



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT
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CORPUS CHRISTI, TEXAS 78411-4318

CESWG-RDR

7 May 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),¹ SWG-2023-00798²

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 For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ 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

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 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.).

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.

amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable Texas 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. Wetland 1 (0.275 ac), PEM wetland, 27.748429 N 97.124468 W, non-adjacent, non-jurisdictional
 - ii. Wetland 2 (6.942 ac), PEM wetland, 27.748082 N 97.122888 W, abutting/adjacent, jurisdictional, Section 404
 - iii. Wetland 3 (0.011 ac), PEM wetland, 27.748045 N 97.122526 W, non-adjacent, non-jurisdictional
 - iv. Wetland 4 (0.017 ac), PEM wetland, 27.748919 N 97.12228 W, non-adjacent, non-jurisdictional
 - v. Wetland 5 (0.023 ac), PEM wetland, 27.747247 N 97.120876 W, non-adjacent, 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. 12 March 2025 Memorandum to the Field Between the U.S. Department of Army, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act.

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3. REVIEW AREA. The approximately 25.5-acre review area is located on Mustang Island between 6109 TX-361 and 6021 TX-361 in Port Aransas, Nueces County, Texas. Latitude: 27.74822 N, Longitude: 97.12289 W.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Corpus Christi Bay⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Wetland 2 is in effect one contiguous wetland with palustrine and estuarine wetlands on the west side of TX-361 through one under-highway culvert adjacent roadside ditches approximately 90 feet northwest of the northwestern most corner of the review area. This one continuous wetland is abutting Corpus Christi Bay, a TNW. Multiple pieces of evidence support that the divided wetland is functioning as one wetland.
6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ 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

⁶ 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.

⁷ 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.

⁸ 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.

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

- g. Adjacent wetlands (a)(7):

Wetland 2 (6.942 acres): LiDAR, topo, aerial imagery, site visit photos, and wetland delineation field data forms were utilized as part of the desktop analysis to identify that this palustrine wetland is contiguous with the wetland on the opposite side of TX-361. Aerial imagery and site visits confirmed that the boundaries of Wetland 2 abuts the ditch (containing hydrophytic vegetation) and leads to a culvert where water flows under TX-361 to wetlands abutting Corpus Christi Bay. The estuarine wetlands on the north side of TX-361 are abutting Corpus Christi Bay and are tidally influenced. Corpus Christi Bay is a waterbody that qualifies as a “navigable water of the United States” (33 C.F.R. Part 329) and is (a) subject to the ebb and flow of the tide, and (b) is presently used, and/or has been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

Based on the “*Memorandum to Re-evaluate Jurisdiction for NWO-2003-60436*”, the culvert acts as a discrete feature so that Wetland 2 is a continuation of wetlands on the west side of TX-361. Furthermore, the topographic quads (2016 Port Ingleside, 2016 Port Aransas, 2016 TX Crane Island NW and NW OE) reveal wetland characteristics/symbols with a slope line that extends across TX-361 into the review area. When comparing the topographic quads and the LiDAR 3D mapping, the LiDAR indicates the continuation of slopes and hydrology of wetlands on either side of TX-361 extending into the review area as well. The wetlands on either side of TX-361 have the same mapped hydric mustang fine

sandy soils and there are similarities in plant communities between the divided portions of the wetland on either side of TX-361. The EPA Headquarters and Office of the Assistance Secretary (Civil Works) Memorandum on NWO-2003-60436 states that “slopes and topography allow for a shallow subsurface connection from wetlands” on either side of the road and “multiple pieces of evidence to assess whether divided wetland areas are separate, distinct wetlands or are functioning as one wetland” can be assessed to provide valuable information including historic conditions “to determine if a divided wetland is functioning as one wetland”. This valuable information includes hydrologic connection, discrete features like culverts through a shallow subsurface connection, similarities in plant communities, slope and topography, soils and hydrologic indicators. Therefore, Wetland 2 is considered one contiguous jurisdictional water with the wetlands on the east and west sides of TX-361. Therefore, Wetland 2 meets the definition of adjacent because Wetland 2 is abutting Corpus Christi Bay, a traditional navigable water. Therefore, the discharge of dredged and/or fill material in Wetland 2 is subject to Section 404 of the Clean Water Act.

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”).⁹ 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

⁹ 51 FR 41217, November 13, 1986.

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).

