DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, [MVK] DISTRICT
[4155 CLAY STREET]
[VICKSBURG, MISSISSIPPI 39183]

[CEMVK-RD] [02 APR 2024]

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) ,[1] [MVK-2024-85]

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] For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),[4] 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 amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable [Arkansas] due to litigation.

1. SUMMARY OF CONCLUSIONS.

[1] 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.
[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.

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).

Wetland	Type	Acreage	Jurisdictional Status	LAT	LONG
WET-1	PFO	0.143973	Non-Jurisdictional	33.2109	-93.5458
WET-2	PSS	5.034753	Jurisdictional	33.21039	-93.544
WET-3	PFO	1.452714	Non-Jurisdictional	33.21144	-93.5498
WET-4	PSS	6.014628	Non-Jurisdictional	33.21057	-93.5502
WET-5	PFO	0.767159	Non-Jurisdictional	33.20977	-93.5527
WET-6	PSS	0.194789	Non-Jurisdictional	33.20964	-93.552
WET-7	PSS	3.238487	Non-Jurisdictional	33.20835	-93.5456
WET-8	PSS	0.185676	Non-Jurisdictional	33.20769	-93.5467
WET-9	PSS	5.015878	Non-Jurisdictional	33.20721	-93.5543
WET-10	PFO	0.502484	Non-Jurisdictional	33.20646	-93.5526
WET-11	PSS	0.3551	Non-Jurisdictional	33.20614	-93.5545
WET-12	PSS	6.687056	Non-Jurisdictional	33.20518	-93.5498
WET-13	PSS	2.354638	Non-Jurisdictional	33.20618	-93.5474
WET-14	PSS	6.803545	Non-Jurisdictional	33.20558	-93.5456
WET-15	PSS	2.334928	Non-Jurisdictional	33.20531	-93.5443
WET-16	PFO	4.53565	Non-Jurisdictional	33.20054	-93.5436

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. _, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area is consists of 255 acres residing at 33.207852 N, -93.550385 W southwest of Magnolia, Arkansas in Lafayette County. Within the site boundaries lies a series of PSS and PFO wetlands totaling approximately 45.63 acres. The project area and surrounding areas have been historically involved in silviculture activities that remain active today. There is ample evidence that this site has been heavily manipulated over the decades, such as an intricate system of roads throughout the site and neighboring properties and seemingly randomized, long-standing levees constructed around the property, which in most cases have aided in the entrapment of water during rainfall events creating many artificial wetlands given that the LiDAR/Digital Elevation Model showing this particular parcel of land to be some of the highest ground in the immediate vicinity (Enclosure 1).

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Loggy Bayou, south of Lake Bistineau

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS [Flow exits the project area in a few different directions (see additional information in sections 7 & 8). WET-2 continues offsite and eventually appears to abut Walker Creek, an intermittent RPW according to the NHD. Once flow from said wetland has joined Walker Creek, it flows a very slight, insignificant distance west to meet the flows of the other wetlands from the subject property that have flowed through a series of wetland complexes and uplands via overland sheet flow to eventually become channelized for approximately 0.7 miles in the form of a non-RPW prior to converging with Walker Creek. The cumulative flows from the site then flow south for about 8.5 miles, where it is then dumped into Lake Erling for 3.6 miles. It continues due south through Bayou

Bodcau/Bodcau Creek for 62.3 miles then down Red Chute Bayou for 25.2 miles where it adds to the Flat River for 17.1 miles and eventually ends up in Loggy Bayou, a Section 10 water just south of Lake Bistineau.

6. SECTION 10 JURISDICTIONAL WATERS[5]: 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 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): N/A

    f. The territorial seas (a)(6): 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.

g. Adjacent wetlands (a)(7):

a. WET-2 consists of 5.03 acres of scrub-shrub wetlands that is part of a larger scrub-shrub/forested wetland complex that continues offsite due east before turning to the south and appearing to abut a RPW (Walker Creek, labeled intermittent at the point of flow into the stream channel according to NHD) based on LiDAR (**Figure 2**), historical imagery, NHD, and potential wetlands that were submitted by the consultant (**Figure 3**). Due to this complex continuing offsite and having a continuous surface connection to a RPW, WET-2 is jurisdictional.

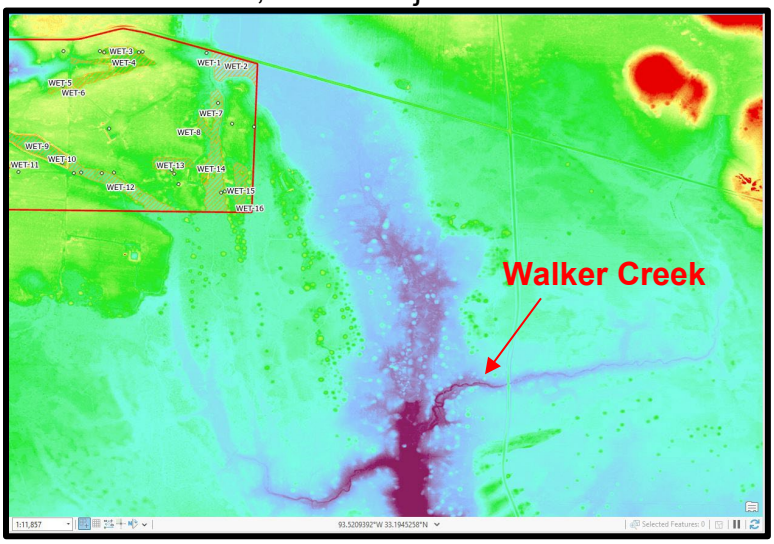


Figure 2. LiDAR Depicting WET-2 connection to Walker Creek.

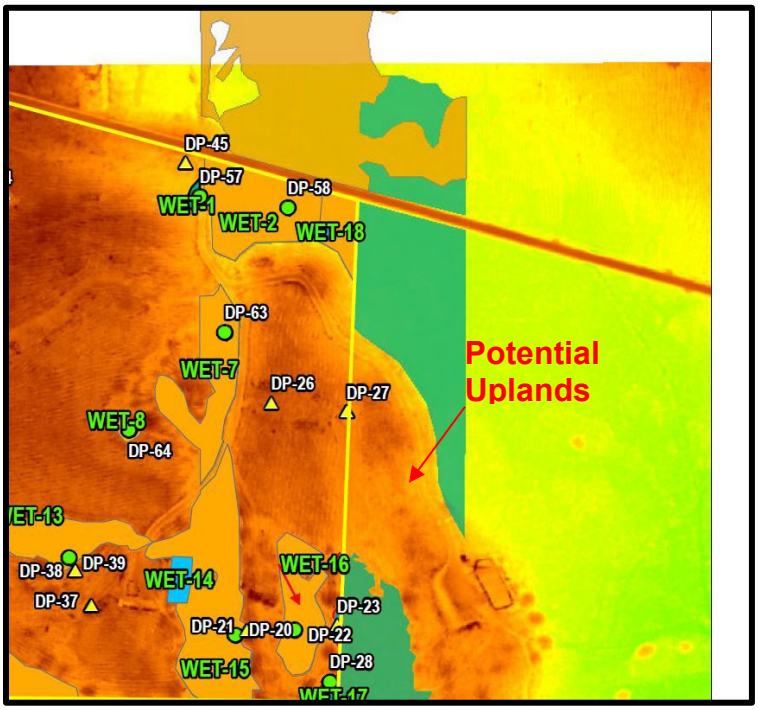


Figure 3. Screenshot from Consultant Data Showing Potential Wetlands Offsite.

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").[7] 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

[7] 51 FR 41217, November 13, 1986.

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).

-WET-1

WET-1 is a forested wetland comprised of approximately 0.14 acres. Flow into said wetland consists solely of storm water runoff impounded by a decades old roadbed, and its outflow is comprised of evapotranspiration and, in abnormal precipitation events, overland sheet flow (**Figure 1)**. WET-1 and WET-2 do not appear to function as one wetland as the area lacks culverts and compaction overtime has created a virtually impermeable barrier in the vicinity of what would potentially route shallow subsurface flow along the decades old roadbed, which does not exhibit wetland characteristics. Thus, making WET-1 isolated and non-jurisdictional.

