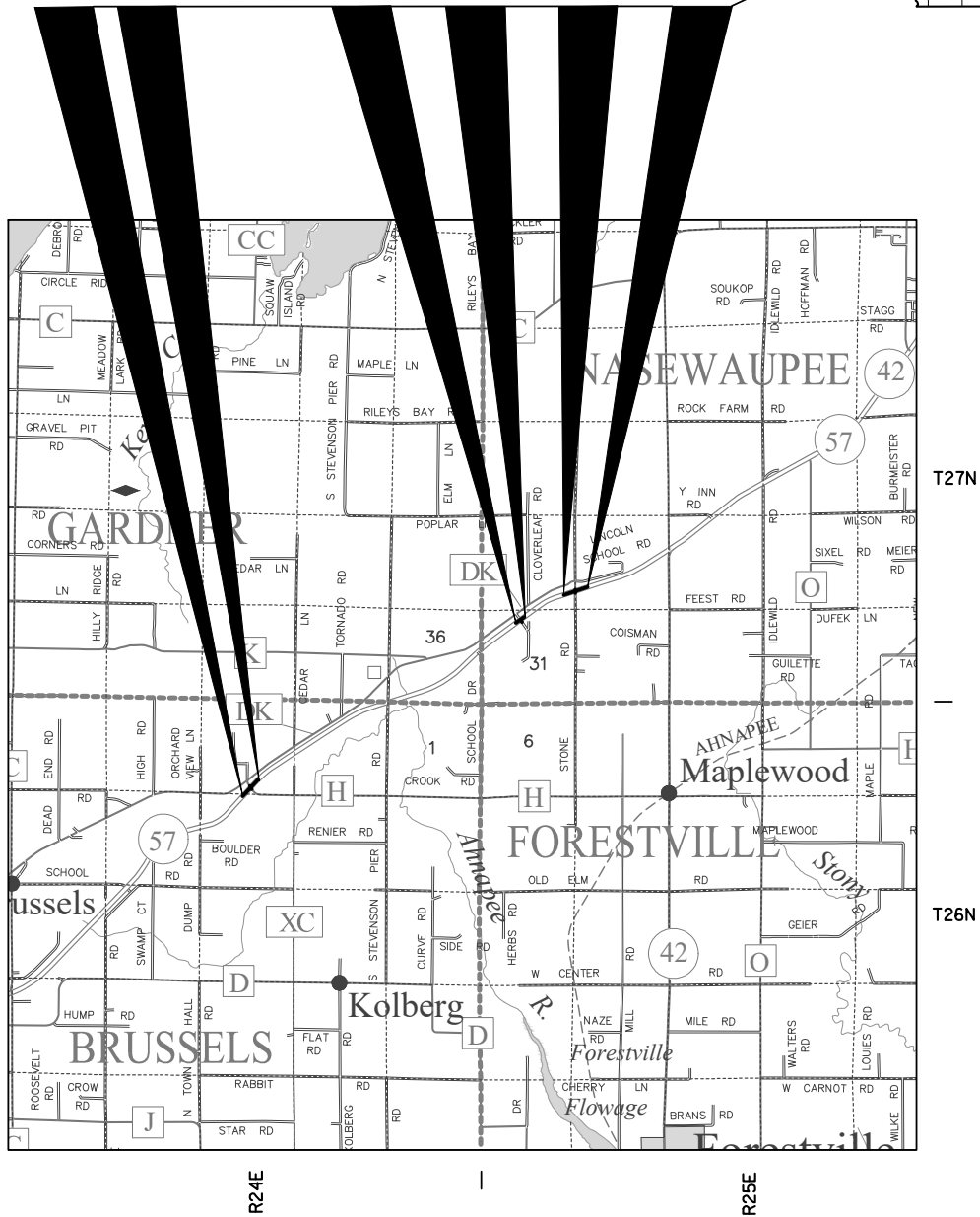
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