Wetland 1, Wetland 3, Wetland 4, and Wetland 5 (totaling 0.326 acres):

LiDAR, topo, aerial imagery, site visit photos, and wetland delineation field data forms were utilized as part of the desktop analysis to identify that these palustrine wetlands reside in small depressional areas. There is no presence of a continuous surface connection to a TNW or RPW due to elevation changes. The elevation changes isolate these wetlands so that there is no overland sheet flow with the exception of large precipitation events. Therefore, in accordance with the pre-2015 regime post-Sackett and the 12 March 2025 Memorandum to the Field Between the U.S. Department of Army, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency Concerning the Proper Implementation of “Continuous Surface Connection” Under the Definition of “Waters of the United States” Under the Clean Water Act, Wetlands 1, 3, 4, and 5 do not meet the definition of adjacent as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States subject to Section 404 of the Clean Water Act. Any discharge of dredged and/or fill material into these aquatic resources does not require a Department of the Army permit.

- 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: Buffalo Bill Farms – Port Aransas Natural Resources Assessment, prepared by Dunaway
 - b. Historical Aerials (1979, 1995, 2002, 2016, 2017, 2020, 2022, 2023, and 2024;

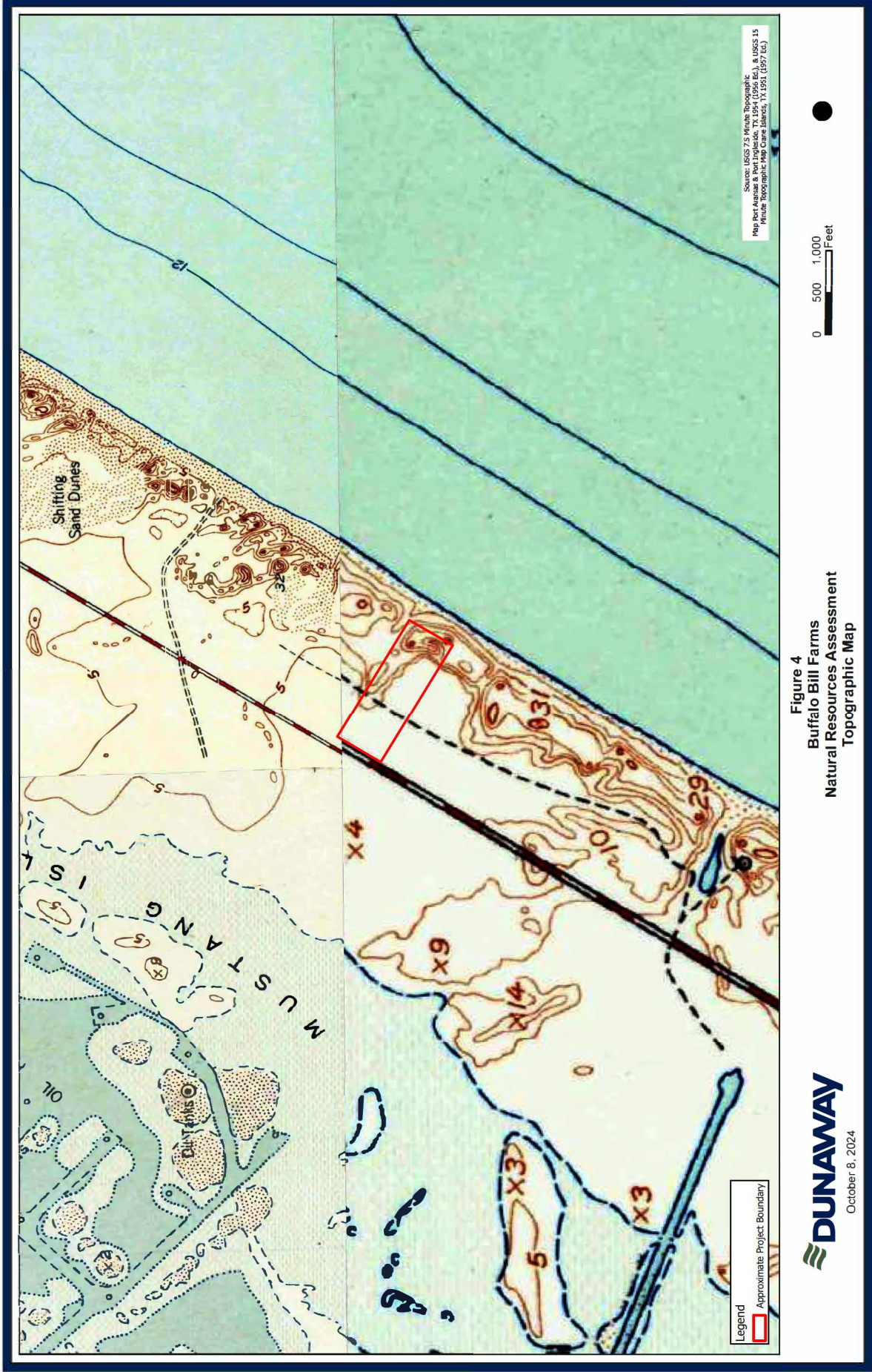
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source: Google Earth)