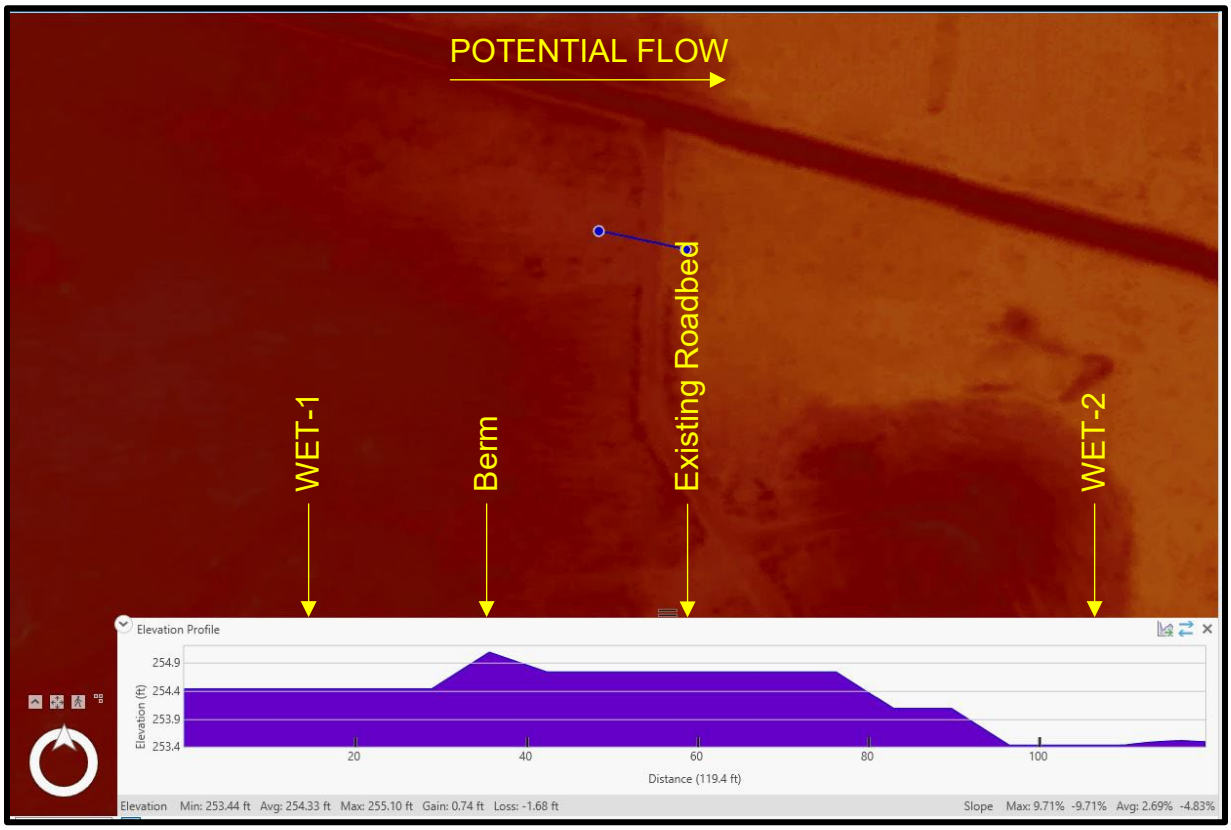


Figure 1. Elevation Profile between WET-1 and WET-2.

-WET-3/4 Complex

WET-3/4 Complex includes approximately 6.01 acres of scrub-shrub wetlands and 1.45 acres of forested wetlands. The only flow into said complex comes from precipitation events, and the outflow consists of evapotranspiration and overland sheet flow in times of abnormal precipitation events. Provided below is an elevation profile for the location potential flow leaving the complex via overland sheet flow (**Figure 4**). As the consultant's delineation suggests, along with a steeper gradient, and additional data received (**Enclosure 2**), the WET-3/4 complex is considered isolated, lacking a continuous surface connection and non-jurisdictional.

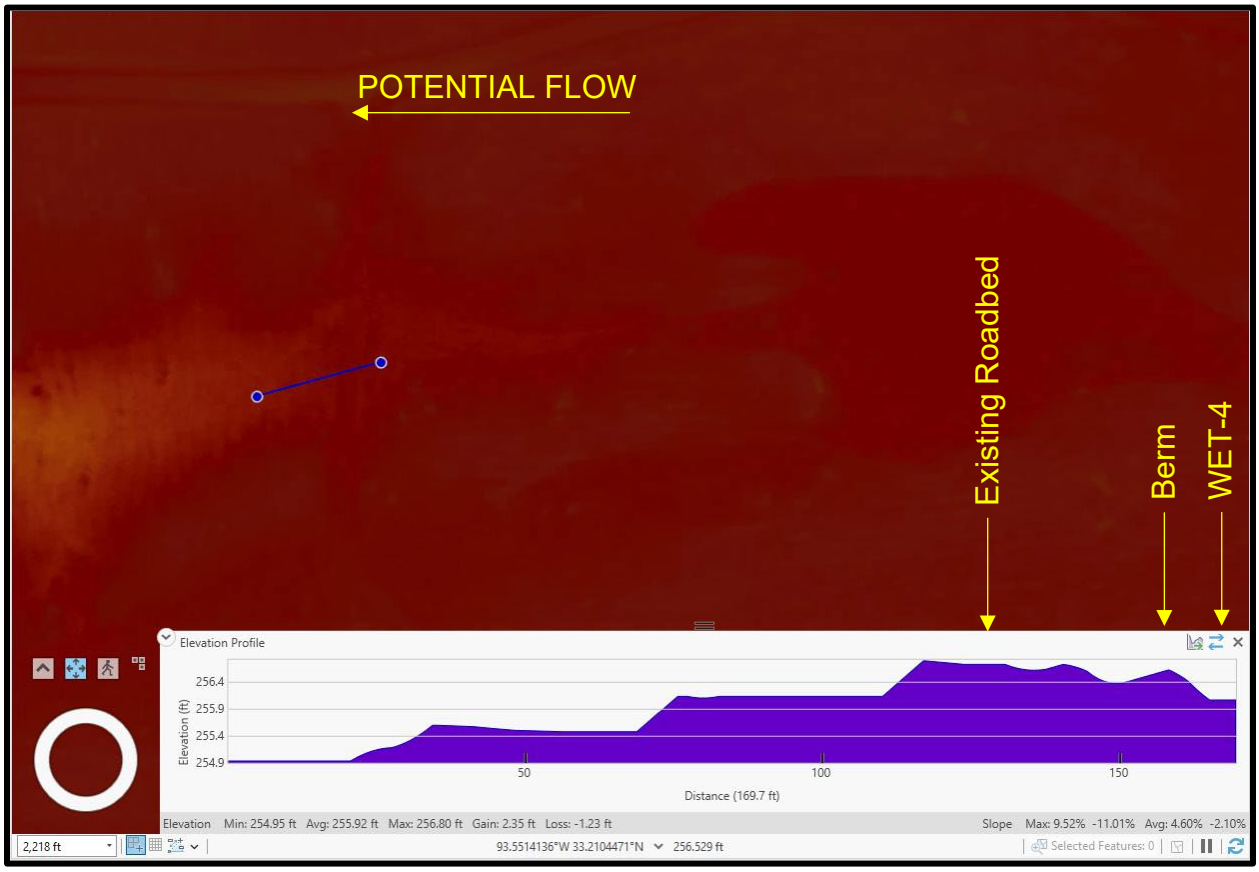


Figure 4. Elevation Profile for point at which flow exits WET-3/4 complex during abnormal conditions.

WET-5

WET-5 is a forested wetland comprised of approximately 0.77 acres surrounded by uplands. Flow into said wetland consists solely of storm water runoff impounded by a decades old roadbed, and its outflow is comprised of evapotranspiration and, in abnormal precipitation events, overland sheet flow as evident in the LiDAR image below (**Figure 5**), making it isolated, lacking a continuous surface connection and non-jurisdictional.

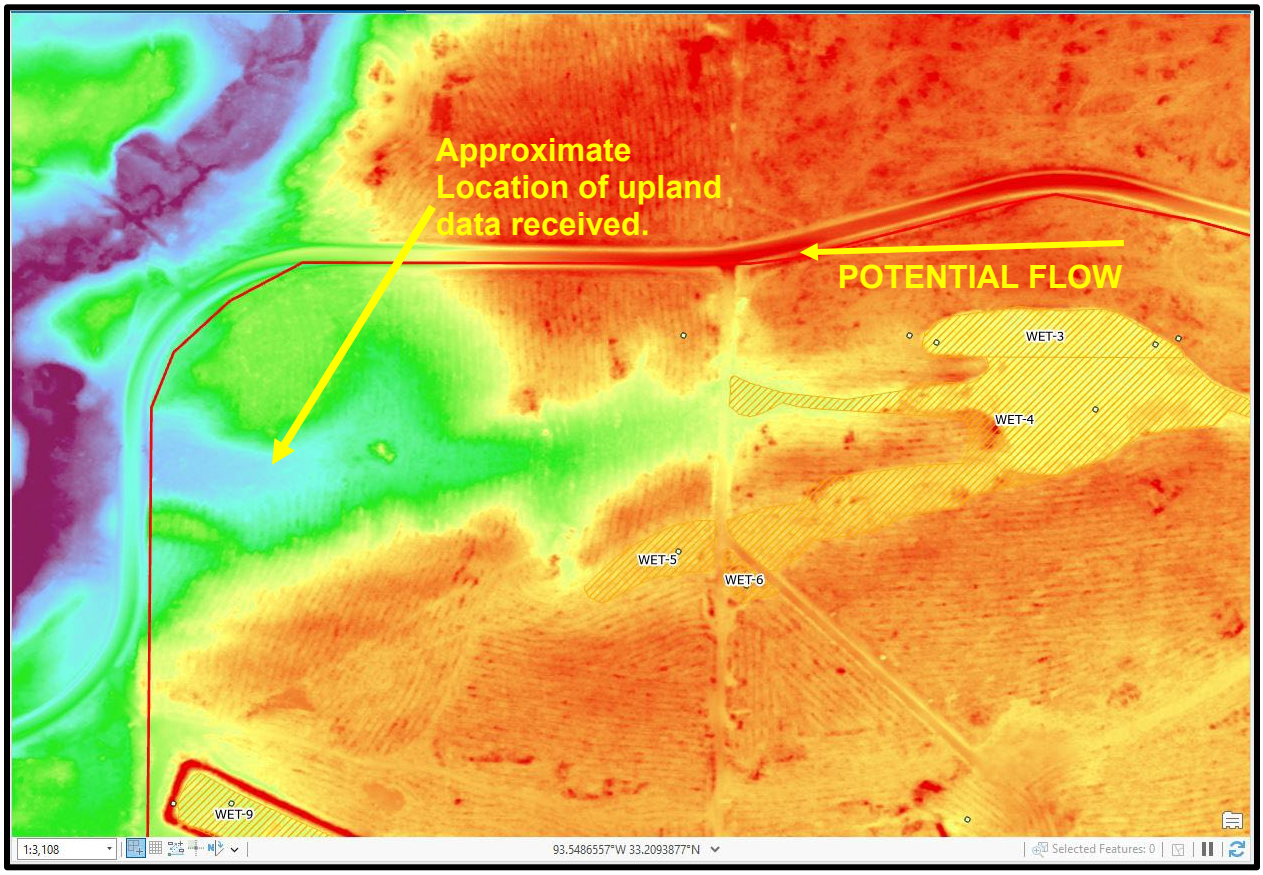


Figure 5. LiDAR Imagery depicting the approximate location of upland data received from the consultant (Enclosure 2, pgs. 158-162) downgradient of WET3/4, WET-5, & WET-6.

