



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

CEMVS-OD-F

February 23, 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-2024-73](#)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).

Tributaries

- 1) S-4 (2,486 feet), non-jurisdictional
- 2) S-5 (697 feet), non-jurisdictional
- 3) S-6 (68 feet), non-jurisdictional
- 4) S-7 (330 feet), non-jurisdictional
- 5) S-8 / S-21¹ (1,928 feet), non-jurisdictional
- 6) S-9 (383 feet), non-jurisdictional
- 7) S-10 (4,730 feet), jurisdictional (Section 404)
- 8) S-11 (2,299 feet), jurisdictional (Section 404)
- 9) S-15 (2,363 feet), jurisdictional (Section 404)
- 10) S-17 (447 feet), non-jurisdictional
- 11) S-22 (34 feet), non-jurisdictional
- 12) S-33 (209 feet), non-jurisdictional
- 13) S-34 (377 feet), non-jurisdictional
- 14) S-39 (1,076 feet), non-jurisdictional
- 15) S-44 (3,629 feet), jurisdictional (Section 404)

Wetlands

- 16) W-8 (0.01-acre), non-jurisdictional
- 17) W-10 (0.05-acre), non-jurisdictional
- 18) W-22 (0.11-acre), non-jurisdictional
- 19) W-24 (0.11-acre), non-jurisdictional
- 20) W-26 (0.32-acre), jurisdictional (Section 404)

See Tables 1 and 2 in Section 10 for more detailed information relating to each aquatic resource presented above.

¹Select stream naming conventions and their limits have been manipulated and/or combined by USACE and differ from the Agent's delineation submittal to comply with analysis of (a)(3) tributaries under the 2023 WOTUS Rule, as amended.

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. ___, 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.”
 - e. Citing to the “Technical Support Document for the Final “Revised Definition of ‘Waters of the United States’” Rule dated December 2022.
3. REVIEW AREA. The Review Area is limited to the Limits of Disturbance (LOD) and anticipated impacted water features associated with approximately 834 acres of land proposed for the development of a 68-megawatt solar and battery energy storage system near Baldwin, Randolph County, Illinois. Approximate coordinates for the center of the Review Area are Latitude 38.2020° and Longitude -89.8478°.
 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [Kaskaskia River](#)
 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. [Doza Creek and Baldwin Lake](#) are the receiving waters for all the surface drainage within the Review Area. Both receiving waters eventually flow west to the [Kaskaskia River](#), a TNW at its downstream extent.
 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](#)

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

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**

e. Tributaries (a)(3):

Four tributaries (S-10, S-11, S-15, and S-44) within the Review Area were determined to meet the Relatively Permanent Standard. Physical characteristics combined with the systems watershed conditions provide weight-of-evidence that the systems contain flow continuously for extended periods of time, which is necessary to meet the relatively permanent standard. Descriptions of each tributary are provided below.

- **S-10** (4,730 feet) is a second-order tributary (per NHD) to Baldwin Lake with an 895-acre watershed at its downstream most extent within the Review Area. Both intermittent and perennial flow characteristics were observed throughout the relevant reach, which satisfied the relatively permanent standard. The tributary, which appears to maintain a water surface elevation that coincides with the lake itself and a groundwater connection throughout much of the year. At the time of the delineation field evaluation, the stream reach was observed with both flowing and pooled water.

329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

- **S-11** (2,299 feet) is a second-order tributary (per NHD) to S-10 with a 336-acre watershed at its downstream most extent within the Review Area. Both intermittent and perennial flow characteristics were observed throughout the relevant reach, which satisfied the relatively permanent standard. The northern extent of the tributary appears to maintain a water surface elevation that coincides with S-10 and Baldwin Lake. A portion of the tributary appears to maintain a groundwater connection throughout much of the year. At the time of the delineation field evaluation, the stream reach was observed with both flowing and pooled water.
- **S-15** (2,363 feet) is a first-order tributary (per NHD) to S-11 that receives hydrology from a 185-acre watershed and numerous roadside drainage ditches along the power plants entrance road. The tributary was flowing at the time of the delineation field evaluation during the dry season (normal conditions). Based on the surrounding soil properties and well log data available in the vicinity of the stream, S-15 likely receives flows from a seasonal elevated water table in combination with surface flows from the surrounding watershed.
- **S-44** (3,629 feet) is an unnamed tributary to S-10. The tributary has a watershed of 203-acres that collects hydrology through a series of headwater, non-RPW tributaries as well as flows out of the adjacent borrow pond (W-7), which maintains a consistent water surface elevation likely as result of a groundwater connection. The headwaters of the tributary have been channelized before gaining sinuosity as it moves north and west towards S-10. Based on the stream's physical characteristics, watershed conditions, and presence of pooled reaches during the dry season, it was determined the stream contains a ground water connection and meets the relatively permanent standard.

f. Adjacent Wetlands (a)(4):

- **W-26** is a 0.32-acre emergent wetland that abuts S-10, an (a)(3) water.

