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CESWL-RD

30 June 2025

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime  
Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322  
(2023),<sup>1</sup> **SWL 2024-00323** []<sup>2</sup>

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>3</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>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</sup> the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as

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<sup>1</sup> While the Supreme Court's decision in *Sackett* 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> 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, interstate water, or territorial seas 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</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.

amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in this state due to litigation.

## 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. DR01 (~2,018 linear feet), Jurisdictional, Section 404
  - ii. WET02-EPH (~47 linear feet), Jurisdictional, Section 404
  - iii. DR02 (~74 linear feet), non-Jurisdictional
  - iv. DR03 (~50 linear feet), non-Jurisdictional
  - v. DR04 (~116 linear feet), Jurisdictional, Section 404
  - vi. DR05 (~115 linear feet), Jurisdictional, Section 404
  - vii. DR06 (~116 linear feet), Jurisdictional, Section 404
  - viii. WET01 (~0.21 acres), Jurisdictional, Section 404
  - ix. WET02 (~0.43 acres), Jurisdictional, Section 404
  - x. WET03 (~0.36 acres), non-Jurisdictional
  - xi. WET04 (~0.44 acres), Jurisdictional, Section 404
  - xii. WET05 (~0.10 acres), non-Jurisdictional
  - xiii. WET06 (~0.10 acres), non-Jurisdictional

## 2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).
- b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).

- c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (December 2, 2008)
  - d. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)
  - e. 1987 Corps of Engineers Wetlands Delineation Manual, Eastern Mountains and Piedmont Region Supplement
3. REVIEW AREA. The review area is an approximately 38-acre property located in Fayetteville in Washington County, Arkansas. Approximate center coordinates for the review area are Lat. 36.105797, Long. -94.194354
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. All aquatic resources flow into the Illinois River which is a Section 10 waterway and is a TNW.<sup>6</sup>
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. All aquatic features flow generally south – southwest into Clabber Creek (RPW) and exit the review area, Clabber Creek flows into Hamstring Creek (RPW), Hamstring Creek flows into Clear Creek (RPW), Clear Creek flows into the Illinois River (TNW).
6. SECTION 10 JURISDICTIONAL WATERS<sup>7</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>8</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

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<sup>6</sup> This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

<sup>7</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>8</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.

in accordance with the pre-2015 regulatory regime and 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 pre-2015 regulatory regime. 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. TNWs (a)(1): N/A
- b. Interstate Waters (a)(2): N/A
- c. Other Waters (a)(3): N/A
- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5):
  - i. DR01 ~25 wide by 3 feet deep 2,018 linear feet long RPW. The agent's delineation report describes the feature as having defined bed/banks with riffle-pool morphology. Waterflow indicators including a clear, natural line impressed on bank, shelving, destruction of terrestrial vegetation, presence of litter and debris, presence of rack line, sediment sorting, and a presence of base flow were also noted during the site visit. Historic aerial imagery also supports evidence of relatively permanent flow.
  - ii. DR04 ~2 wide by 0.3 feet deep 116 linear feet long RPW. The agent's delineation report describes the feature as having defined bed/banks with riffle-pool morphology. Waterflow indicators including a clear, natural line impressed on bank, destruction of terrestrial vegetation, sediment sorting, scouring, and a presence of base flow were also noted during the site visit. Historic aerial imagery also supports evidence of relatively permanent flow.
  - iii. WET02-EPH, ~2 feet wide by 0.5 feet deep 47 linear feet long RPW. The agent's delineation report describes the feature as being channelized or man-made. This feature is described as having bed/banks, an herbaceous vegetation substrate, rack line, lacking any riffle/pool morphology, and scouring. A review of available historical photos noted this feature having water over multiple years and various months. This evidence supports relatively permanent flow.