WET-6

WET-6 is a scrub-shrub wetland comprised of approximately 0.19 acres surrounded by uplands. Flow into said wetland consists solely of storm water runoff impounded by the convergence of two decades old roadbeds, and its outflow is comprised of evapotranspiration and, in abnormal precipitation events, overland sheet flow as illustrated by the elevation profile below (**Figure 6**), making it isolated, lacking a continuous surface connection, and non-jurisdictional.

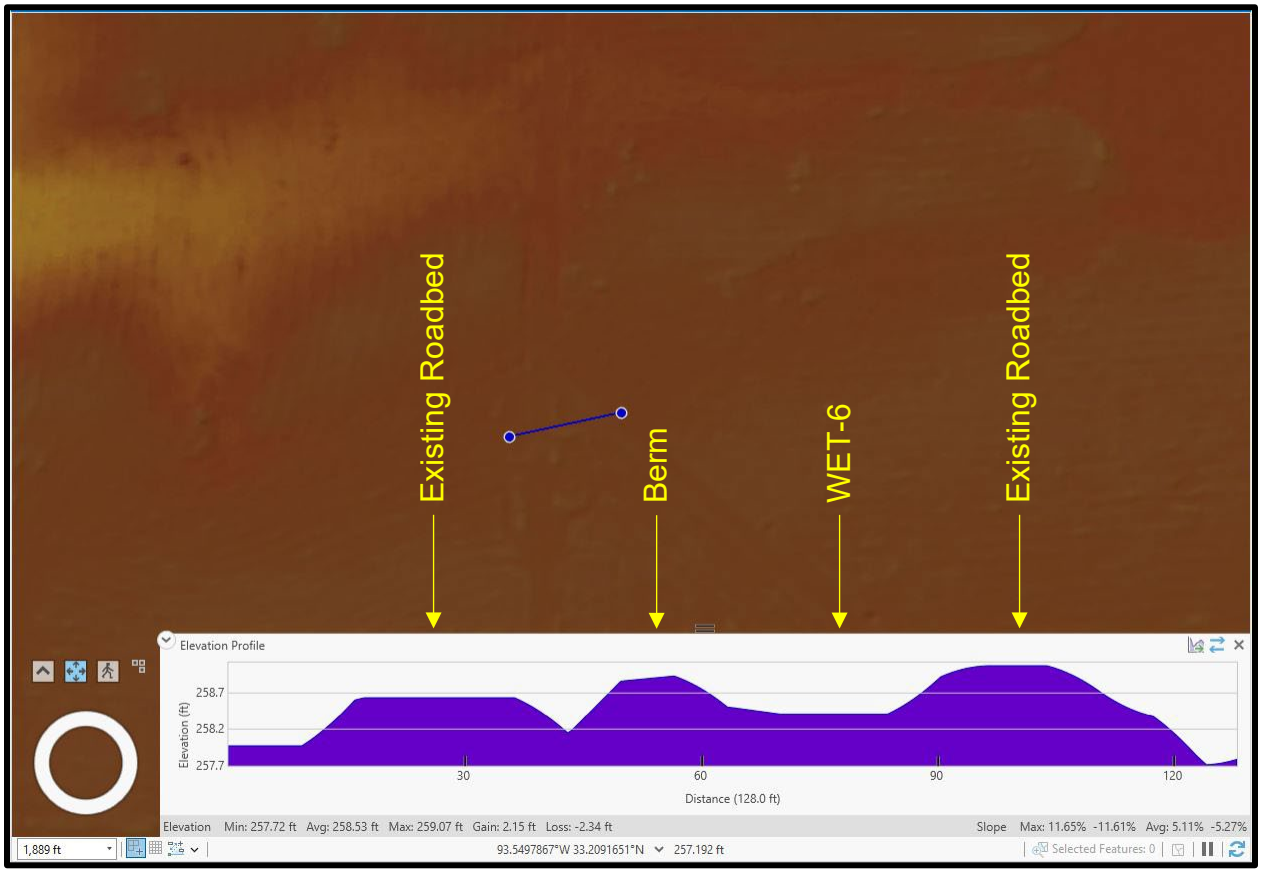


Figure 6. Elevation profile showing WET-6 created by convergence of two roadbeds not allowing flow out of said wetland.

WET-7

WET-7 is a scrub-shrub wetland comprised of approximately 0.3.24 acres. Flow into said wetland consists of storm water runoff and flow redirected from WET-13 impounded by a decades old roadbed, and its outflow is comprised of evapotranspiration and, in abnormal precipitation events, overland sheet flow as depicted in the elevation profile below (**Figure 7**), making it isolated, lacking a continuous surface connection and non-jurisdictional.

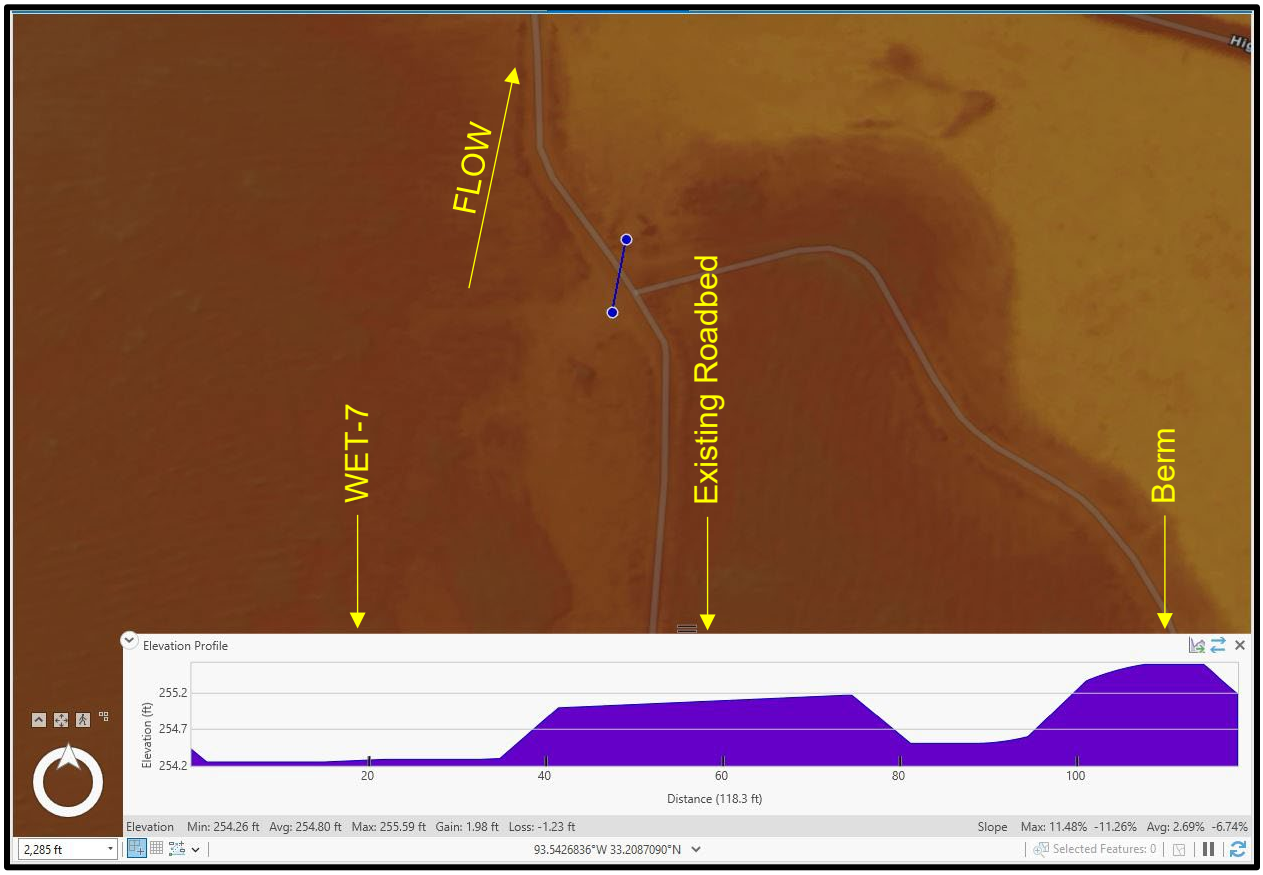


Figure 7. Elevation profile depicting the lowest point in WET-7 at the lowest point of flow exiting the wetland.