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 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).

- **Non-RPW Tributaries:**

S-4 / S-5 / S-6 / S-7 / S-9 / S-17 / S-22 / S-33 / S-34 / S-39 / S-8¹

Each of these 11 non-RPW features are first-order tributaries, not identified by NHD that lie within the upper extents of small watersheds. Many of these features lie within agricultural waterways that have not been properly maintained or in disturbed settings where the lack of perennial vegetation has allowed for channel development. The onset of streamflow coincides with precipitation events and cease shortly after the termination of overland run-off. Even with presumed back-to-back or multiple storm events throughout their watersheds, these systems would not sustain baseflows for extended periods of time, but rather maintain a repeated sequence of streamflow, flow cessation, and channel drying throughout the year. Their watershed sizes do not provide enough overland flow to maintain continuous seasonal flow without the presence of an elevated groundwater connection during the wet season for extended periods. Based on their location within their respective local watershed and lack of physical characteristics indicating the presence of a groundwater connection, these features would not meet the Relatively Permanent Standard.

- **Wetlands without a Continuous Surface Connection:**

- **W-22** and **W-24** about non-RPW drainage channels; however, these channels do not continue downslope to RPW's via discrete features or non-RPW tributaries. Flow through these features eventually dissipate into overland flow or terminates at another wetland feature, which lacks connection downslope.

⁸ 88 FR 3004 (January 18, 2023)

- o **W-8** and **W-10** are depressional wetlands located within a previous agricultural setting that has since been disturbed because of the construction of a borrow pond (W-7). No discrete features or non-RPW tributaries were identified entering or exiting the wetland features.

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 August 18, 2023
- b. USGS TopoView Topographic Maps, 1:24,000 Scale, Baldwin, IL Quad
- c. USGS NHDPlus, Accessed February 22, 2024
- d. USGS Stream Stats
- e. Hydrologic Modeling System (HEC-HMS)
- f. Antecedent Precipitation Tool
- g. USDA-NRCS Soil Survey for Randolph County, Illinois
- h. USGS Illinois Geologic Maps
- i. USFWS National Wetland Inventory, Color Infrared, 1980's, 1:58,000 Scale
- j. Illinois Height Modernization (ILHMP) LiDAR Data
- k. Google Earth Pro Aerial Imagery, Various Aerial Images

10. OTHER SUPPORTING INFORMATION.

Antecedent Precipitation Tool Results

Delineation Field Evaluation Dates:

- Aug 6, 2021: Dry Season / Normal Conditions
- June 15, 2022: Dry Season / Normal Conditions
- June 21, 2022: Dry Season / Normal Conditions

Table 1. Wetlands Identified within the Review Area

Wetland ID	Latitude	Longitude	Area (Acres)	Wetland Type	CSC	WOTUS
W-8	38.2011	-89.8348	0.01	PEM	No	No
W-10	38.1996	-89.8356	0.05	PEM	No	No
W-22	38.2062	-89.8358	0.11	PEM	No	No
W-24	38.2045	-89.8365	0.11	PEM	No	No
W-26	38.2055	-89.8461	0.32	PEM	Yes (Abuts S-10)	Yes

