

ADMINISTRATIVE APPEAL DECISION
BUFFALO BILL FARMS LLC
APPROVED JURISDICTIONAL DETERMINATION
GALVESTON DISTRICT
SWG-2023-00798

Division Engineer: Brigadier General George H. Walter, Southwestern Division ¹

Review Officer: Travis Morse, South Pacific Division

Appellant/Applicant: WPM Construction

Regulatory Authority: Section 404 of the Clean Water Act (33 USC §1344 *et seq.*)

Date Acceptable Request for Appeal Received: June 16, 2025

Date of Appeal Meeting: September 25, 2025

Summary of Appeal Decision: This appeal reviews the Galveston District's Approved Jurisdictional Determination (AJD) for property between 6109 and 6021 TX-361, Port Aransas, Nueces County, Texas. The appeal challenges the District's conclusion Wetland 2 is jurisdictional as an adjacent wetland to Corpus Christi Bay. Specifically, the Appellant contends that the District:

1. Improperly determined the existence of a continuous surface connection (CSC) between Wetland 2 and Corpus Christi Bay;
2. Mischaracterized the roadside ditch as functionally connected to Wetland 2;
3. Relied on outdated regulatory guidance inconsistent with current policy; and
4. Presumed offsite wetland conditions west of TX-361 without sufficient proof.

After review of the Administrative Record (AR), the Request for Appeal (RFA), and clarifications provided during the appeal meeting, this decision finds that Reasons 1 and 4 are not substantiated, while Reasons 2 and 3 merit remand.

¹ Pursuant to 33 CFR 331.3(a), the Division Engineer has the authority and responsibility for administering the administrative appeal process. While the Review Officer served to assist the Division Engineer in reaching and documenting the Division Engineer's decision, the Division Engineer made the final decision on the merits of this specific appeal. The district engineer retains the final Corps decision-making authority for the AJD.

Background Information: The Buffalo Bill Farms is located along TX-361.² On December 5, 2023, Dunaway Associates requested an AJD on behalf of the Appellant.³ This request included a Natural Resources Assessment and survey plats.⁴

The Galveston District issued an AJD on May 7, 2025, determining Wetland 2 (6.94 acres) was adjacent to Corpus Christi Bay - a traditional navigable waterway.⁵

An RFA was received on June 16, 2025. An appeal meeting and joint site visit occurred on September 25, 2025. The review is based solely on material in the AR as of May 7, 2025 (540 Bates-numbered pages), the RFA, and subsequent clarifications (Appeal Meeting MFR).⁶

Information Received and its Disposition During the Appeal: A general account of the timeline and information received during this appeal review is as follows:

1. On June 16, 2025, the Southwestern Division (SWD) requested assistance from the South Pacific Division in reviewing the subject appeal.
2. On June 24, 2025, SWD notified the Appellant that the 8-page RFA was complete and contained acceptable reasons for appeal. The notification also requested that the District provide identical copies of the AR to the RO and the Appellant.
3. On July 2, 2025, the District provided a copy of the AR to the RO and the Appellant. The AR for SWG-2023-00798 includes correspondence between the District and the Appellant, various submittals by the Appellant (including a Natural Resources Assessment dated October 14, 2024, and supplemental information dated January 20, 2025), and internal District communications.
4. On September 25, 2025, an informal appeal meeting was held with the Appellant, District, and RO in attendance.
5. On September 29, 2025, the RO provided a draft Appeal Meeting MFR to the Appellant and the District, summarizing the appeal meeting.
6. On October 3, 2025, both the Appellant and District provided edits to the Appeal Meeting MFR.

² See AR 12-16.

³ AR 376-379.

⁴ AR 381-533, 535-536.

⁵ AR 2-20. See 33 CFR 328.3(a)(7).

⁶ See 33 CFR 331.2.

7. Comments on the draft Appeal Meeting MFR received from the District and the Appellant were considered and included with the final Appeal Meeting MFR, signed October 3, 2025.

Evaluation of the Appellant's Reasons for Appeal, Findings, and Instructions to the District Engineer: The review is limited to whether the District examined all relevant data and rationally explained its action, including a rational connection between the facts found and the decision made. The reasons for appeal below are based on the Appellant's RFA but have been rephrased for clarity.

REASON FOR APPEAL 1: The District's determination of a continuous surface connection between Wetland 2 and Corpus Christi Bay is incorrect because the roadside ditch is non-jurisdictional.

FINDING: This reason for appeal does not have merit.

DISCUSSION: This argument misrepresents the basis of the District's AJD. The AR shows that the District did not assert a continuous surface connection (CSC) through the roadside ditch or rely on the ditch or its associated culverts to determine jurisdictional connectivity.