PROJECT LOCATION MAP

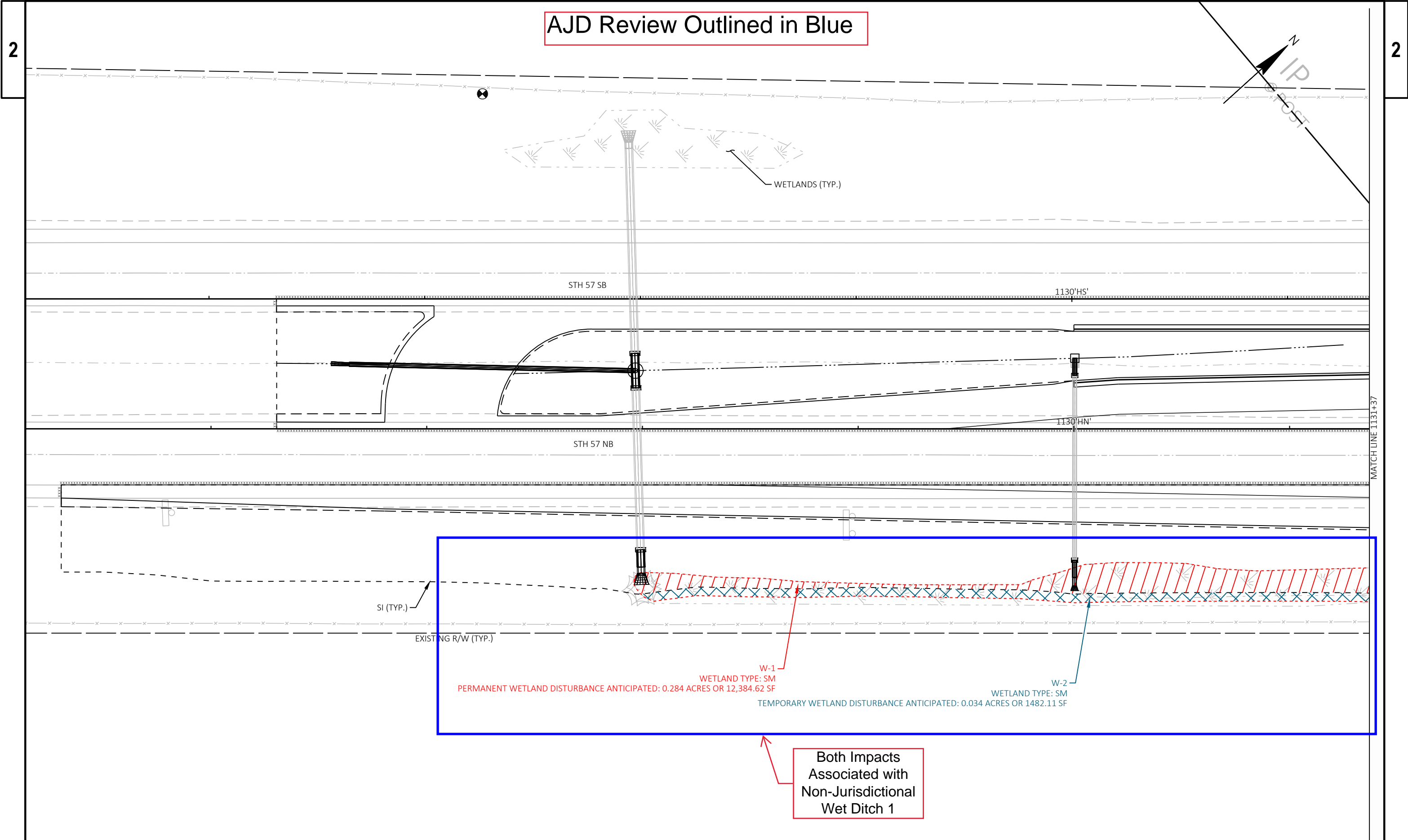
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 ID: 1480-30-71 (CONSTRUCTION - COUNTY H)
 ID: 1480-30-72 (CONSTRUCTION - STONE RD)
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 CTH H - S JUNCTION STH 42
 STH 57
 DOOR COUNTY