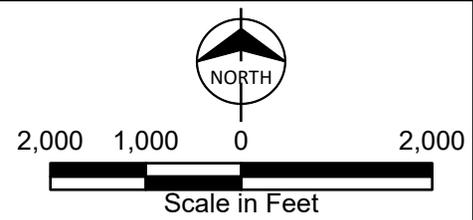
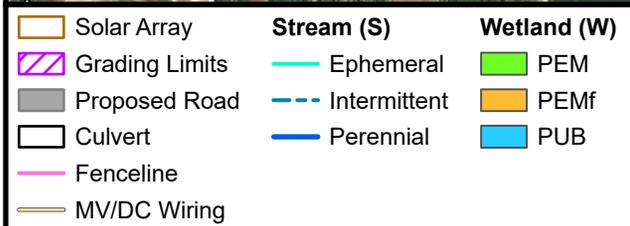
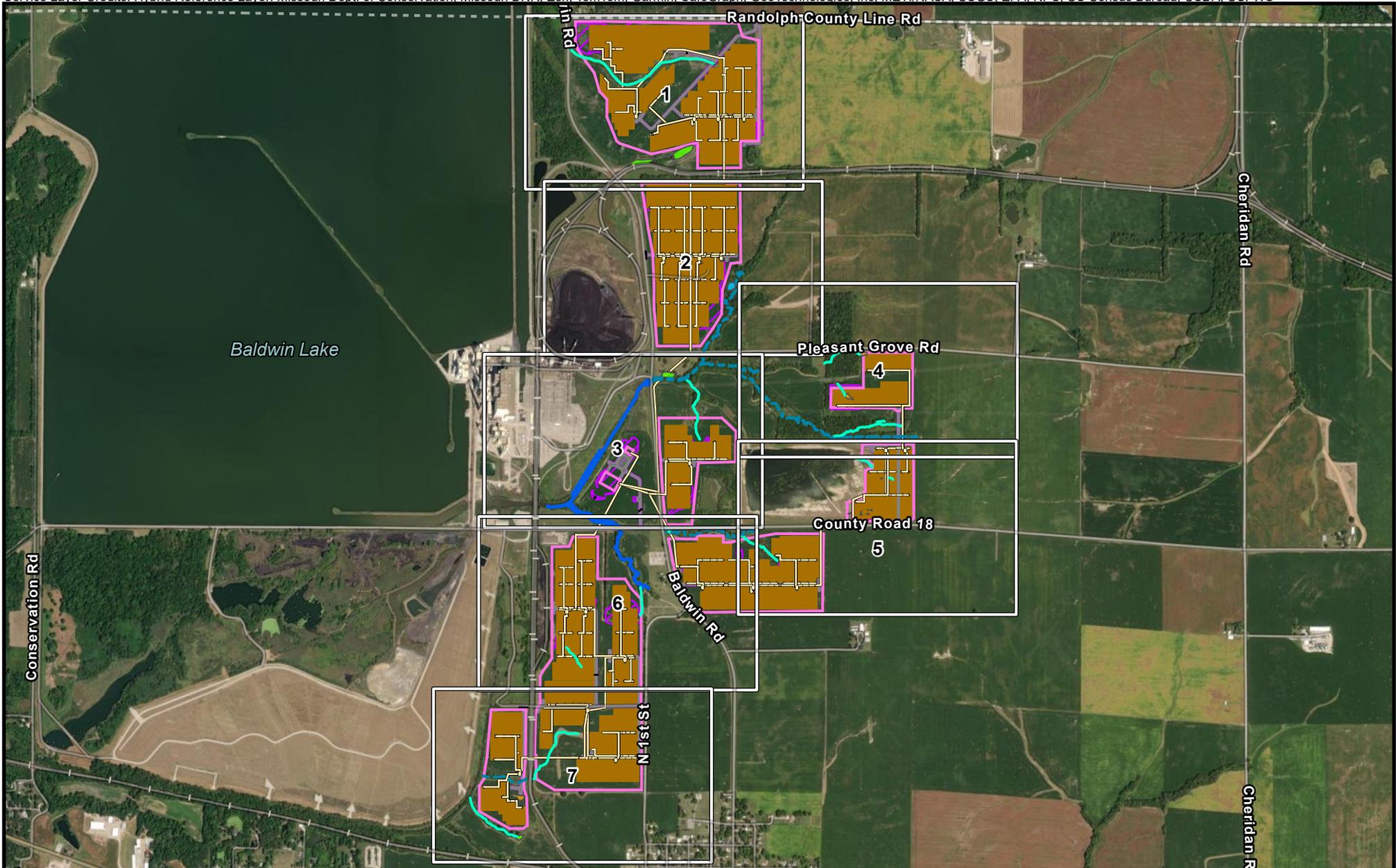
Table 2. Tributaries Identified within the Review Area

Feature ID ³	Latitude	Longitude	Length	Watershed Size (acres)	Flow Characteristics	WOTUS
S-4	38.2182	-89.8491	2,486	94	NRPW	No
S-5	38.1983	-89.8412	697	62	NRPW	No
S-6	38.2011	-89.8347	68	<5	NRPW	No
S-7	38.2018	-89.8357	330	<5	NRPW	No
S-8 / S-21	38.1886	-89.8539	1,928	67	NRPW	No
S-9	38.1939	-89.8512	383	<25	NRPW	No
S-10	38.2031	-89.8488	4,730	895	RPW	Yes
S-11	38.1995	-89.8498	2,299	336	RPW	Yes
S-15	38.1988	-89.8445	2,363	185*	RPW	Yes
S-17	38.1959	-89.8474	447	<25	NRPW	No
S-22	38.1990	-89.8456	34	<10	NRPW	No
S-33	38.2048	-89.8371	209	<25	NRPW	No
S-34	38.2034	-89.8345	377	<25	NRPW	No
S-39	38.2041	-89.8446	1,076	36	NRPW	No
S-44	38.2033	-89.8390	3,629	203	RPW	Yes