WET-8

WET-8 is a scrub-shrub wetland comprised of approximately 0.19 acres surrounded by uplands. Flow into said wetland consists solely of storm water runoff, and its outflow is comprised of evapotranspiration and overland sheet flow making it isolated, lacking a continuous surface connection, and non-jurisdictional.

WET-9/10 Complex

The complex of WET9 and WET-10 encompasses 5.02 acres of scrub-shrub wetlands and 0.50 acres of forested wetlands that are surrounded by a levee on all sides with no point of at which flow exits the complex as the LiDAR image below (**Figure 8**) shows, rendering this wetland complex isolated, lacking a continuous surface connection, and non-jurisdictional. The two lowest elevations atop the levee that may serve as potential points of outflow are depict in elevation profiles below (**Figures 9 & 10**)

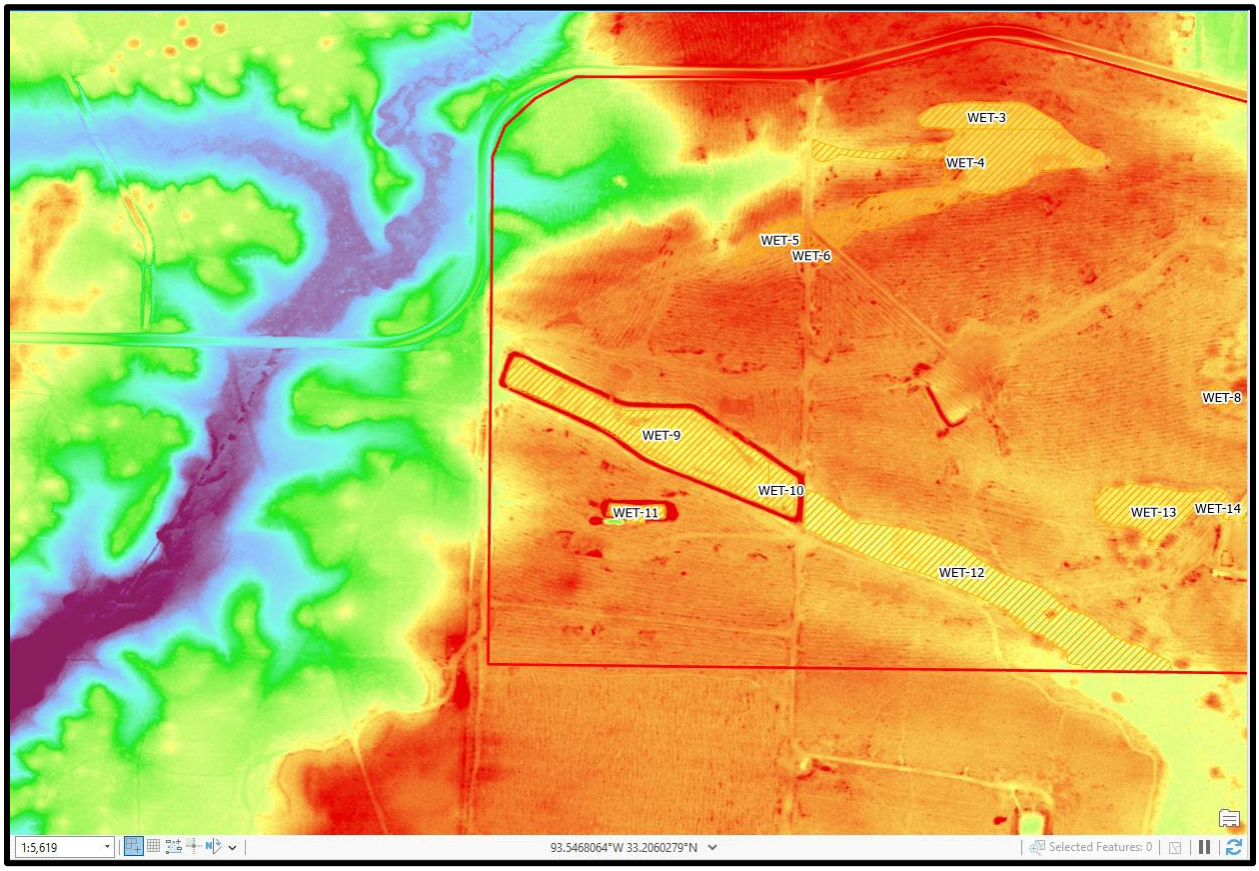


Figure 8. LiDAR depicting levee surrounding WET-9/10 complex

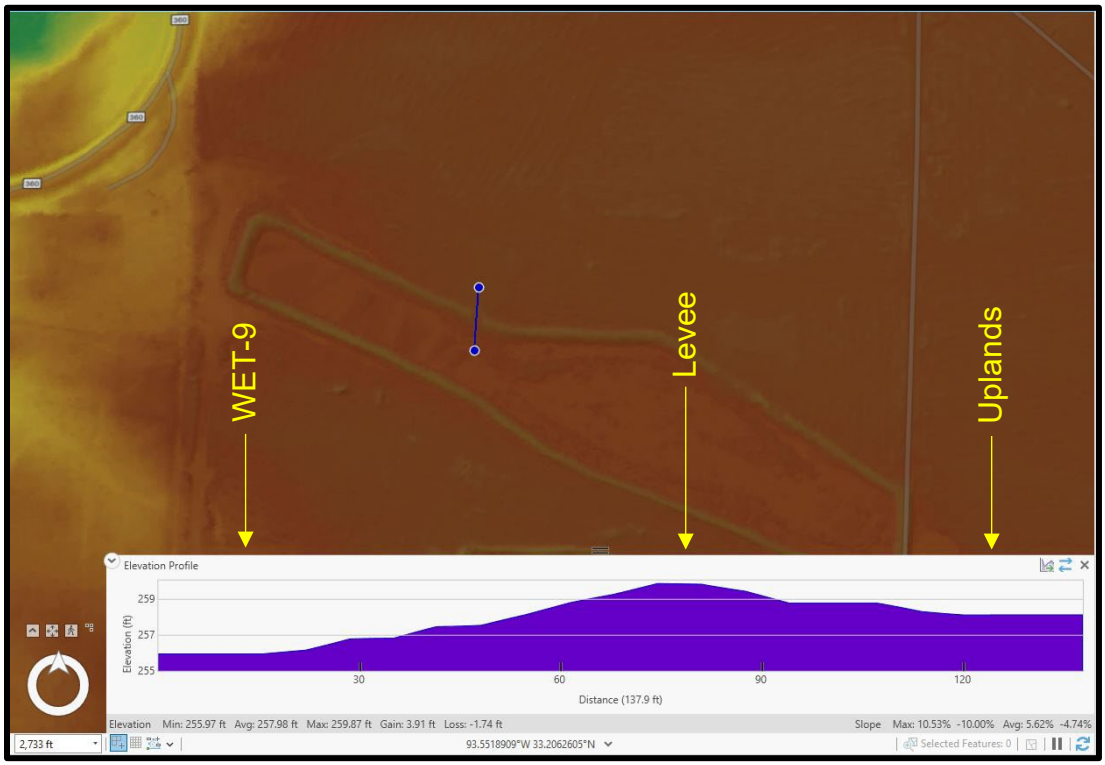


Figure 9. Elevation profile showing one of the two lowest points around the levee illustrated, indicating NO FLOW out of WET9/10 complex.

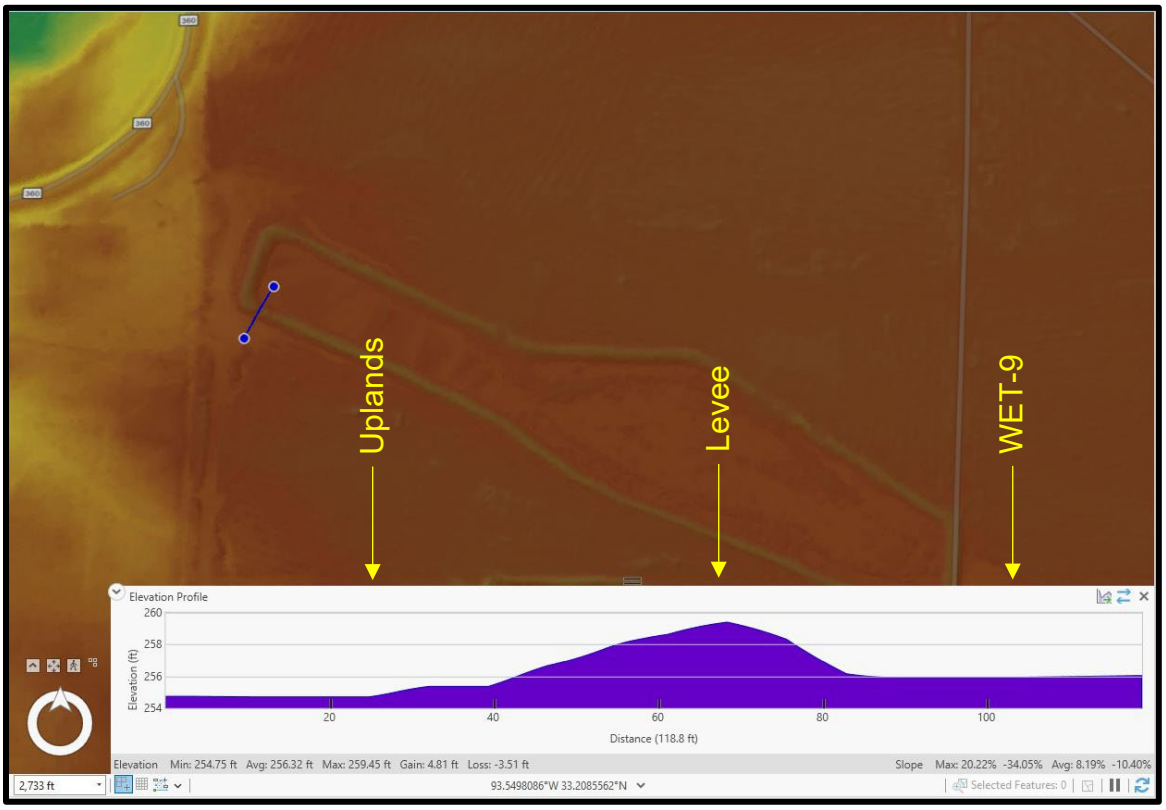


Figure 10. Elevation profile of the second of the two lowest points around the levee illustrated indicating, NO FLOW out of WET9/10 complex.