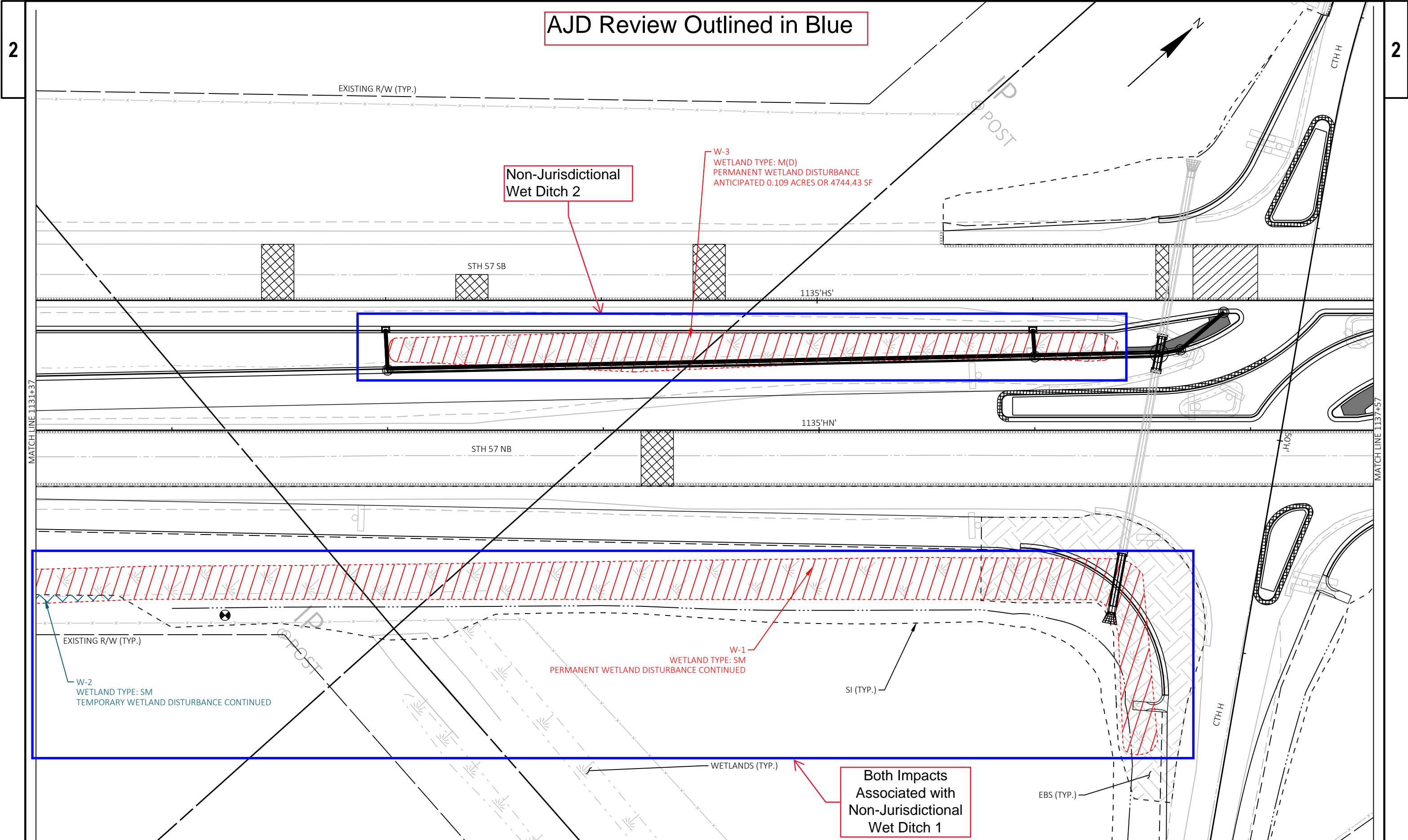
PROJECT LOCATION
DOOR COUNTY, WI