- iv. DR05 ~2 feet wide by 0.3 feet deep 115 linear feet long RPW. The agent's delineation report describes the feature as weakly defined bed/banks, an herbaceous vegetation substrate, lacking any riffle/pool morphology. A review of available historical photos noted this feature having water over multiple years and various months. Additionally, the herbaceous vegetation noted in the substrate (*Lespedeza virginica* FAC, *Agrimonia parviflora* FAC, *Cyperus strigosus* FACW, *Xanthium strumarium* FAC, *Diodia virginiana* FACW, *Bidens* Species FACW/FAC/OBL, *Echinochloa crus-galli* FACW, and *Paspalum floridanum* FACW is further evidence that supports relatively permanent flow.
  - v. DR06 ~3 wide by 0.6 feet deep 525 linear feet long RPW. The agent's delineation report describes the feature as having defined bed/banks with riffle-pool morphology. Waterflow indicators including a clear, natural line impressed on bank, shelving, scouring, water staining, vegetation matted down/bent/absent in different sections, and a presence of base flow were also noted during the site visit. Historic aerial imagery also supports evidence of relatively permanent flow.
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7):
- i. WET01 is an approximately 0.21-acre palustrine emergent/forested wetland. This features vegetation has been previously impacted by being utilized as a golf course and subsequently utilized as a hay field hence the two different noted vegetation types. WET01 abuts DR01 (RPW). As such WET01 does have a continuous surface connection to a RPW and provides relatively permanent flow to a downstream TNW.
  - ii. WET02 is an approximately 0.43-acre palustrine emergent wetland. This features vegetation has been previously impacted by being utilized as a golf course and subsequently utilized as a hay field hence the two different noted vegetation types. WET02 abuts WET02-EPH (RPW). As such WET02 does have a continuous surface connection to a RPW and provides relatively permanent flow to a downstream TNW.
  - iii. WET04 is an approximately 0.44-acre palustrine emergent/forested wetland. This features vegetation has been previously impacted by being utilized as a golf course and subsequently utilized as a hay field hence the two different noted vegetation types. WET04 abuts DR05 (RPW). As such WET04 does have a continuous surface connection to a RPW and provides relatively permanent flow to a downstream TNW.

## 8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).<sup>9</sup> Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water. N/A
- b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance. N/A
- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. N/A
- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. N/A
- e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “*SWANCC*,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of the aquatic resource or feature, and how it was determined to be an “isolated water” in accordance with *SWANCC*. N/A
- f. 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 pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).
  - i. DR02 ~2 feet wide by 0.2 feet deep 74 linear feet long non-RPW. The agent’s delineation report describes the feature as having weakly defined bed/banks, an herbaceous vegetation substrate, lacking any riffle/pool

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<sup>9</sup> 51 FR 41217, November 13, 1986.

morphology, and no flow at that time. A review of available historical photos supports this feature as being non-RPW.

- ii. DR03 ~2 feet wide by 0.2 feet deep 50 linear feet long non-RPW. The agent's delineation report describes the feature as having weakly defined bed/banks, disturbed leaf litter, lacking any riffle/pool morphology, and no flow at that time. A review of available historical photos supports this feature as being non-RPW.
  - iii. WET03 is an approximately 0.36-acre palustrine emergent wetland. Per available historical photos and LiDAR data, WET03 is an isolated wetland lacking any continuous surface connection to an RPW.
  - iv. WET05 is an approximately 0.10-acre palustrine emergent/forested wetland. This features vegetation has been previously impacted by being utilized as a golf course and subsequently utilized as a hay field hence the two different noted vegetation types. Per available historical photos and LiDAR data, WET05 is an isolated wetland lacking any continuous surface connection to an RPW.
  - v. WET06 is an approximately 0.10-acre palustrine emergent wetland. This features only noted connection, per available historical photos and LiDAR data, to an RPW is via a swale (non-RPW) outside of the review area. Additionally, this swale is bisected by an un-culverted cart path crossing. As such WET06 does not have a continuous surface connection to a RPW and does not provide relatively permanent flow to a downstream TNW.
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. Corps personnel office review, conducted June 02, 2025
  - b. Cattails Environmental, LLC Delineation Report dated, August 01, 2024
  - c. USGS Stream Stats accessed, June 02, 2025
  - d. USGS topoView Fayetteville, AR 1:24K accessed, June 02, 2025
  - e. Google Earth Pro. (1994-2023 Imagery) accessed, June 02, 2025
  - f. USDA Natural Resources Conservation Service Web Soil Washington County accessed, June 02, 2025

- g. NHD data accessed on National Regulatory Viewer accessed, June 02, 2025
  - h. Historic Aerials via <https://www.historicaerials.com/viewer> accessed, June 02, 2025
10. OTHER SUPPORTING INFORMATION. The feature WET04 is not depicted on the 1958 or 1995 USGS topo maps. It is depicted on the 2011 USGS topo map.
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.