WET-11

WET-11 encompasses 0.36 acres of scrub-shrub wetlands that are surrounded by uplands on all sides. Flow into this wetland consists solely of storm water runoff with no point of flow out of said wetland as the LiDAR image below (**Figure 11**) shows, rendering this wetland isolated, lacking a continuous surface connection, and non-jurisdictional.

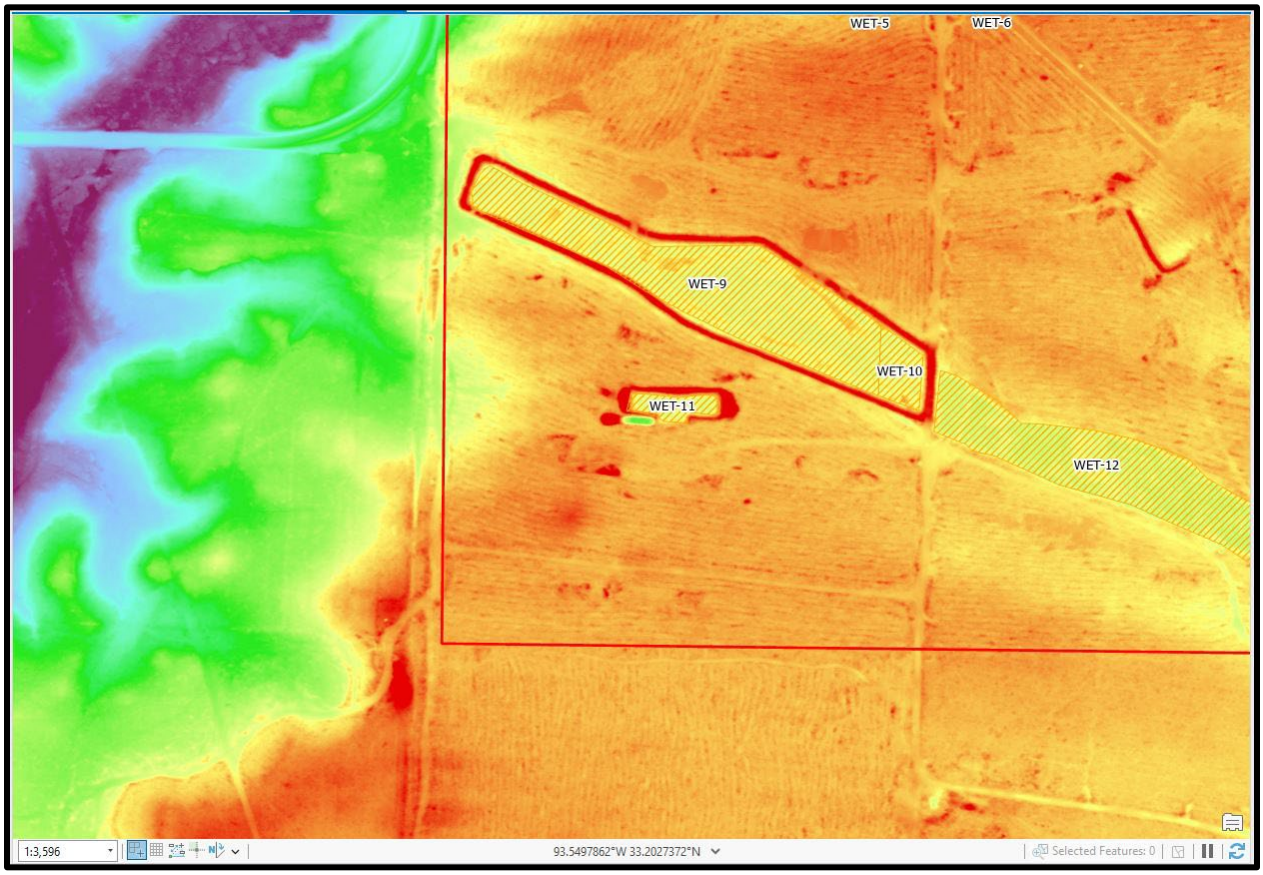


Figure 11. LiDAR showing WET-11 surrounded by uplands with no potential for flow to exit outside of overland flow and evapotranspiration.

WET-12

WET-12 is comprised of 6.69 acres of scrub-shrub wetlands flowing off of the property to the south. As flow exits the site in a southwestwardly direction, during abnormal precipitation events, it transitions to overland sheet flow through a series of uplands slightly offsite (**Figure 12**) before entering a larger wetland complex that continues due south. This renders WET-12 isolated, lacking a continuous surface connection, and non-jurisdictional.

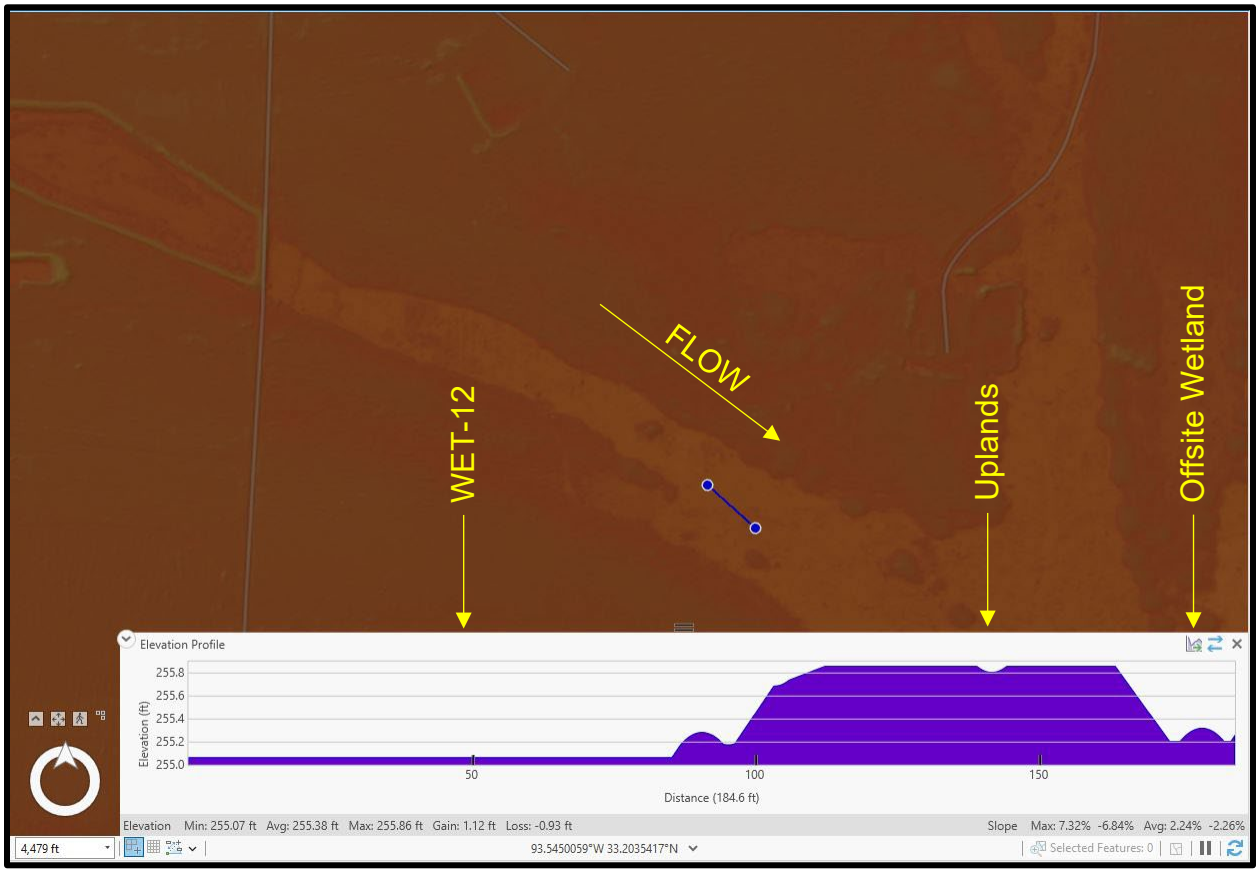


Figure 12. Elevation profile depicting WET-12's overland flow to wetlands offsite.

WET-13

WET-13 encompasses 2.35 acres of scrub-shrub wetlands. Inflow to said wetland consists solely of storm water runoff during precipitation events. Flow under normal conditions would exit the limits due east until hitting an upland swale just before the existing roadbed (**Figure 13**), which diverts flow to the northeast and eventually flows into WET-7, which has previously been established as isolated, lacking a continuous surface connection, and non-jurisdictional. WET-13 flowing to into WET-7 makes it part of a larger, isolated system, thus rendering WET-13 non-jurisdictional due to the lack of a continuous surface connection.