The Appellant infers that, because the District asserted a CSC with Corpus Christi Bay, that CSC is the basis for the District's entire determination. As stated, the District instead relied on the "one-wetland" analysis outlined in the Memorandum to Re-Evaluate Jurisdiction for NWO-2003-60436 (One Wetland Memo).⁷ Under this framework, a divided wetland may be evaluated as a single wetland system when multiple lines of evidence support that they are functioning as a single wetland. The AR reflects that the District analyzed topographical, vegetative, soils, and hydrological information and explains the role of the barrier—TX-361—and determined the area was historically one wetland.⁸

The record demonstrates that the District neither relied on the roadside ditch, nor asserted it as a basis for jurisdictional connectivity between Wetland 2 and Corpus Christi Bay. The 'one-wetland' analysis rather, as documented, relies on ecological and topographic continuity, not on a presumed CSC via the ditch.

Accordingly, Reason for Appeal 1 rests on an incorrect assumption. The District's AJD did not rely upon the roadside ditch as a CSC to establish jurisdiction. Instead, the District applied the one-wetland analysis, which is addressed under Reason for Appeal 3. The record confirms that the District did not depend on the roadside ditch or related culverts to demonstrate a CSC. The District's application of the one-wetland analysis is further discussed under Reason for Appeal 3; however, any potential misapplication of that analysis does not alter the resolution of this particular issue.

⁷ AR 2, 6-9. Memorandum to Re-Evaluate Jurisdiction for NWO-2003-60436 (December 19, 2023).

⁸ *Id.*

ACTION: No further action is required.

REASON FOR APPEAL 2: The District's characterization of the roadside ditch is insufficient; the ditch is not a Relatively Permanent Water (RPW) or tidally influenced, and the AJD relies solely on hydrophytic vegetation to define a wetland.

FINDING: This reason for appeal has merit.

DISCUSSION: To the extent that the appeal implies, the District did not classify the ditch as an RPW or tidally influenced water, but rather asserted Wetland 2 extends offsite through a culvert.⁹ The AJD MFR states that Wetland 2 continues beyond the review area “through one under-highway culvert approximately 90 feet northwest of the northwesternmost corner of the review area.”¹⁰

The ditch lies outside the AJD review area. To delineate the wetland, the District relied on offsite methodologies—mapped vegetation, hydric soils, aerial photography, and other remote sensing data—consistent with the “office-estimation” method described in Section D, Subsection 1 of the 1987 Wetland Delineation Manual.¹¹

While remote sensing is an accepted approach when site access is limited, the 1987 Manual and regulatory policy directs that field verification be performed when access is possible.¹² In this case, although a wetland delineation was submitted, it did not include the off-site ditch and culvert, which are important to the AJD. Given that the District did not have sufficient remote data to conclusively determine the significance of this gap, it should have requested a delineation of these features from the Appellant or independently gathered data within the public right-of-way. It is recognized that jurisdictional determinations can be performed remotely when adequate information is available; however, when critical data are missing, requesting supplemental delineation or conducting a field investigation is prudent to ensure a complete and accurate evaluation.

The AJD relies on hydrophytic vegetation to infer the presence of wetland hydrology and hydric soils between Wetland 2 and the culvert.¹³ The AR identifies the ditch as excavated in uplands for stormwater drainage, positioned two to three feet higher than adjacent wetlands, and lacking an ordinary high water mark or evidence of relatively permanent flow.¹⁴

The record indicates that the District relied on remote indicators, without adequate explanation or reconciliation with field and elevation data. The District's conclusion that

⁹ AR 7-9.

¹⁰ AR 7.

¹¹ AR 8-9, 24, 28-31, 38-43, 69-70, 81, 87-88.

¹² See Questions and Answers for RGL 16-01 Q&A #7.

¹³ AR 7-9, 24, 38-31, 38-43).

¹⁴ AR 24, 38-43, 69-70. See Regulatory Guidance Letter 05-05: *Ordinary High Water Mark Identification*.

Wetland 2 extends continuously through the roadside ditch and culvert is not supported by sufficient rationale addressing contradictory physical, topographic, and hydrologic data in the record.¹⁵ These data identify the ditch's upland origin, its elevated position above the wetland, and its lack of observed hydrologic connectivity.¹⁶

While office-based methods may be appropriate when site access is limited, here the public right-of-way containing the elevated berms, ditch, and culvert appears accessible. According to the record, the District conducted at least two partial site visits, and the AR includes photographs from these site visits documenting Wetland 2, the ditch features, and associated hydrophytic vegetation.¹⁷ As such, the District should have either requested additional delineation data from the Appellant or verified the extent of ditch features through onsite investigation. Jurisdictional determinations should comply with the three-parameter (vegetation, soils, hydrology) standard, and reliance solely on remote indicators falls short in this context.

