

MEMORANDUM FOR FILE

SWG-2020-00039 – Oaks Texas City, LLC; Alleged Unauthorized Discharge of Fill Material into a Wetland, Approximate 34-Acre Tract, Hitchcock, Galveston County, Texas

1. On 18 September 2020, the USACE received an email from Ms. Kristen Schlemmer on behalf of the Bayou City Waterkeeper and a concerned resident concerning an alleged discharge of fill material into wetlands associated with the construction of a subdivision. The project site is located northeast of the State Highway 6 and FM 2004 intersection, in Hitchcock, Galveston County, Texas.
2. Off-site information reviewed includes the following:
 - a) Aerial Photos: Strategic Mapping Program (StratMap). Upper Coast Lidar, 2018-03-22. Web. 2020-02-18.
 - b) Google Earth Aerial Photos (1969-2018)
 - c) United States Department of Homeland Security (DHS), Federal Emergency Management Agency (FEMA), Flood Insurance Rate Map (FIRM) Community and Panel Number: HITCHCOCK, CITY OF, Panel Number **48167C0385G (08/15/2019)** Flood Zone: AE; Elevation: 12 feet.
 - d) United States Department of Interior (DOI), Fish and Wildlife Service (FWS), National Wetland Inventory (NWI): FWS NWI Online Mapper. (<http://www.fws.gov/wetlands/data/mapper.HTML>), accessed 2 October 2020.
 - e) Earth Point Topographic Map Google Earth Layer: Accessed 2 October 2020.
 - f) United States Department of Agriculture (USDA), Natural Resource Conservation Service (NRCS), Soil Survey: NRCS National Cooperative Soil Survey (NCSS) Google Earth Layer (http://casoilresource.lawr.ucdavis.edu/soil_web/kml/mapunits.kml), accessed 12 October 2020.
3. The Earth Point Topo map shows the review area as generally level, with no discernable slope. The January 2019 Google Earth aerial photo shows a mixture of pine and deciduous trees. No aquatic features are noted within the subject site on the topo map, although an open water pond is located directly east of the site with Highland Bayou being immediately south. The review area lies wholly within 1% annual flood risk zone (100-year flood plain) associated with Highland Bayou, which lies immediately south of the subject site. The USFWS NWI Mapper identifies one aquatic resource within the subject site, PFO1A, located north of the existing road/driveway. The USDA Web Soil Survey identified one (1) soil order present within the subject site; Bacliff clay, 0 to 1 percent slopes, rarely flooded.
4. On 18 September 2020, the USACE received an email from Ms. Kristen Schlemmer on behalf of the Bayou City Waterkeeper and a concerned resident, concerning the alleged discharge of fill material into wetlands associated with the

construction of a subdivision. In the attached letter, they asked the Corps to investigate the site further to document jurisdictional wetlands in areas where aerial photography and other sources strongly suggest the presence of wetlands, and yet no field observations have been recorded, investigate the jurisdictional status of a pond on the southeast portion of the site, and require Oaks Texas City, LLC to cease and desist from all development on the site until the Corps completes its additional investigation. As for the request for a jurisdictional determination on the pond, neither Kristen Schlemmer nor Bayou City Waterkeeper own the [pond or are under contract to purchase the pond. Therefore, we cannot conduct a jurisdictional determination on the pond without the property owner's permission.

5. A site visit was conducted on 1 October 2020. Mr. Beau Yarbrough of Oaks Texas City, LLC, John Davidson from the USACE and I attended the site visit. We noted that no additional land clearing had occurred after the initial site visit. We re-evaluated the 11.3-acre portion of the site located south of the road/driveway on the tract. We took Sample Point 1, located approximately 170 feet east of FM 2004 and 230 feet south of the road/driveway. Sample Point 1 was dominated by hydrophytic vegetation consisting of Green Flat Sedge (*Cyperus Virens* – FACW) and Sand Spike-Rush (*Eleocharis montevidensis* - FACW). Previous dominant trees at this site were Chinese tallowtree (*Triadica sebifera* - FAC), American elm (*Ulmus americana* – FAC) and sugar-berry (*Celtis laevigata* – FAC). The sample point was in a depression (geomorphic position) and met the FAC-Neutral test, which are sufficient indicators for positive wetland hydrology. The soil profile met the Depleted Below Dark Surface, Depleted Matrix and Redox Depressions hydric soil indicators. Sample Point 1 was in a wetland. We delineated the boundary with a GPS. We then walked southeasterly approximately 200 feet and took another sample point. Sample Point 2 was dominated by hydrophytic vegetation consisting of loblolly pine (*Pinus taeda* – FAC) and deciduous holly (*Ilex decidua* – FACW). Previous dominant trees were loblolly pine and Chinese tallowtree. The sample point met the FAC-Neutral test, which is a secondary indicator and insufficient for positive wetland hydrology. The soil profile met the Depleted Matrix hydric soil indicator. Sample Point 2 was not in a wetland. We walked east approximately 240 feet and took Sample Point 3, which was dominated by hydrophytic vegetation consisting of Chinese tallowtree (*Triadica sebifera* – FAC). Prior to the land clearing, the sample point was also dominated by loblolly pine (*Pinus taeda* – FAC). Non-dominant species were broad-leaf rosette grass (*Dichanthelium latifolium* – FACU) and Brazilian vervain (*Verbena incompta* – FACU). No wetland hydrology indicators were present. The soil profile met the Depleted Below Dark Surface, Depleted Matrix and Redox Depressions hydric soil indicators. Sample Point 3 was not in a wetland due to a lack of any wetland hydrology indicators. We then traveled northwest approximately 175 feet and took Sample Point 4. The sample point was dominated by hydrophytic vegetation consisting of Chinese tallowtree (*Triadica sebifera* – FAC). Non-dominant vegetation was Bermuda grass (*Cynodon dactylon* – FACU) and Chinese privet (*Ligustrum sinense* – FAC). The sample