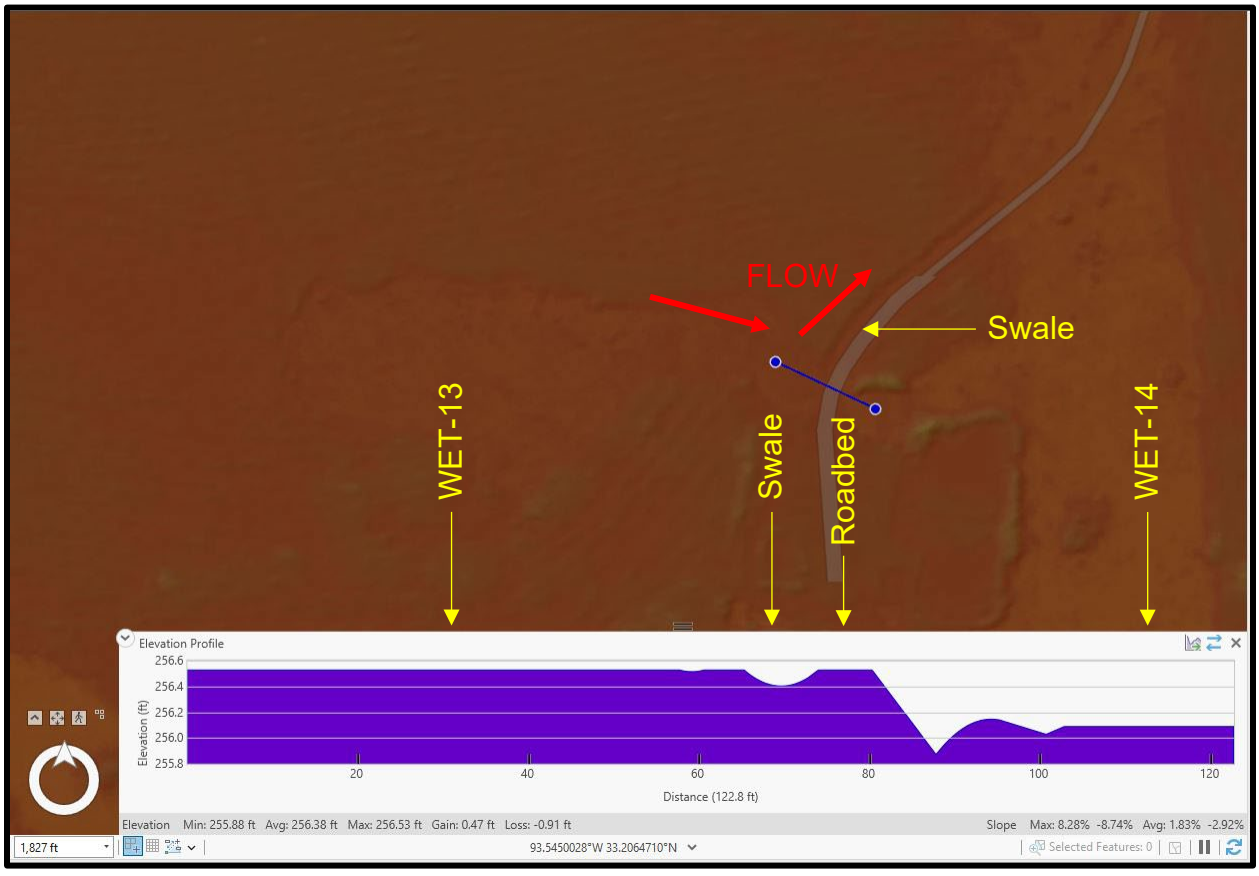


Figure 13. Elevation profile showing diversion of flow out of WET-13.

WET-14

WET-14 include approximately 6.8 acres of scrub-shrub wetlands continuing offsite. Based on potential wetlands delineated offsite by the consultant (**Figure 14**) and further south considering LiDAR (**Figure 15),** flow from WET-14 reaches a pinch point near an existing silviculture road (**Figure 16**), transitions to overland sheet flow and eventually dumps into an unnamed, non-RPW tributary of Walker Creek, making this larger, offsite wetland complex isolated and non-jurisdictional.

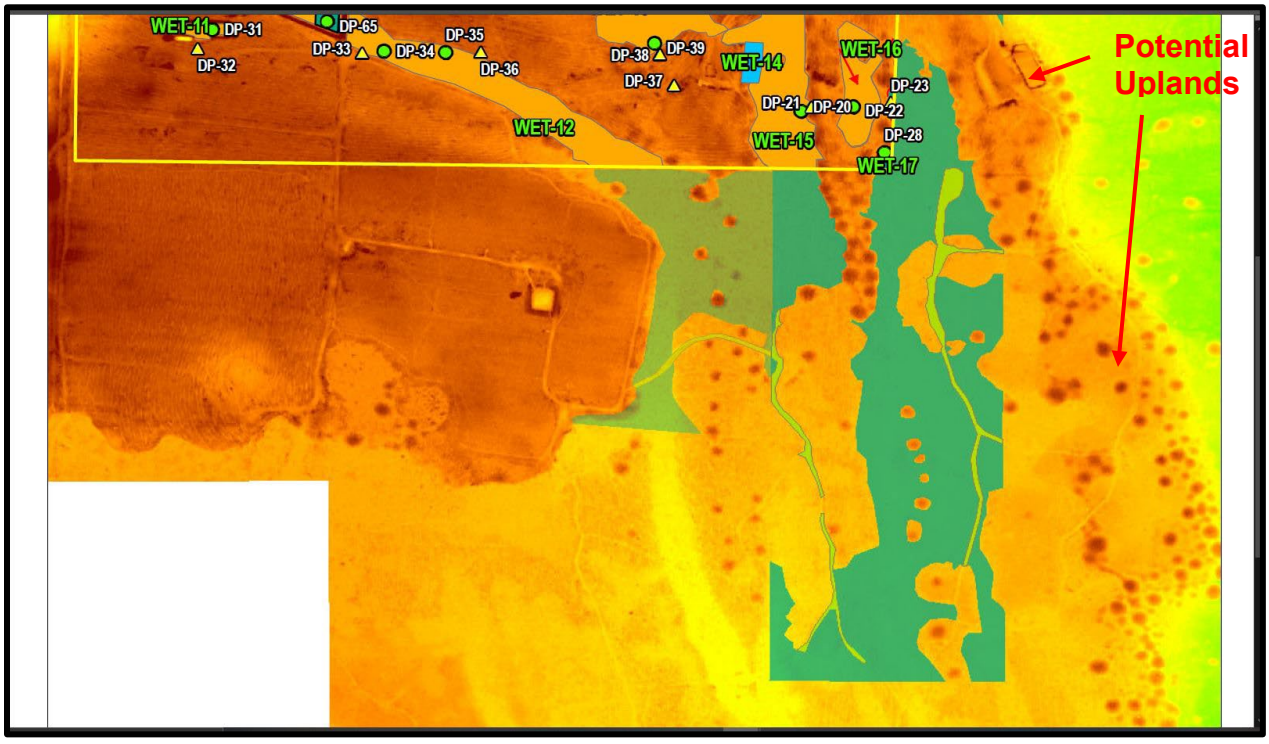


Figure 14. Screenshot from Consultant Data Showing Potential Wetlands Offsite.