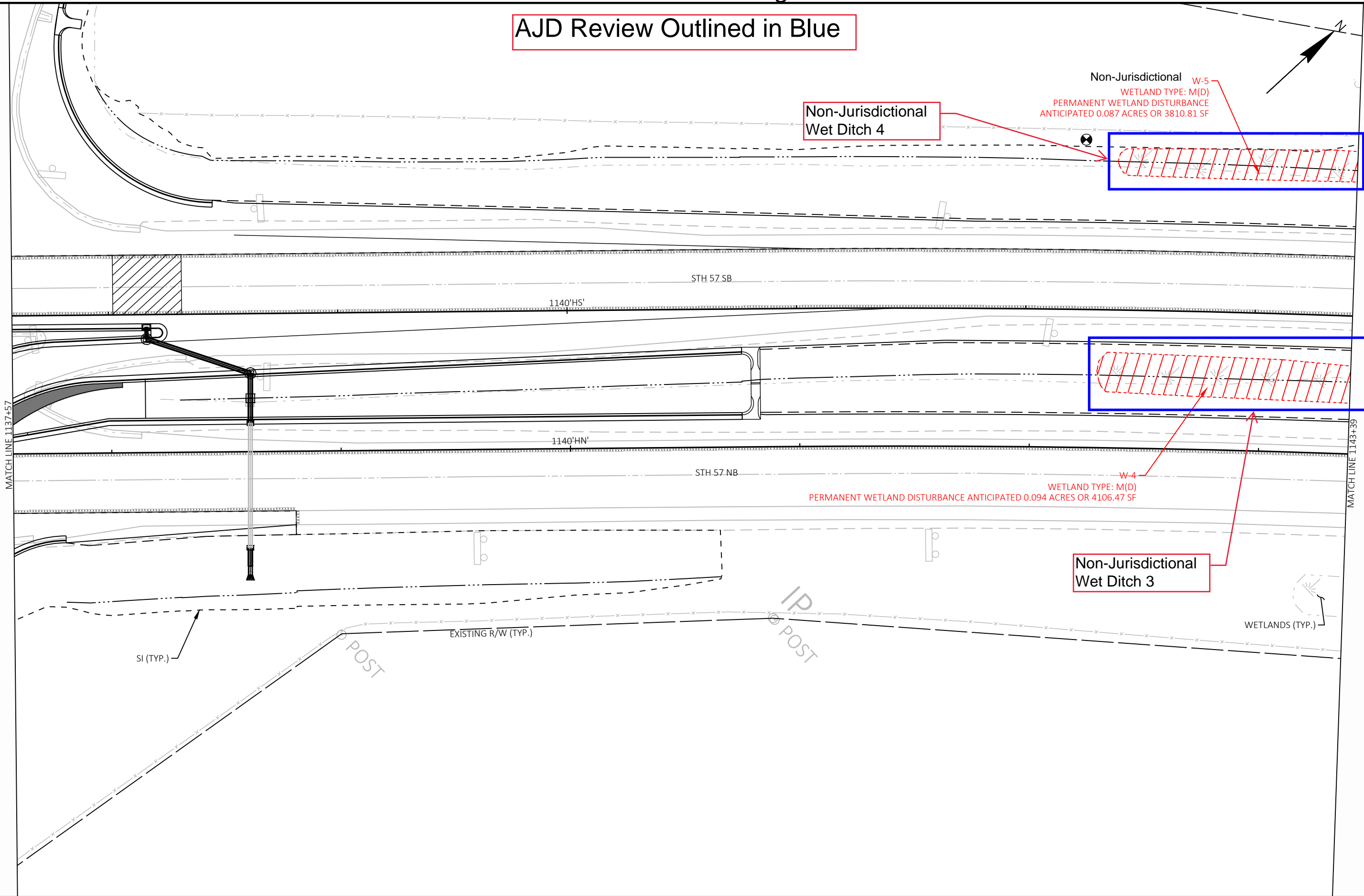
AJD Review Outlined in Blue