- c. USGS Topographic Map 1:24,000 Crane Islands NW OE E 2025, 1:24,000 Crane Islands NW 2025, and 1:24,000 Port Aransas 2025
 - d. Web Soil Survey Hydric Rating Map for Nueces County, Texas (NRCS website accessed 26 December 2024)
 - e. National Wetland Inventory (NWI) (USFWS website accessed 23 April 2025)
 - f. 3D Hydrography Program (3DHP) – Mapper accessed 23 April 2025
 - g. ORM2 Database: A jurisdictional determination (JD) was issued for this property under SWG-2016-01067 in October 2017 where all wetlands were considered jurisdictional.
 - h. Texas Regulatory Viewer – Accessed 6 May 2025
 - i. Site visits conducted on May 16, 2024 and December 4, 2024.
10. OTHER SUPPORTING INFORMATION. EPA Headquarters and Office of the Assistance Secretary (Civil Works) Memorandum on NWO-2003-60436.-
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.





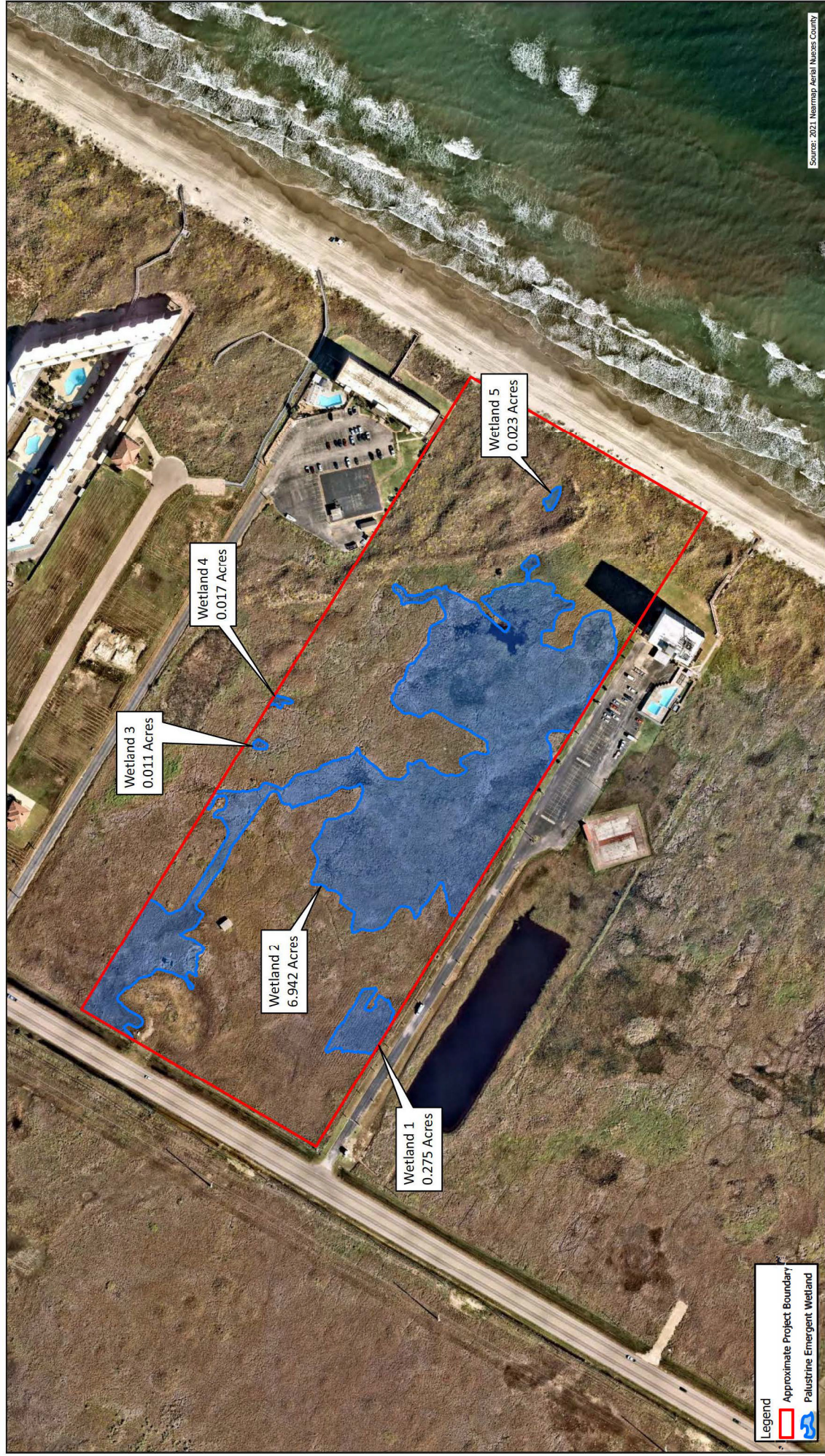
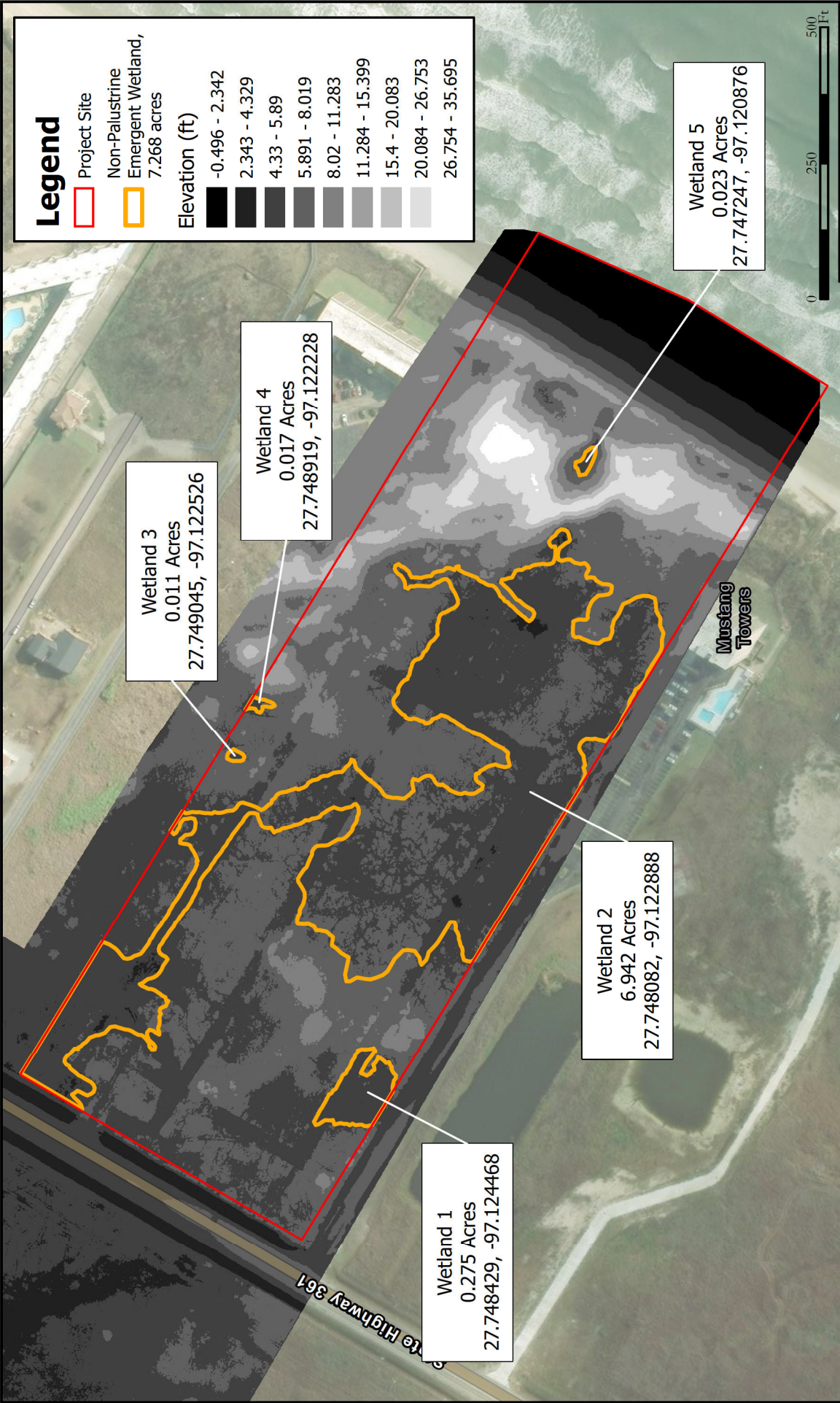