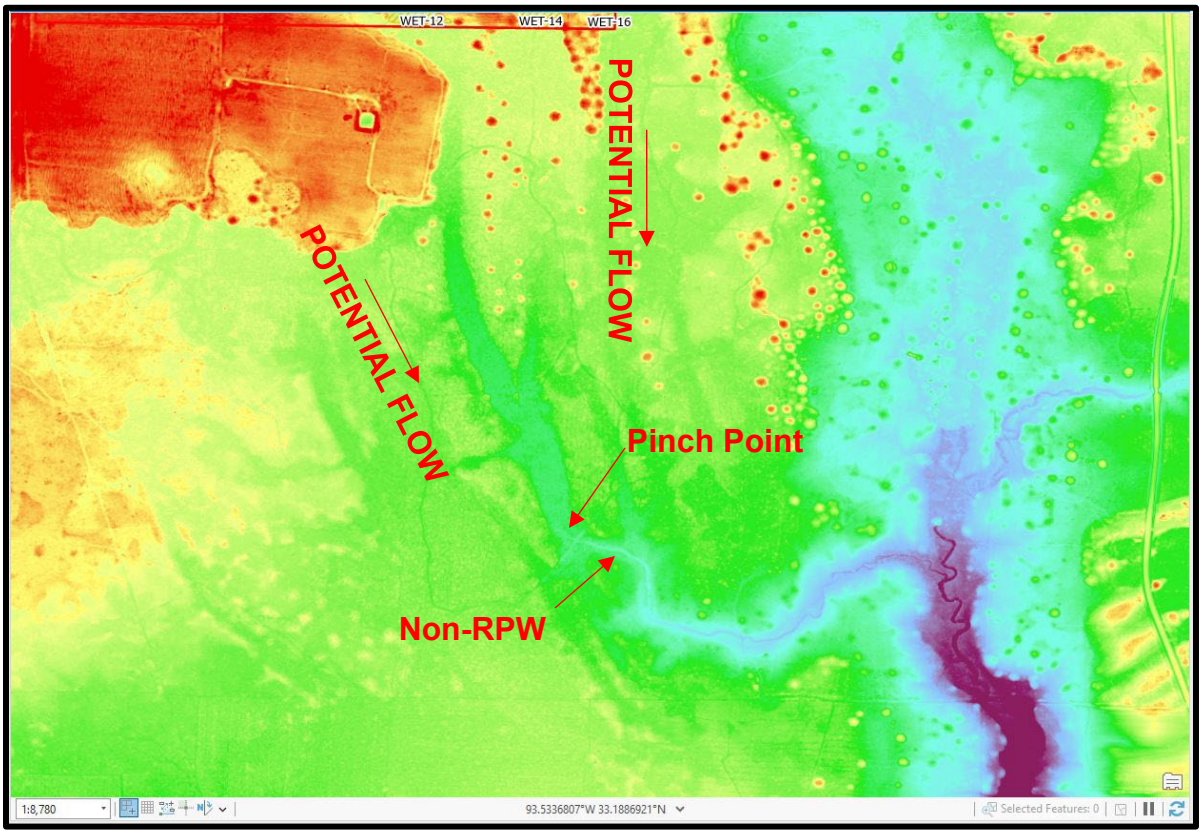


Figure 15. LiDAR showing offsite, downgradient 'pinch point' and one approximate transition to overland sheet flow prior to becoming channelized within a non-RPW.

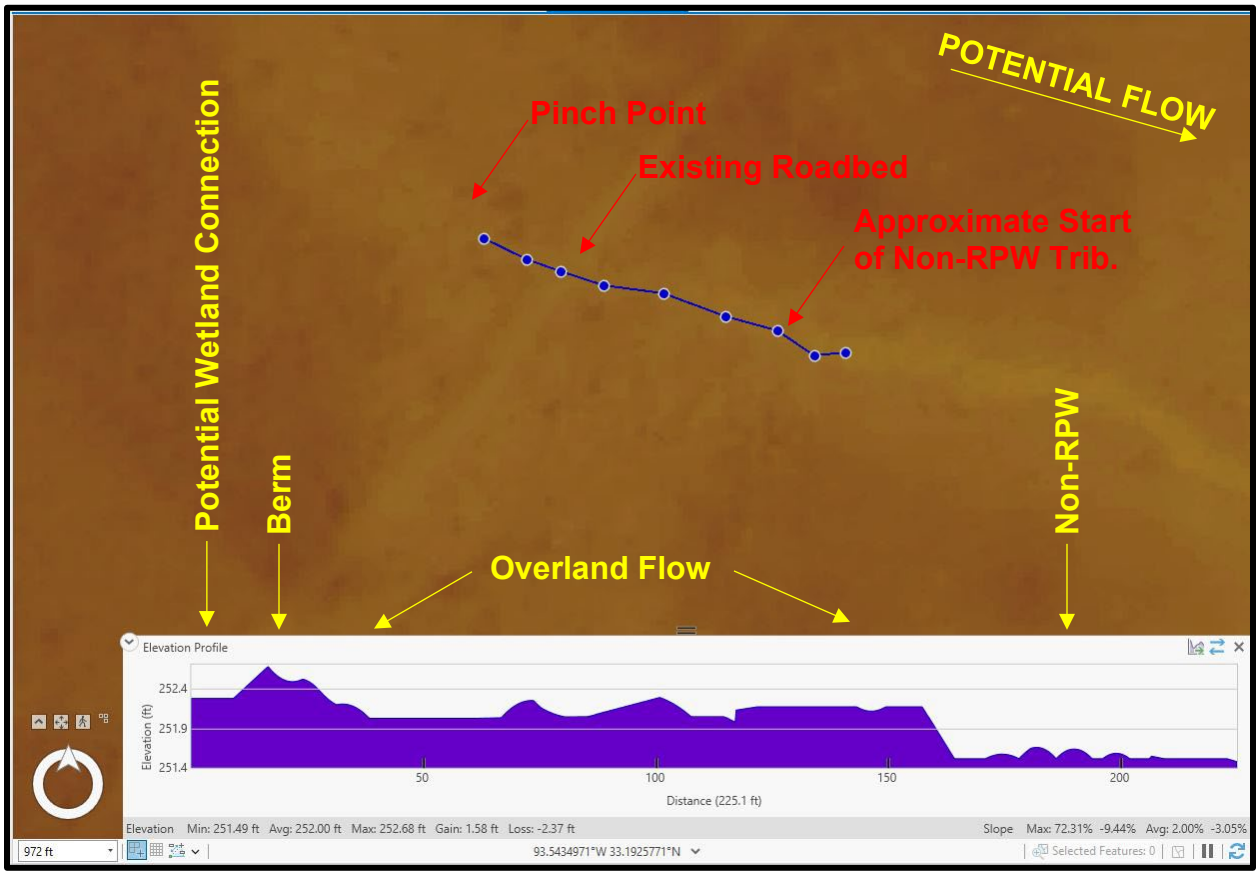


Figure 16. Elevation profile showing the potential project site wetland connection transition to overland sheet flow before dropping into the unnamed, non-RPW tributary of Walker Creek.

WET-15

WET-15 consists of 2.33 acres of scrub-shrub wetlands that are isolated, lack a continuous surface connection, and thus non-jurisdictional. Flow from WET-15 exits during abnormal rainfall events via overland sheet flow into WET-16 and continues offsite.

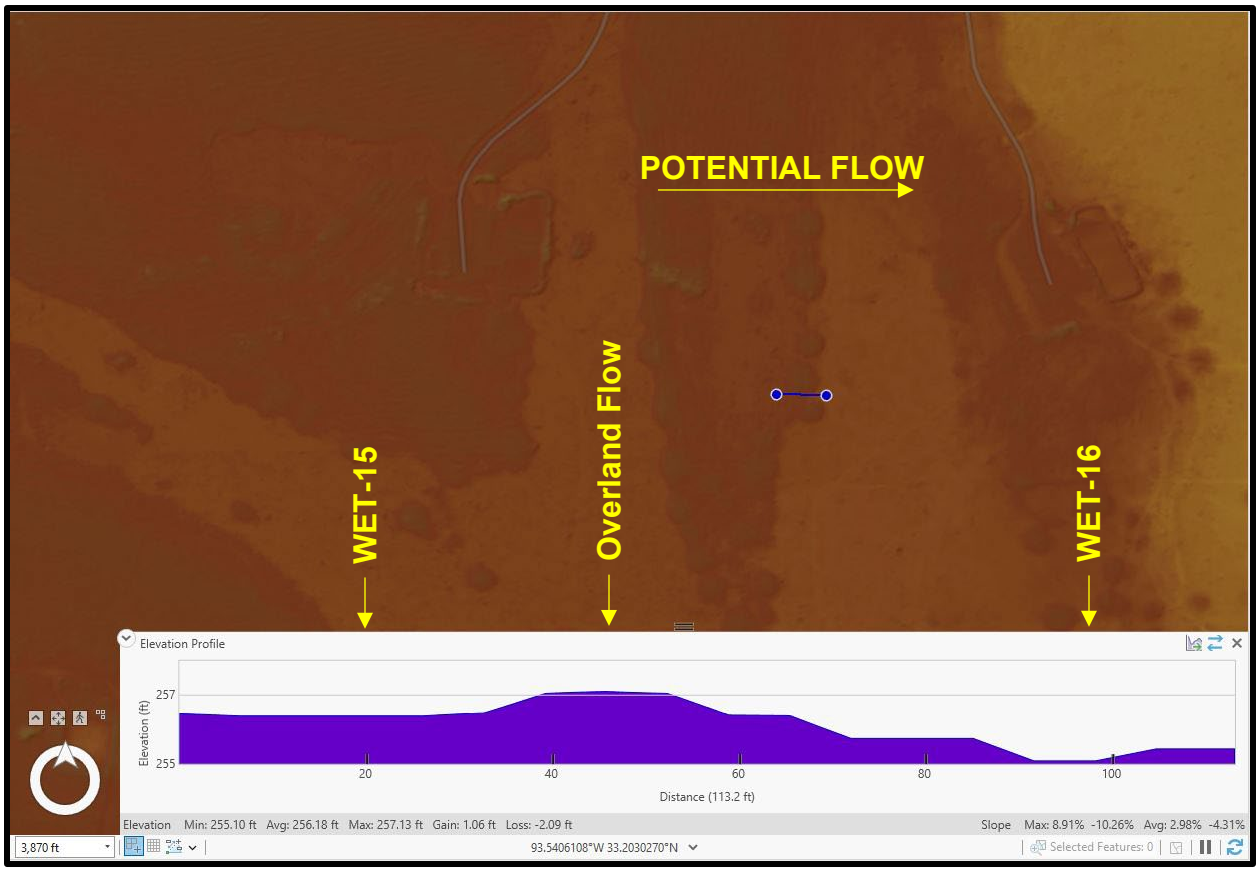


Figure 17. Elevation profile depicting the lack of discrete connection between WET-15 and WET-16.

WET-16

WET-16 limits begin just inside the project boundary with only 4.54 acres lying inside. Said wetland continues offsite with a flow path very similar to that of WET-14. Flow from the wetland exits the project due east then immediately turns south continuing through a potential wetland complex and overland sheet flow then splitting into two flow paths. The first of which joins that of WET-14, which has been previously established as transitioning to overland sheet flow before dropping into a non-RPW (refer to **Figures 14, 15, 16**). Flow path #2 travels due southeast slightly further upgradient from flow path #1, yet runs into a similar situation, transitioning to overland sheet flow prior to dropping into the non-RPW (**Figure 18**).