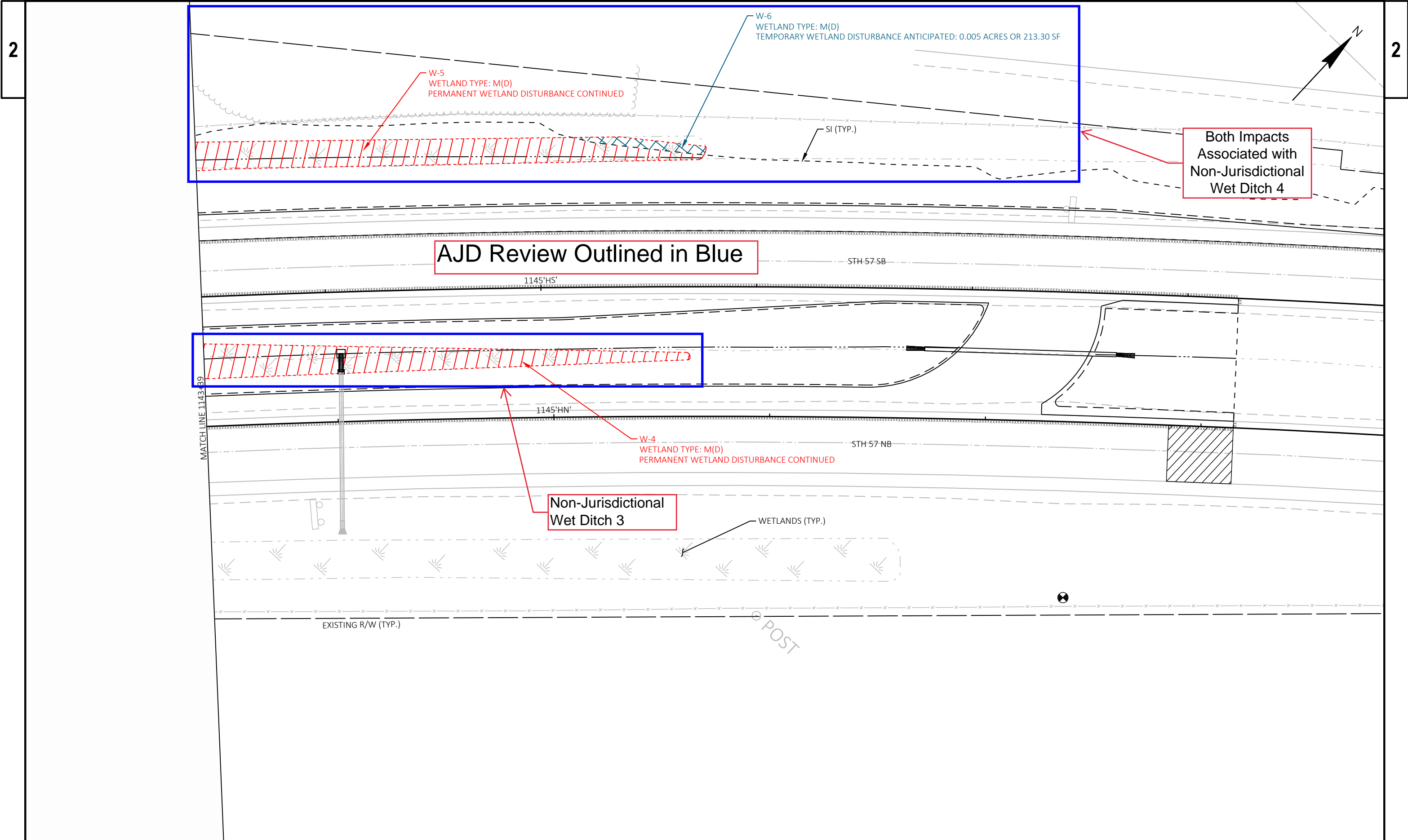