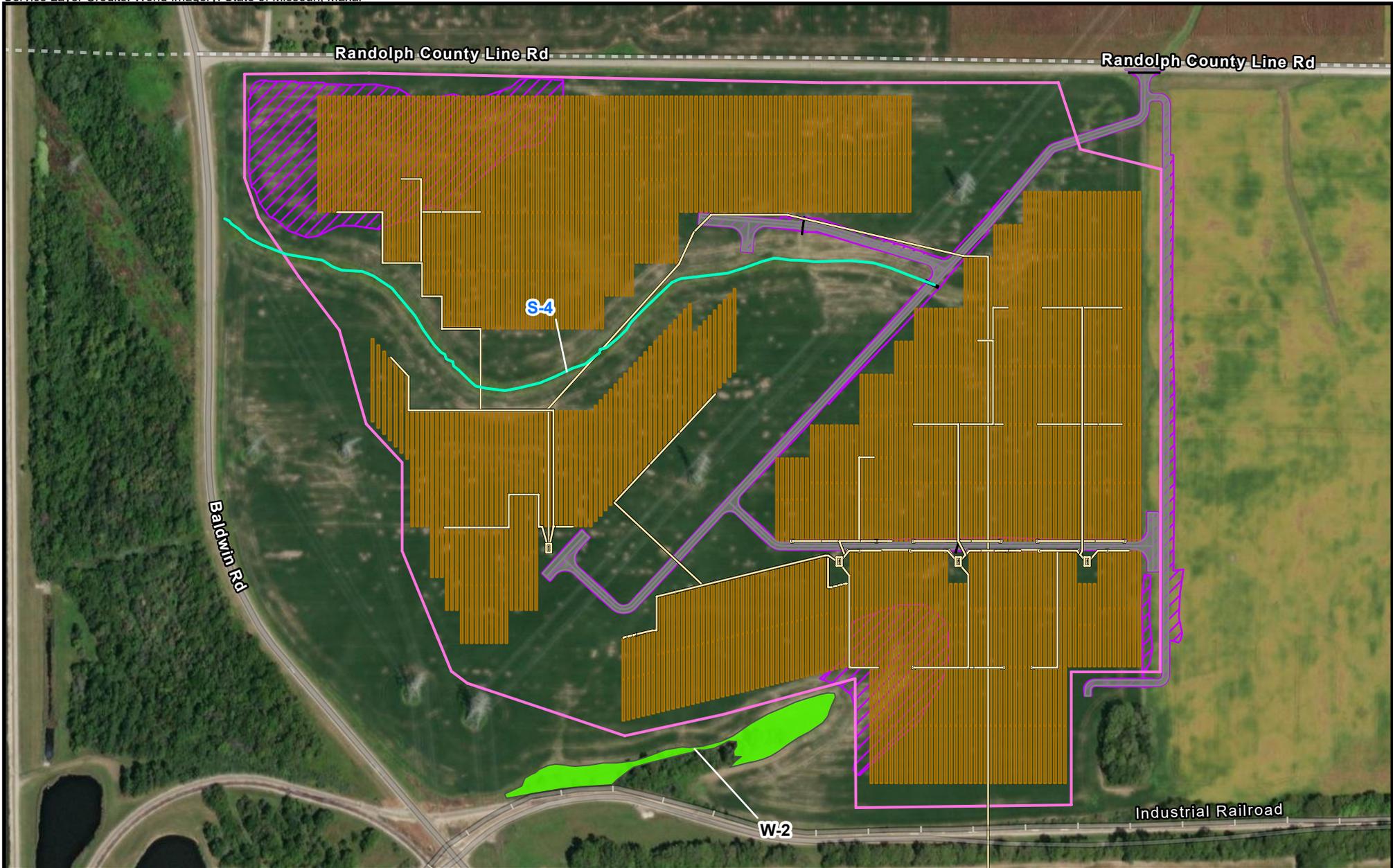
¹Some stream naming conventions and their limits have been manipulated and/or combined by USACE and differ from the Agent's delineation submittal to comply with analysis of (a)(3) tributaries under the 2023 WOTUS Rule, as amended.

*Watershed size may not reflect total drainage area to the routing of roadside drainages into the feature.