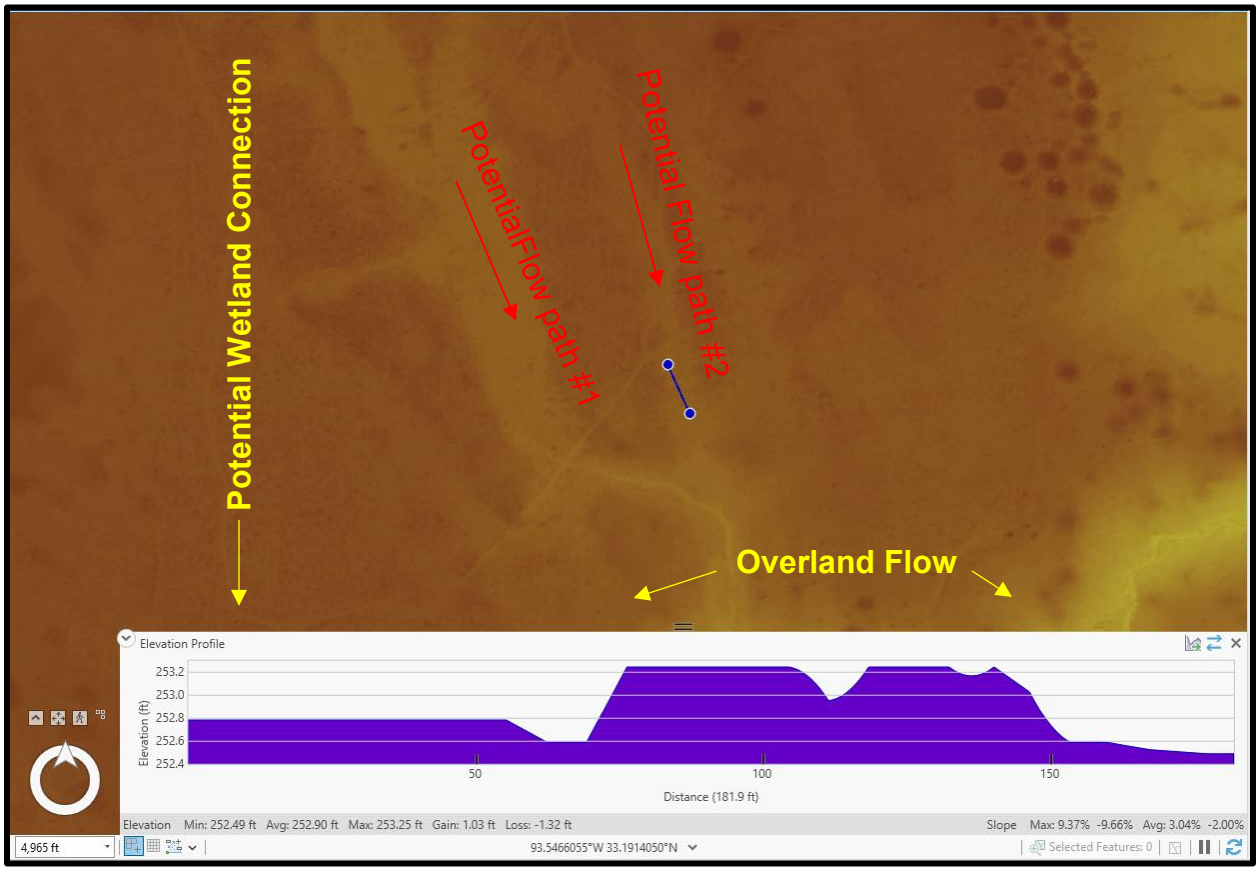


Figure 18. Elevation profile. Flow paths from WET-16 downgradient overland flow transition in flow path #2.

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. Stantec AJD Request: Project Pine Demonstration Facility, Highway 360, Lafayette County, Arkansas (February 7, 2024)

   b. Additional data submitted by Stantec (Additional datasheets as requested by MVK/February 22, 2024)

   c. Additional data submitted by Stantec (Potential Wetlands outside the project area/March 6, 2024)

   d. Consultant conducted multiple site visits in 2023

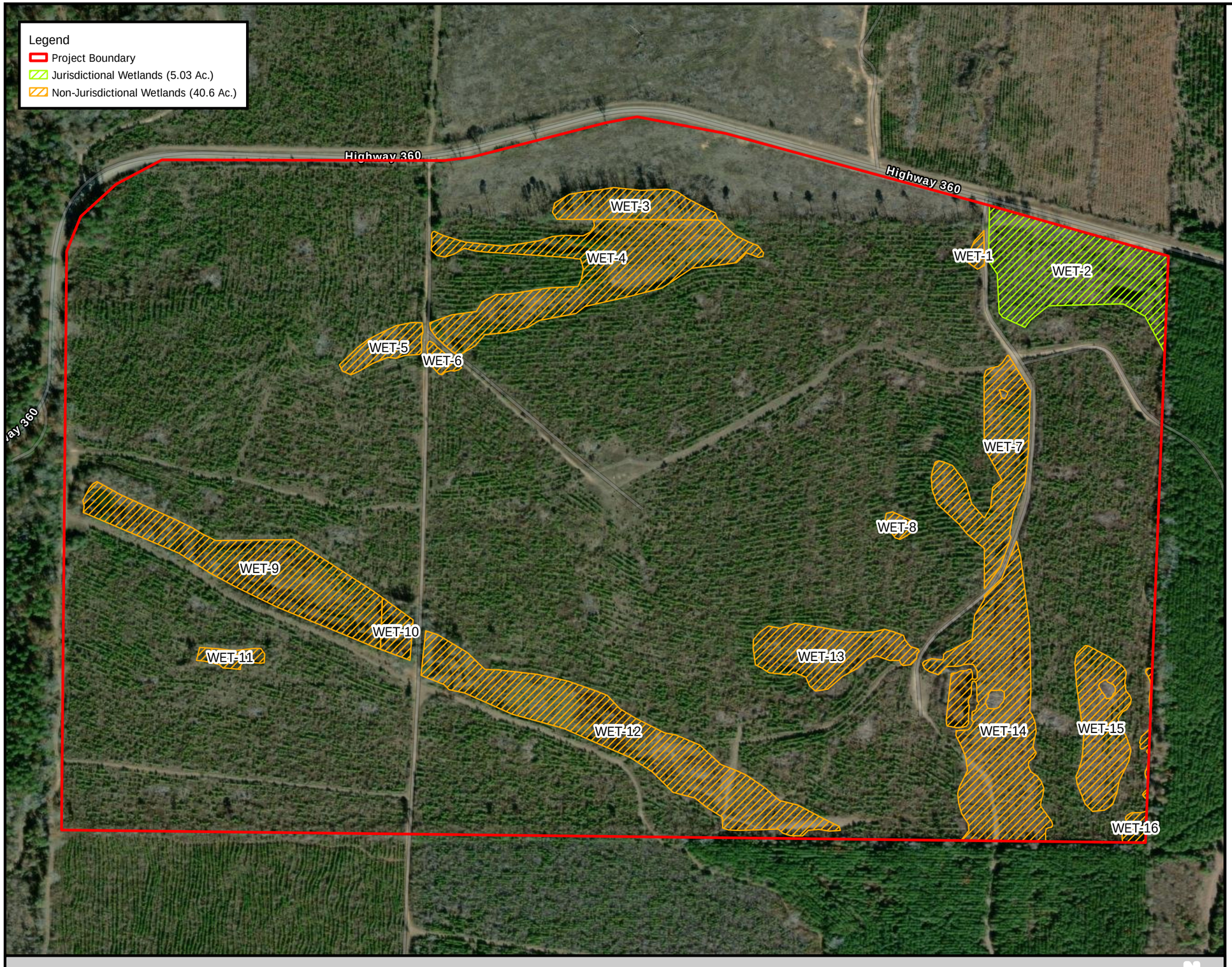
   e. Various Google Earth Imagery

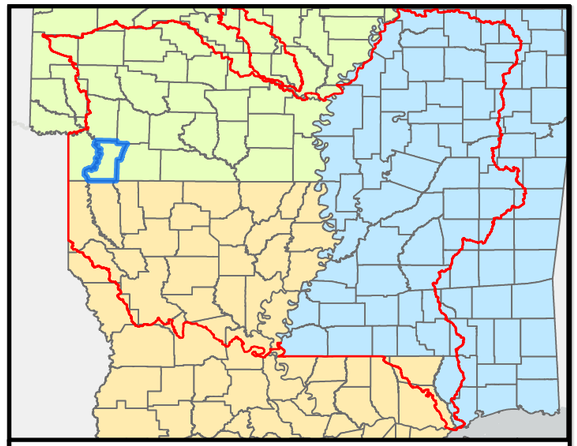
   f. LiDAR, Digital Elevation Models, 2018

   g. National Hydrography Dataset

   h. National Wetlands Inventory

10. OTHER SUPPORTING INFORMATION.N/A.





Lafayette County, Arkansas

MVK-2024-85

Kelsey Cleve
Stantec Consulting Services
Project Pine Demonstration Facility

Vicksburg District

Regulatory Division

April 3, 2024

Bryton Hixson

0 500 1,000 Feet

Approved Jurisdictional Determination