The AR confirms that, although the District followed certain technical guidance for offsite delineation, its characterization of the ditch (and elevated berm) as part of Wetland 2 is inadequately supported. On remand, the District should request supplemental field data and incorporate such data into its analysis. The District retains the authority to independently collect data from the public right-of-way, where accessible. If, after reasonable efforts, field data remain unavailable, the District must clearly document clarify its rationale for relying on remote evidence and explain why such reliance meets the 'best available information' standard under current jurisdictional determination standards.

ACTION: On remand, the District should gather or request supplemental field data and incorporate such data into its analysis. If such field data remains unavailable the District should clearly document its rationale for relying on remote evidence and explain why such reliance meets the "best available information" standard.

REASON FOR APPEAL 3: The District's reference to Memorandum NWO-2003-60436 is inconsistent with current regulations prohibiting the use of discrete features and subsurface connections to establish a continuous surface connection.

FINDING: This reason for appeal has merit.

DISCUSSION: The RFA asserts that this memorandum has been superseded by the March 12, 2025 Memorandum to the Field Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act (CSC Memo).¹⁸ The Appellant argues the District's reliance

¹⁵ AR 24, 38–43, 69–70, 81, 87-88.

¹⁶ *Id.*

¹⁷ AR 28-37.

¹⁸ Memorandum to the Field Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act (March 12, 2025).

on the “One Wetland Memo” is inconsistent with more recent regulations restricting the assertion of jurisdiction via a CSC that includes discrete connections (e.g., culverts, pipes) or subsurface pathways.¹⁹

The EPA-Army memorandum dated March 12, 2025, rescinded previous interpretations, including case-specific memoranda, that relied on “discrete features” to establish a continuous surface connection for wetland jurisdiction.¹⁹ However, the One Wetland Memo was not specifically included in the list of rescinded case-specific memoranda in that directive.²⁰

Importantly, the One Wetland Memo does not rely on discrete features or subsurface pathways to establish a continuous surface connection to a requisite water for asserting jurisdiction.²⁰ Instead, it explains how a discrete feature or subsurface connection may allow a divided wetland to function as a single, unified wetland. After the District determines whether the divided wetland is functioning as one wetland, the entire wetland is considered “adjacent” if any part of it meets the criteria for adjacency.

The March 12, 2025 memo comes into play specifically only during the determination of adjacency. Because the One Wetland Memo was neither rescinded by name nor does it contradict the March 12 memo’s guidance on adjacency and continuous surface connection, the One Wetland Memo remains valid.²¹

For this AJD, the key issue is whether the application of the One Wetland Memo is factually appropriate, considering the distinct topographical separation observed across TX-361. Under the One Wetland Memo, determination of whether separated wetland areas (e.g., divided by a road or ditch) function as one wetland requires assessment of:

- Historic aerial imagery, topography, and mapping to establish whether the areas were originally one wetland.
- Functional unity, which may be demonstrated by evidence of hydrologic connection (surface, discrete features, shallow subsurface), similar plant communities, congruent soils, or hydrologic indicators like seepage. The memo does not require all criteria at once; one reliable indicator may suffice.

The CSC Memo, while limiting the assertion of CWA jurisdiction to wetlands directly abutting jurisdictional waters, does not rescind the One Wetland Memo’s methodology for identifying functional wetland unity. Importantly, the CSC Memo prohibits asserting jurisdiction solely on the basis of discrete connections (e.g., ditches, pipes, culverts) between a wetland and a jurisdictional water, but the One Wetland Memo allows such discrete features when assessing whether divided areas remain one wetland—

¹⁹ Memorandum to Re-Evaluate Jurisdiction for NWO-2003-60436 (December 19, 2023).

²⁰ *Id.*

²¹ Memorandum to the Field Concerning the Proper Implementation of “Continuous Surface Connection” Under the Definition of “Waters of the United States” Under the Clean Water Act (March 12, 2025). See footnote 8.

regardless of subsequent CWA jurisdiction.²² The controlling issue is not whether that memo is still valid, but rather whether the application of that memo is factually warranted in this case, given the distinct topographical separation observed across TX-361.

For wetlands separated by an artificial barrier to be considered a single system, there must be sufficient evidence of a hydrologic connection between Wetland 2 and the wetland on the west side of TX-361. Current guidance recognizes that hydrologic connection is essential for wetland function, and to operate as an integrated wetland despite the presence of the barrier. The size, composition, and design of the barrier may influence hydrologic and ecological connections, but determinations must be made case-by-case, as the One Wetland Memo acknowledges situations involving substantial structures where unity is maintained through functional or documented exchange.²³

In this case, the record shows that Wetland 2 and adjacent fragments are separated by TX-361, which is elevated several feet above the mapped wetland areas.²⁴ There is no documentation in the record of a direct surface or subsurface hydrologic connection between these areas, including during rainfall events.²⁵ Field data and historical imagery do not demonstrate ongoing functional unity of these wetlands post-construction.²⁶

Accordingly, the AJD does not sufficiently document a hydrologic connection between Wetland 2 and the adjacent fragments to satisfy the criteria described in the One Wetland Memo.