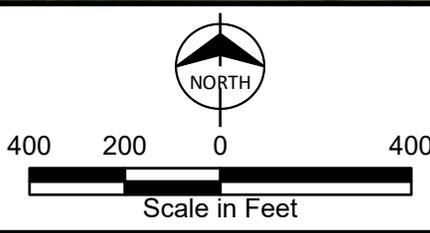
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional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



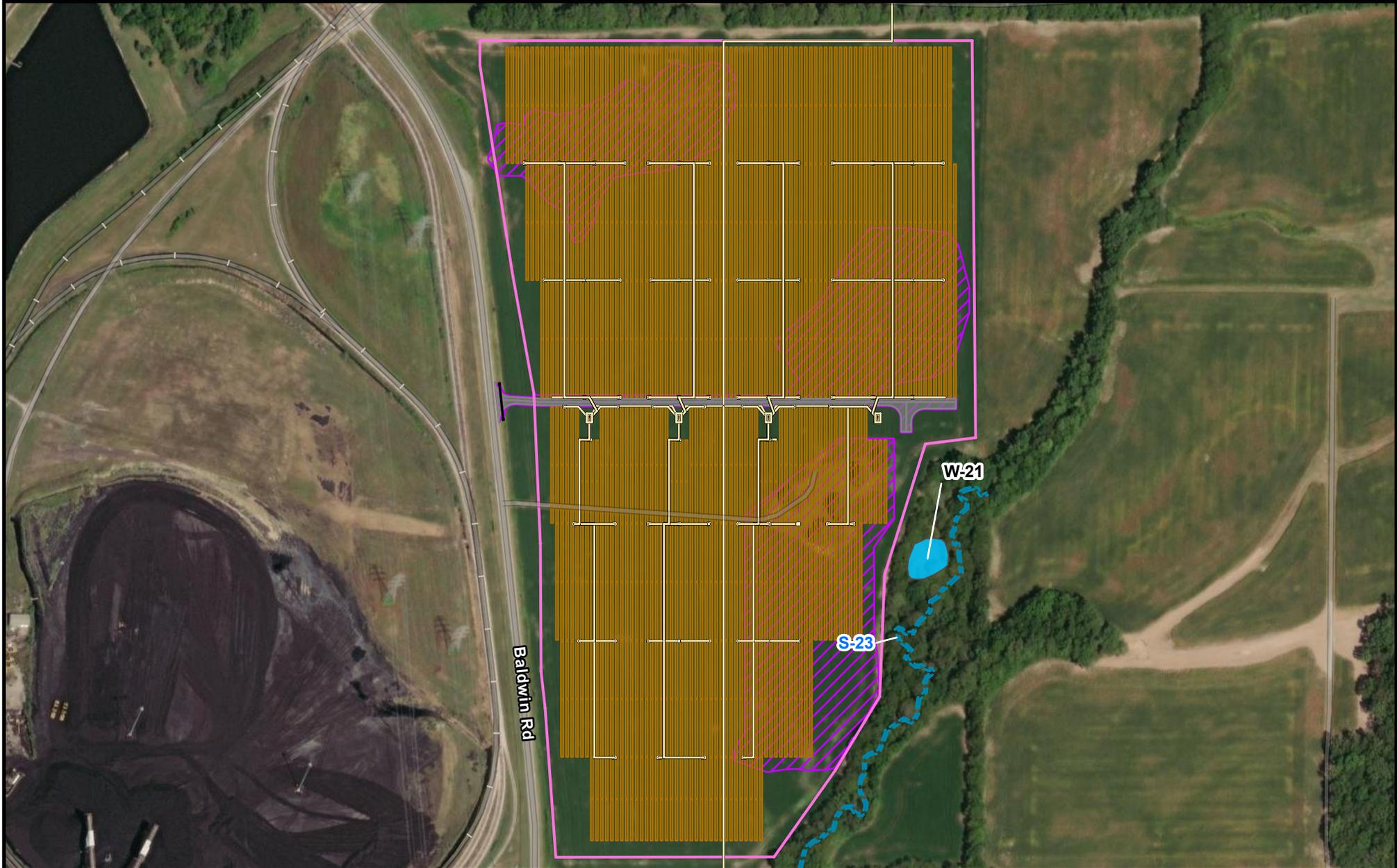
AJD Request
 Wetland and Surface Water Overview Map
 Baldwin Solar and BESS Project
 Vistra Corporate Services Company
 Randolph County, Illinois



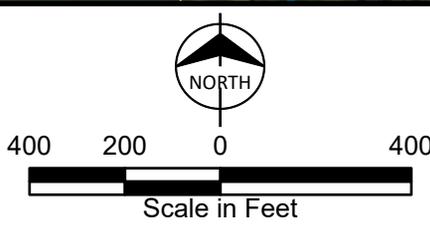
Solar Array	Stream (S)	Wetland (W)
Grading Limits	Ephemeral	PEM
Proposed Road	Intermittent	PEMf
Culvert	Perennial	PUB
Fenceline		
MV/DC Wiring		