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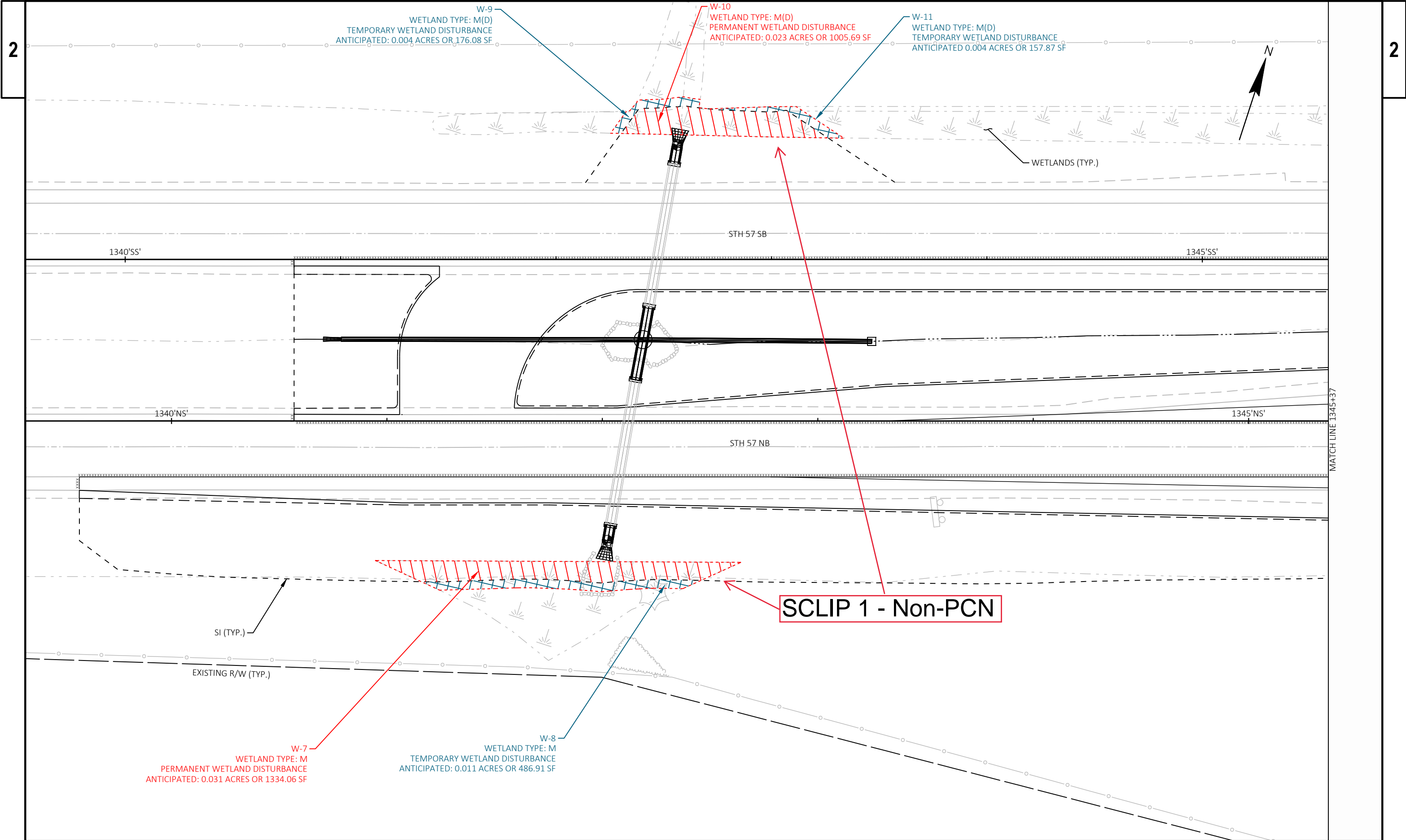