Although wetlands may occur within or adjacent to ditches, those excavated entirely in uplands for drainage purposes are generally non-jurisdictional, even if they support hydrophytic vegetation.²⁷ Jurisdictional determinations depend on a ditch's origin, hydrology (including flow patterns and duration), and its connection to jurisdictional waters.²⁸

ACTION: On remand, the District should reevaluate its jurisdictional rationale under the One Wetland Memo and reassess whether the conditions for treating a divided wetland as “one wetland” are met.

²² Memorandum to Re-Evaluate Jurisdiction for NWO-2003-60436 (December 19, 2023).

²³ *Id.*

²⁴ AR 81, 106.

²⁵ AR 24, 38–43, 69–70, 86–88, 102–104.

²⁶ AR 24, 38–43, 69–70.

²⁷ 2008 Rapanos Guidance (p. 12) and 2020 Memorandum to the Field on Exemptions from Regulation under Section 404(f)(1)(C) of the CWA for the Construction or Maintenance of Irrigation Ditches and for the Maintenance of Drainage Ditches. *See also* 88 FR 3113–3116 and 51 FR 41217.

²⁸ *Id.*

REASON FOR APPEAL 4: The District relies on limited data by incorrectly presuming, not proving, the conditions for the wetland data west of TX-361 to the TNW (Corpus Christi Bay).

FINDING: This reason for appeal does not have merit.

DISCUSSION: The Appellant asserts that the District did not gather field data for land west of TX-361 (distinct from the accessible roadside ditch and right-of-way east of the highway addressed in Reason 2), instead evaluating wetland conditions with remote indicators and offsite methodologies. The AR confirms no direct field sampling - such as wetland delineation sheets- was performed for these areas. Rather, the District used mapped soils, vegetation, topographic data, historical aerial imagery, and LiDAR images. These methods follow Section D(1) of the 1987 Corps of Engineers Wetland Delineation Manual and standard regulatory practice.²⁹

Under the 1987 Manual and current policy, decisions must rely on the best available scientific and technical data.³⁰ While direct sampling is preferred, remote assessments are explicitly permitted when access is limited or the available information provides reliable support. The record must also document the rationale for using offsite methods and describe the limitations of such approaches.

In this instance, the AR contains multiple lines of evidence—LiDAR, aerial imagery, topographic mapping, and soils data—which the District determined collectively support the existence of a continuous wetland system from TX-361 to Corpus Christi Bay.³¹ Similar methodologies and data support the conclusion of a wetland complex west of the highway, even though direct sampling was not performed.

To distinguish approaches: remote tools—such as LiDAR, aerial photography, and mapped soils—were used only where physical access could not be obtained (i.e., west of the highway and outside publicly accessible right-of-way). For wetlands within the review boundary or areas accessible via public right-of-way (such as the roadside ditch discussed in Reason 2), direct field delineations are conducted whenever practical to ensure compliance with the three-parameter standard for vegetation, hydrology, and soils.

In summary, the District's reliance on remote, offsite methodologies for inaccessible private property west of TX-361 was appropriate, transparently documented, and consistent with applicable guidance and regulations. Therefore, this reason for appeal does not have merit.

ACTION: No further action is necessary.

²⁹ AR 24, 31-32, 35-36, 38-43, 45-56, 58, 69-70, 84-88, 149-150.

³⁰ See Questions and Answers for RGL 16-01 Q&A #8.

³¹ AR 24, 31-32, 35-36, 38-43, 45-56, 58, 69-70, 84-88, 149-150; see RGL 16-01 Q&A #8.

Conclusion: This AJD is remanded to the Galveston District Engineer for further analysis and documentation in accordance with 33 CFR 331.10(b) for reconsideration due to inadequate documentation and procedural compliance, as above in Reasons 2 and 3. Reasons 1 and 4 are found without merit.

On remand, the District should reassess the jurisdictional status of Wetland 2, including the application of the One Wetland Memo, consistent with current regulations and policies, governing wetland delineation. The AR should contain detailed methodology, rationale, data sources, assumptions, and findings that collectively form a defensible basis for the AJD.

The reconsideration must comply with regulations and reflect any policies effective at the time of the AJD's completion and account for any subsequently issued or revised rules and guidance relevant to jurisdictional determinations.

Upon completion, the District shall issue a revised AJD consistent with this decision and the requirements of 33 CFR Part 331.

GEORGE H. WALTER
Brigadier General, USA
Commanding