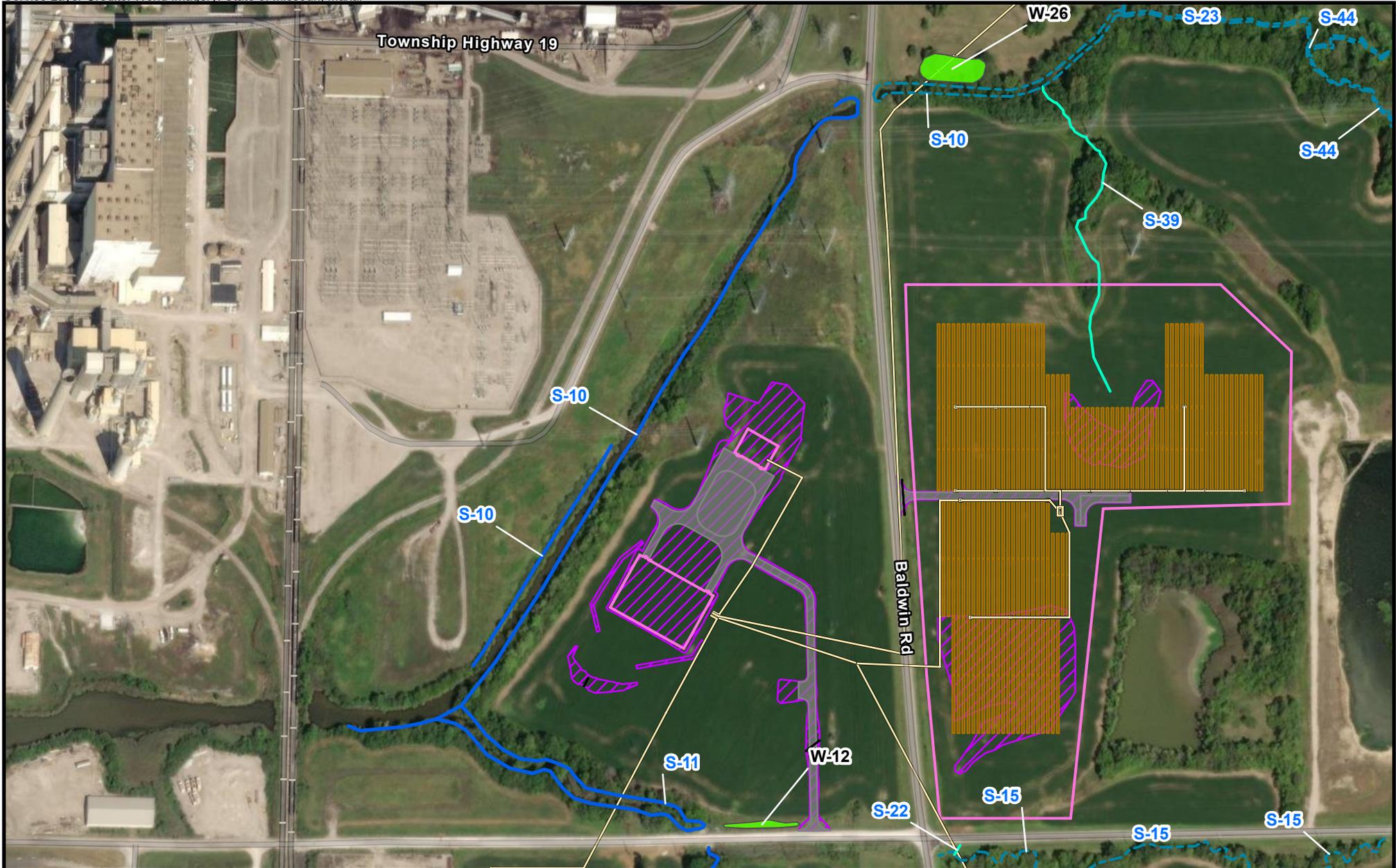
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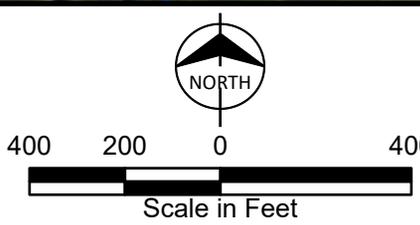
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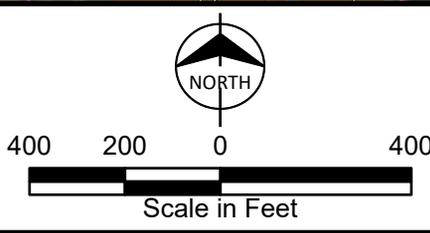
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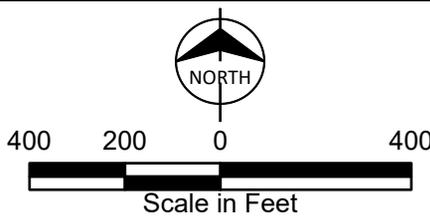
