



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ST. LOUIS DISTRICT
1222 SPRUCE STREET
ST. LOUIS, MISSOURI 63103

CEMVS-RD

August 6, 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 [MVS-2024-324](#)²

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.³ 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.⁴

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),⁵ 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 When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, the territorial seas, or interstate water that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ 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.

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).

- 1) Waterway 1 (274 feet), non-jurisdictional
- 2) Wetland 2 (0.19-acre), non-jurisdictional
- 3) Wetland 3 (0.02-acre), non-jurisdictional
- 4) Wetland 4 (0.09-acre), non-jurisdictional
- 5) Wetland 5 (0.02-acre), non-jurisdictional
- 6) Wetland 6 (0.01-acre), non-jurisdictional
- 7) Wetland 7 (0.003-acre), non-jurisdictional
- 8) Wetland 8 (0.003-acre), non-jurisdictional
- 9) Wetland 9 (0.11-acre), non-jurisdictional
- 10) Wetland 10 (0.01-acre), non-jurisdictional
- 11) Wetland 11 (2.19-acre), jurisdictional (Section 404)
- 12) Wetland 12 (0.05-acre), non-jurisdictional
- 13) Wetland 13 (0.40-acre), non-jurisdictional
- 14) Wetland 14 (0.04-acre), non-jurisdictional
- 15) Wetland 15 (0.16-acre), non-jurisdictional
- 16) Wetland 16 (0.08-acre), non-jurisdictional

Note: Wetland 1 (0.56-acre) has been excluded from review under this AJD to avoid review delays.

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) (2023 Rule, as amended)
- c. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)
- d. Citing to the 27 September coordination memo, specifically to the language which reads, "Because the Supreme Court in *Sackett* adopted the Rapanos plurality standard and the 2023 rule preamble discussed the Rapanos plurality standard, the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the Rapanos plurality standard incorporated in

paragraphs (a)(3), (4), and (5) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended.”

3. REVIEW AREA. The Review Area consists of approximately 90-acres proposed for solar development near Marion, Williamson County, Illinois. The Review Area, an undeveloped former coal mine site, is located approximately 1.10-miles east of Interstate 57 and approximately 0.27-miles east of Illinois Route 37 in Sections 6 and 7, Township 9 South, Range 3 East of the third principal meridian in Williamson County, Illinois. Approximate coordinates for the Review Area are Latitude 37.7635° and Longitude -88.9238°.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [Big Muddy River](#)
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. [Unnamed tributaries to Crab Orchard Creek](#) are the receiving waters for all the surface drainage that leaves the Review Area. [Crab Orchard Creek](#) eventually intersects the [Big Muddy River](#), a TNW. The [Big Muddy River](#) is a Section 10 water from mile 0 to mile 51.9, near [DeSoto, Illinois](#).
6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷ [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

⁶ 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.

⁷ 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.

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):

- **Wetland 11** is 2.19-acre wetland complex comprised of both emergent and forested components in a previously mined setting. The wetland complex extends across the northern limits of the Review Area in a northwest to east orientation before exiting the site through a culvert under South Spillertown Road. The wetland complex is then impounded by a series of mine pits. The mine pits (RPW) impound the wetland complex (Wetland 11) as well as a second-order tributary to Crab Orchard Creek, extending north to south. The second-order tributary to Crab Orchard Creek contains relatively permanent flow. As such, the wetland complex abuts a requisite water.

- Flow Path(s): Wetland 11 (2.19-acre) -> Culvert (50 feet) -> Impoundment Complex (1,132 feet) (Requisite Water) ->RPW Tributary

- 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).⁸
- 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

⁸ 88 FR 3004 (January 18, 2023)

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).

- **Waterway 1** is a small first-order tributary that begins near the northwestern limits of the Review Area and is oriented northeast to southwest. The tributary continues off-site and intersects the railroad ditch. The non-relatively permanent flow characteristics of the tributary at the farthest downstream limit of the tributary are representative of the first-order tributary. The lack of standing or flowing water for more than a short duration in direct response to precipitation best characterizes this feature and therefore it would not meet the Relatively Permanent Standard.
- **Wetland 2, Wetland 3, Wetland 4, Wetland 5, Wetland 6, Wetland 7, Wetland 8, Wetland 9, Wetland 10, Wetland 12, Wetland 13, Wetland 14, Wetland 15, and Wetland 16** are wetlands located throughout the review area that collect surface run-off in closed depressions. The wetlands exist because of past mining activities within the Review Area. No discrete features or non-RPW tributaries were identified exiting the wetland features downslope, potentially providing continuous surface connections to requisite waters.