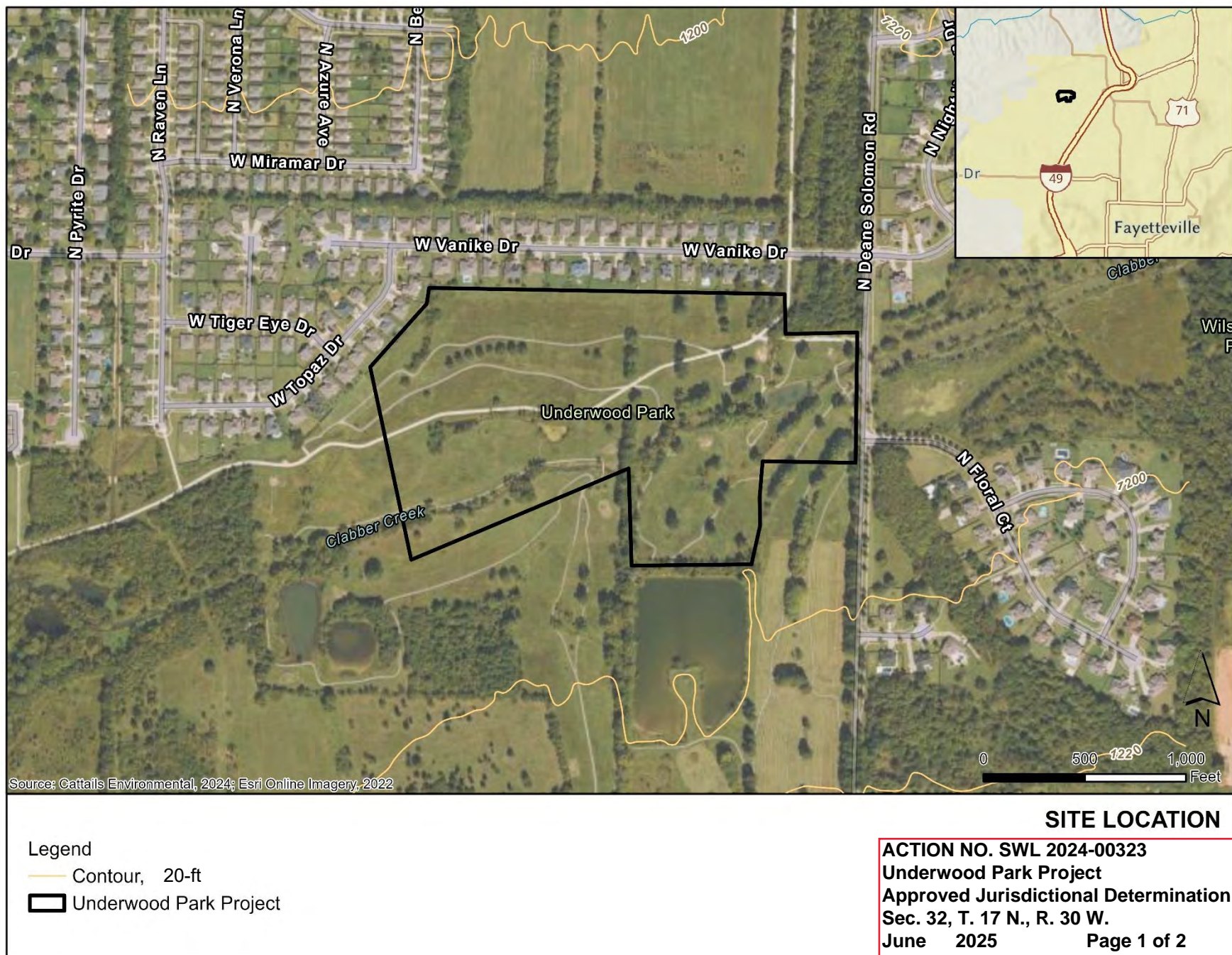


Figure 1-1. Site Location map for the Underwood Park Project, Fayetteville, Washington County, Arkansas.