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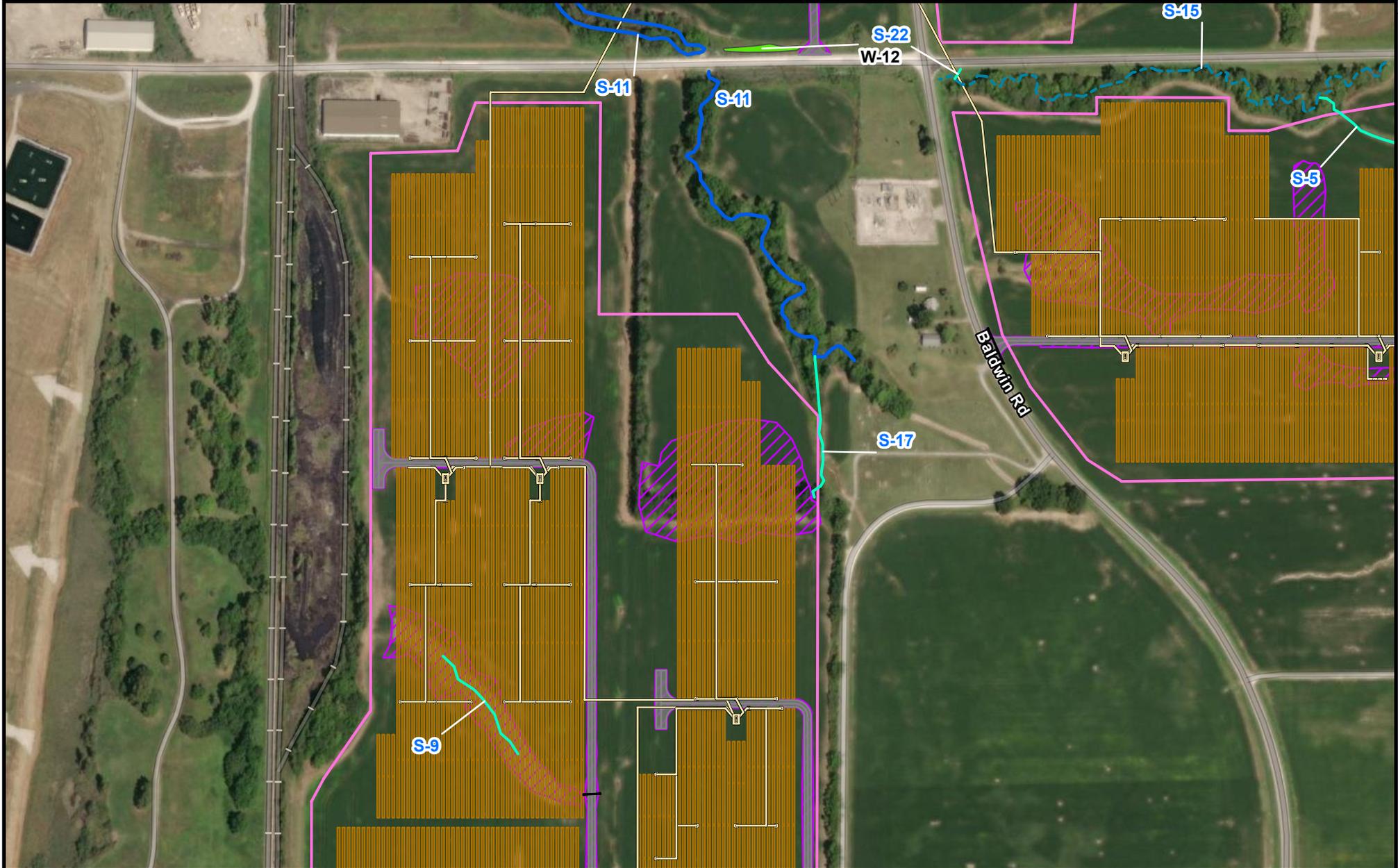
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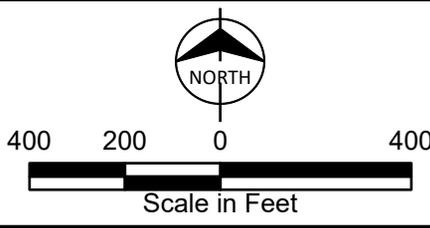
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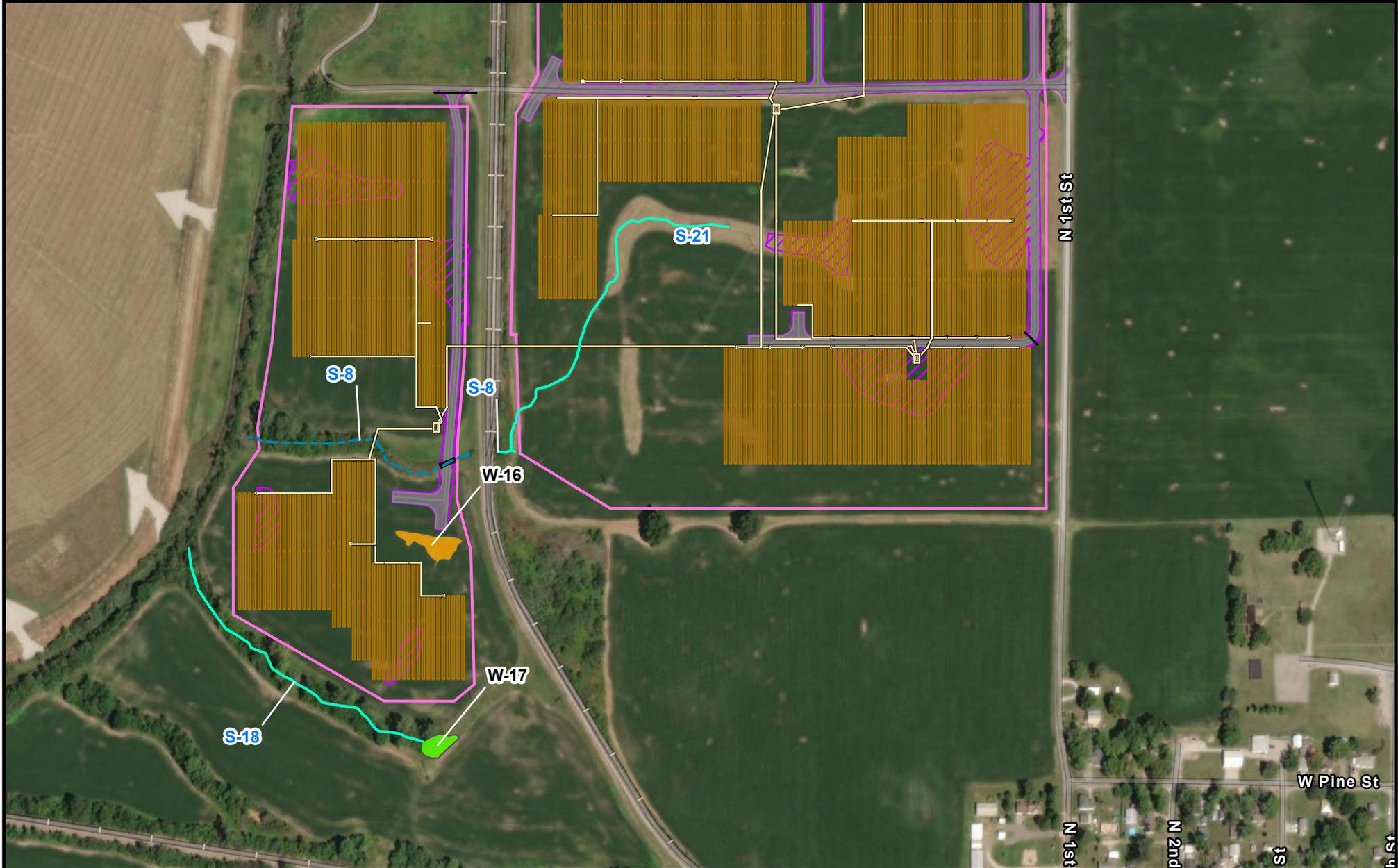
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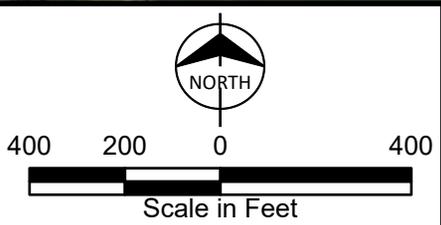
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Solar Array	Stream (S)	Wetland (W)
Grading Limits	Ephemeral	PEM
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