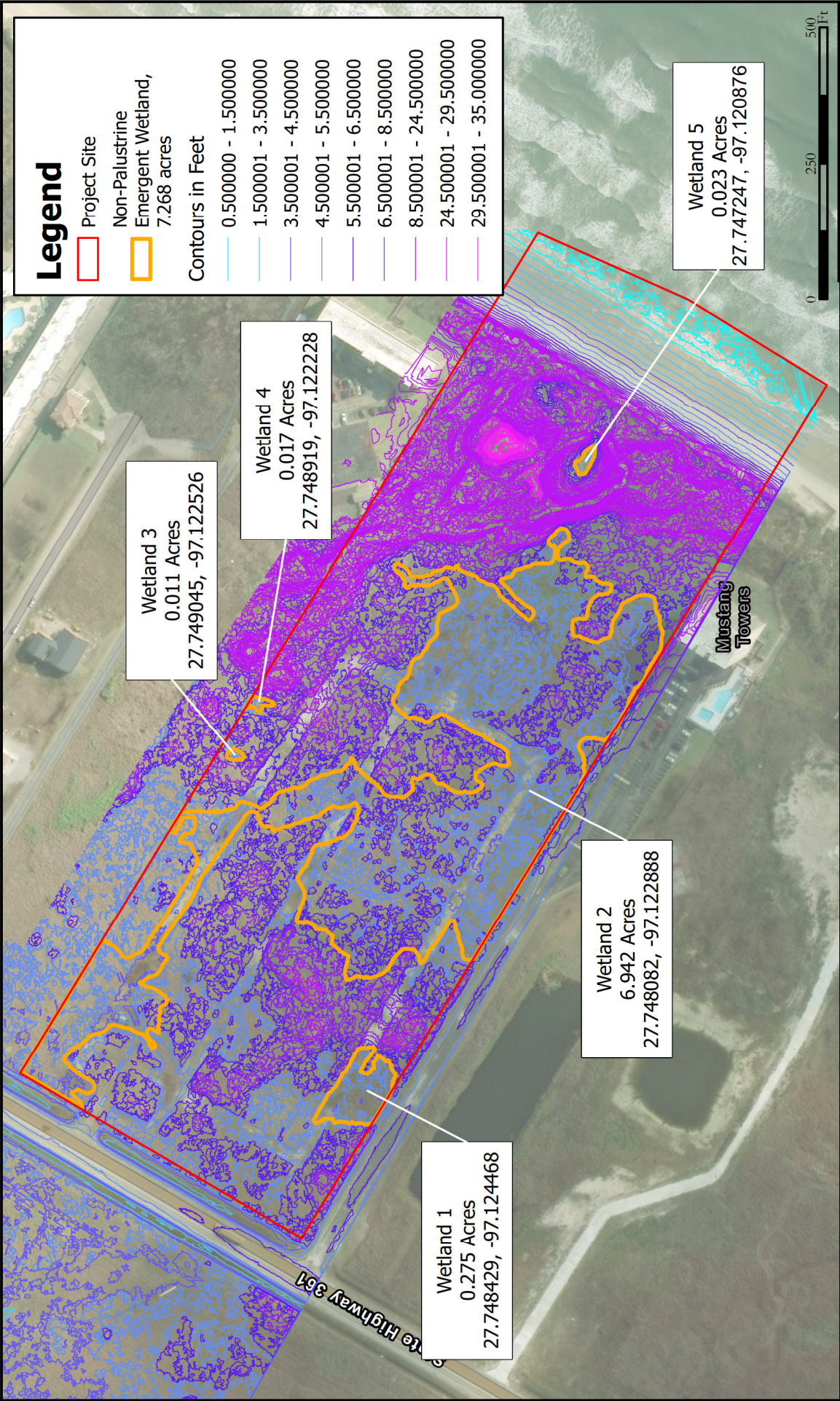




Figure 9
Buffalo Bill Farms - Port Aransas
Natural Resources Assessment
Waters of the U.S. Map



	<h1>LiDAR Elevation and Wetlands Map</h1>	
LiDAR Source: BFS LiDAR Collection Date: 12-13-2024 LiDAR Resolution: 0.10 feet Wetlands Source: Dunaway (2023)	Buffalo Bill Farms Port Aransas, Nueces Co., TX	FIGURE 3 For informational and permitting purposes only. Not for legal, engineering, or survey purposes.



	<h1>Contours and Wetlands Map</h1>	
LiDAR Source: BFS LiDAR Collection Date: 12-13-2024 LiDAR Resolution: 0.10 feet Wetlands Source: Dunaway (2023)	Buffalo Bill Farms Port Aransas, Nueces Co., TX	FIGURE 5 For informational and permitting purposes only. Not for legal, engineering, or survey purposes.