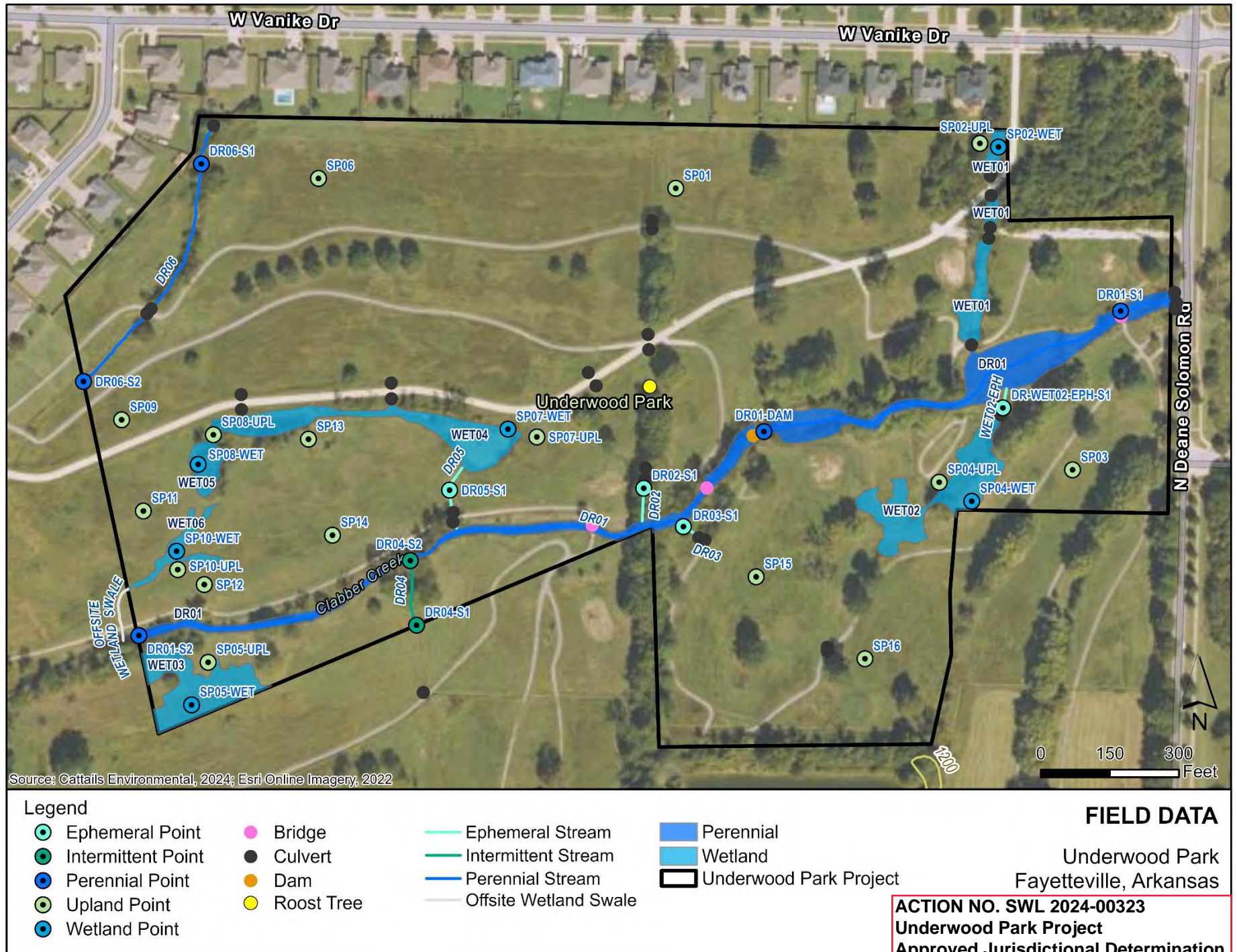


Figure 1-2. Field Data map for the Underwood Park Project, Fayetteville, Washington County, Arkansas