- Flow Path(s): None

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 dated May 6, 2024
- b. USGS Topographic Maps, 1:24,000 Scale, Johnston City, IL Quad
- c. USGS NHDPlus
- d. USGS Stream Stats
- e. Antecedent Precipitation Tool
- f. USDA-NRCS Soil Survey for Williamson County, Illinois
- g. USGS Illinois Geologic Maps
- h. USFWS National Wetland Inventory, Color Infrared, 1980's, 1:58,000 Scale
- i. Illinois Height Modernization (ILHMP) LiDAR Data
- j. Illinois Historic Aerial Photography – ISGS Geospatial Data Clearinghouse
- k. Google Earth Pro Aerial Imagery, Various Aerial Images
- l. Joint Policy Memorandums on NWK-2022-00809, NAP-2023-01223, & SWG-2023-00284

CEMVS-OD-F

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVS-2024-324](#)

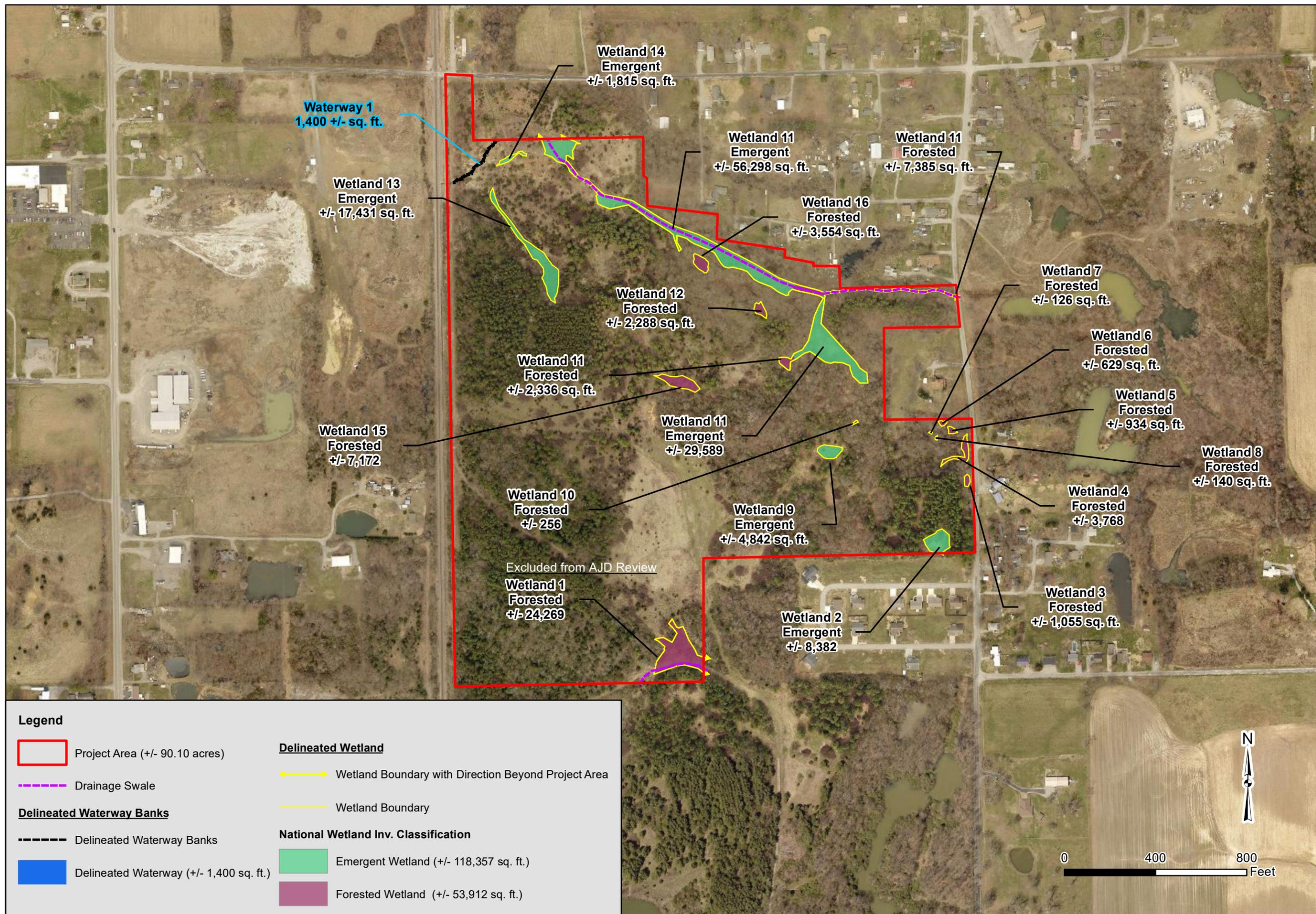
10. OTHER SUPPORTING INFORMATION.

Antecedent Precipitation Tool Results

Delineation Field Evaluation Dates:

March 10, 2024: Wet Season / Drier than Normal / Severe Drought

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.



Legend

Project Area (+/- 90.10 acres)

Drainage Swale

Delineated Waterway Banks

Delineated Waterway Banks

Delineated Waterway (+/- 1,400 sq. ft.)

Delineated Wetland

Wetland Boundary with Direction Beyond Project Area

Wetland Boundary

National Wetland Inv. Classification

Emergent Wetland (+/- 118,357 sq. ft.)