AJD Review Outlined in Blue



PROJECT NO: 1480-30-71	HWY: STH 57	COUNTY: DOOR	STH 57 & CTH H INTERSECTION WETLAND EXHIBIT	SHEET	E
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PROJECT NO: 1480-30-72	HWY: STH 57	COUNTY: DOOR	STH 57 & STONE ROAD INTERSECTION - WETLAND EXHIBIT	SHEET	E
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AJD Review Outlined in Blue

All Impacts
Associated with
Non-Jurisdictional
Wet Ditch 5

W-13
WETLAND TYPE: M
PERMANENT WETLAND DISTURBANCE
ANTICIPATED: 0.024 ACRES OR 1057.55 SF

W-12
WETLAND TYPE: M
TEMPORARY WETLAND DISTURBANCE
ANTICIPATED: 0.015 ACRES OR 666.13 SF

W-14
WETLAND TYPE: M
TEMPORARY WETLAND DISTURBANCE
ANTICIPATED: 0.001 ACRES OR 49.62 SF

WETLANDS (TYP.)

STH 57 SB

STH 57 NB

SI (TYP.)

STONE RD

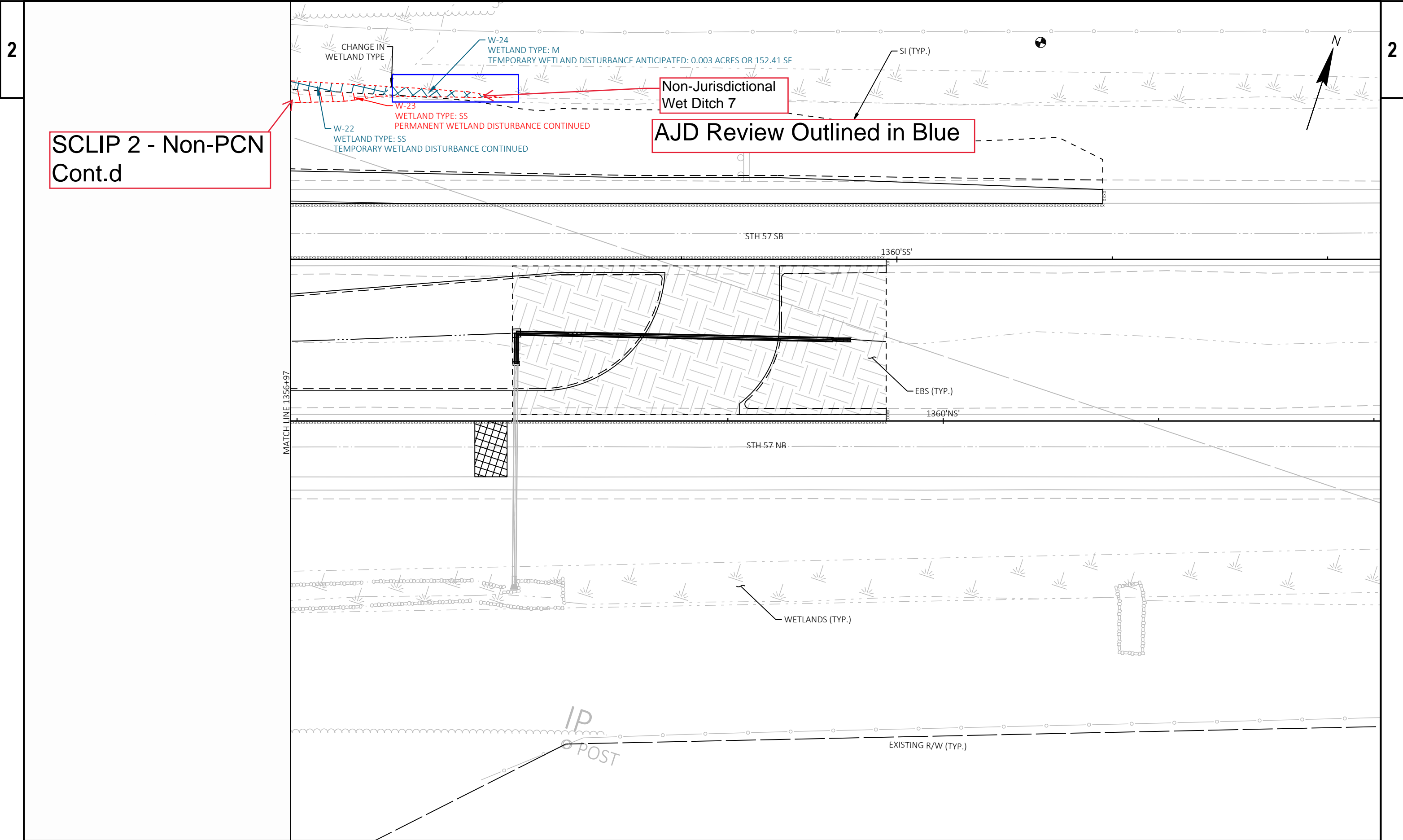
STONE RD

N

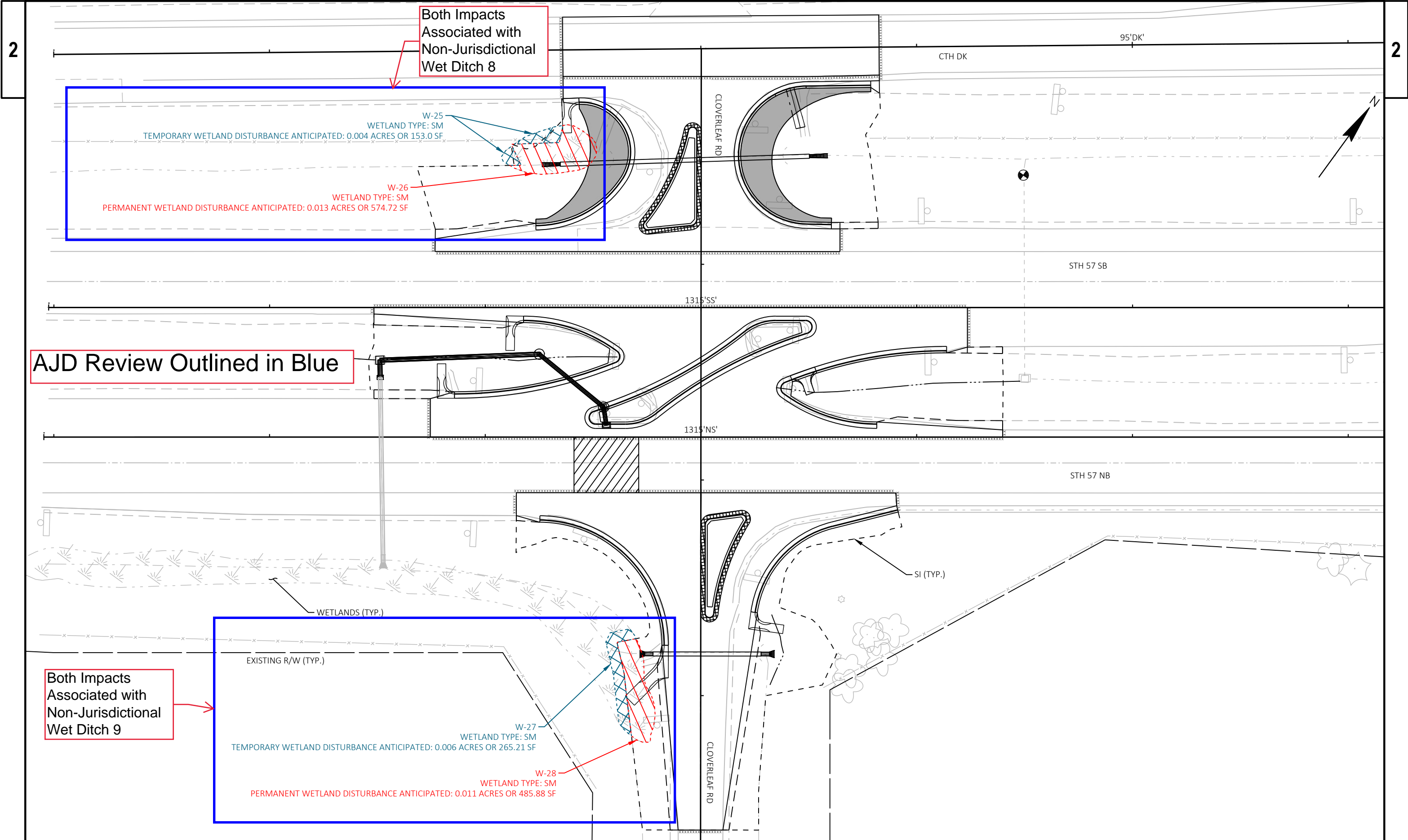
MATCH LINE 1345+37

MATCH LINE 1351+01





PROJECT NO: 1480-30-72	HWY: STH 57	COUNTY: DOOR	STH 57 & STONE ROAD INTERSECTION - WETLAND EXHIBIT	SHEET	E
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PROJECT NO: 1480-30-72	HWY: STH 57	COUNTY: DOOR	STH 57 & CLOVERLEAF ROAD INTERSECTION -WETLAND EXHIBIT	SHEET	E
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