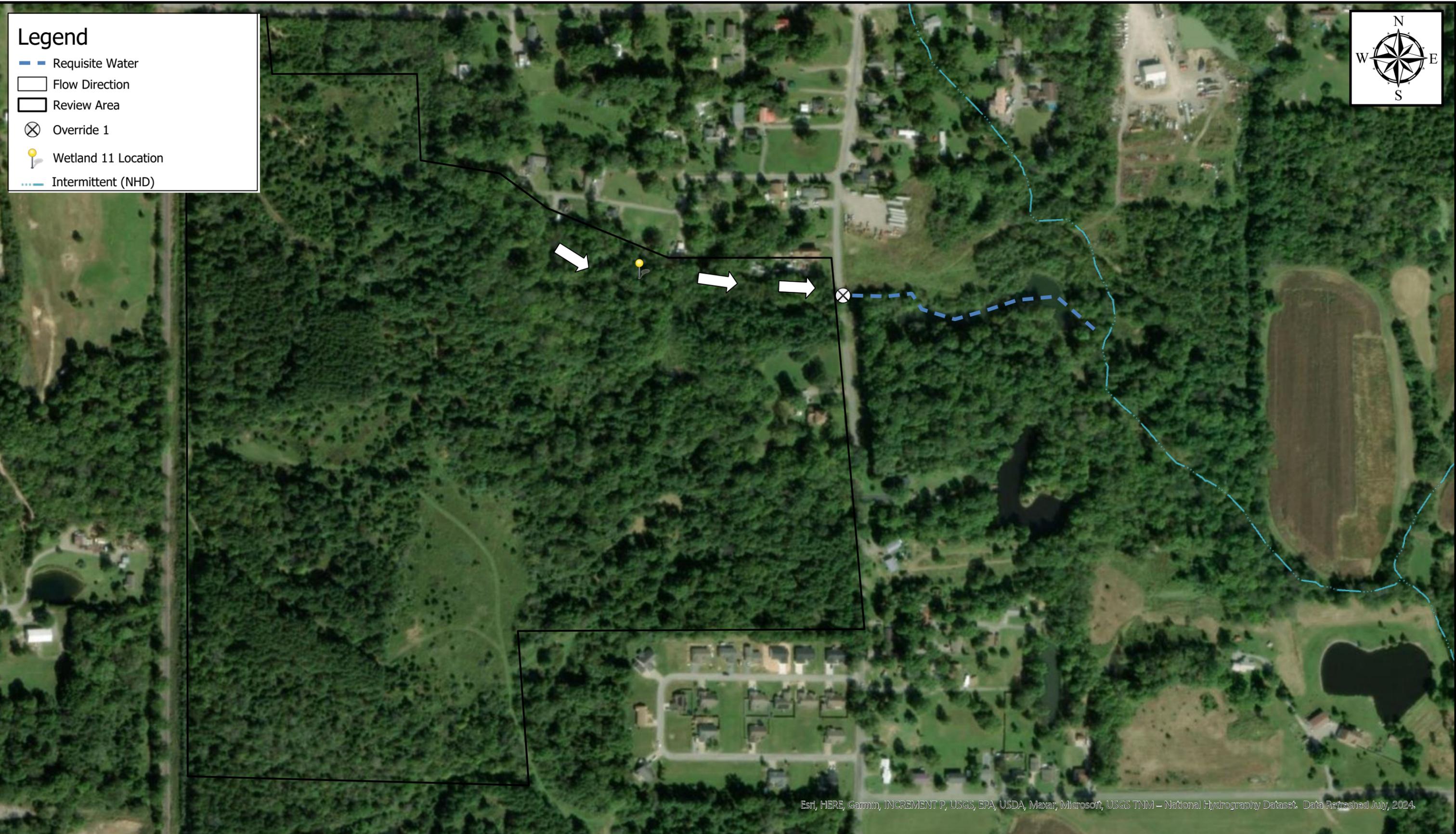
Forested Wetland (+/- 53,912 sq. ft.)

FIGURE 5
WETLAND DELINEATION OVERVIEW MAP
DIMENSION RENEWABLES ENERGY, LLC
GORDON SOLAR SITE
TOWN OF EAST MARION
WILLIAMSON COUNTY, ILLINOIS

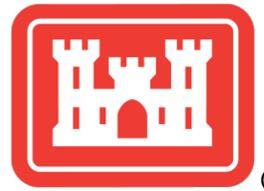
Drawn: MLO 5/2/2024
Approved: KTB 5/2/2024
Scale: As Shown
Project Number: 2403528
Overview Map

Legend

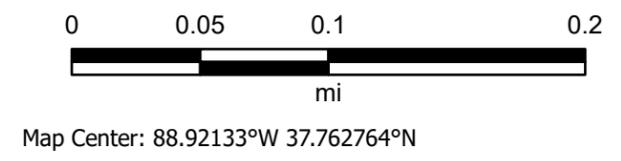
- Requisite Water
- Flow Direction
- Review Area
- Override 1
- Wetland 11 Location
- Intermittent (NHD)



Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA, Maxar, Microsoft, USGS TNM – National Hydrography Dataset. Data Refreshed July, 2024.



MVS-2024-324
Flow Path to
Requisite Water



Map Created by: K. Metzger
Date: 8/6/2024
Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere
Projection: Mercator Auxiliary Sphere