point was in a depression (geomorphic position), which is a secondary wetland hydrology indicator. The soil profile met the Depleted Matrix hydric soil indicator. Sample Point 4 was not in a wetland due to insufficient wetland hydrology indicators. We moved approximately 100 feet northeast to another depression. We took Sample Point 5, which was dominated by hydrophytic vegetation consisting of sand spike-rush (*Eleocharis montevidensis* – FACW). The tree layer prior to the land clearing was dominated by Chinese tallowtree (*Triadica sebifera* – FAC). The sample point had a geomorphic position and met the FAC-Neutral test. Sufficient wetland hydrology indicators were present. The soil profile met the Depleted Matrix and Redox Depressions hydric soil indicators. Sample Point 5 was in a wetland. We delineated the wetland boundary with the GPS. We then went approximately 360 feet southwest and took Sample Point 6 in a depression. The sample point was dominated by hydrophytic vegetation consisting of green flat sedge (*Cyperus virens* – FACW). The tree layer prior to the land clearing was dominated by Chinese tallowtree (*Triadica sebifera* – FAC). The sample point met the geomorphic position and FAC-Neutral test wetland hydrology indicators. Sufficient wetland hydrology was present. The soil profile met the Depleted Matrix and Redox Depressions hydric soil indicators. We recorded the wetland boundary with a GPS. None of the wetlands were abutting Highland Bayou or separated from Highland Bayou by a natural or artificial barrier that allows typical year inundation from Highland Bayou. That concluded the site visit.

6. Another desk review was conducted. We downloaded the GPS data and loaded the data points and wetland polygons into Google Earth. The aeriels and Earth Point Topo Map show that the wetlands are not abutting nor separated from Highland Bayou by a single barrier. We ran the Antecedent Precipitation Tool (APT) for the site visit date and eighteen Google Earth aerial photos from 1995 to 2019. See the table below:

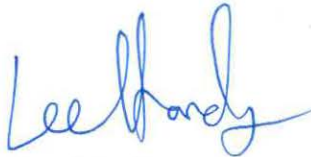
Date	Preceding 72 Hours	WETS (3 Months) Score	PDSI	WebWIMP Seasonal Water Balance
10/1/2020 Site visit	0.01-inch	14- Normal Conditions	N/A	N/A
1/3/2019 aerial	0.48-inch	14- Normal Conditions	Severe Wetness	N/A
3/21/2018 aerial	0.01-inch	11- Normal Conditions	Moderate Wetness	N/A
4/5/2017 aerial	0.01-inch	8- Drier than Normal	Incipient Wetness	N/A
1/22/2017 aerial	0.16-inch	13- Normal Conditions	Mild Wetness	N/A
2/7/2016 aerial	0.02-inch	12- Normal Conditions	Mild Wetness	N/A
12/3/2015 aerial	0.32-inch	13- Normal Conditions	Moderate Wetness	N/A

11/21/2015 aerial	0.00-inch	14- Normal Conditions	Severe Wetness	N/A
3/27/2015 aerial	0.01-inch	14- Normal Conditions	Mild Wetness	N/A
5/15/2014 aerial	0.40-inch	9- Drier than Normal	Incipient Wetness	N/A
10/28/2012 aerial	0.00-inch	10- Normal Conditions	Moderate Drought	N/A
11/28/2011 aerial	0.28-inch	11- Normal Conditions	Extreme Drought	N/A
2/15/2010 aerial	0.15-inch	16- Wetter than Normal	Moderate Wetness	N/A
1/8/2010 Aerial	0.34-inch	13- Normal Conditions	Mild Wetness	N/A
12/31/2008 aerial	0.20-inch	11- Normal Conditions	Mild Drought	N/A
1/8/2008 Aerial	0.00-inch	11- Normal Conditions	Normal	N/A
3/31/2006 aerial	1.22 inches	13- Normal Conditions	Extreme Drought	N/A
1/31/2004 Aerial	0.90-inch	11-Normal Conditions	Mild Wetness	N/A
1/14/1994 aerial		15- Wetter than Normal	Moderate Wetness	N/A

The APT is a tool that affords the user the capability to look at rainfall in the recent past, cumulative for the last 3 months as well and climatological review for the past 30 years. It uses climatic data collected from numerous nearby weather stations and produces the most reliable source with a full 30 years of precipitation data. The site visit conditions were normal precipitation for the previous 3 months and the aerial photos ranged from drier than normal to wetter than normal for the previous 3 months with two being wetter than normal, two being drier than normal and the remaining 14 being normal precipitation. None of the aerial photos show water from Highland Bayou flooding the wetlands. We also reviewed the Galveston County FEMA Coastal Transect #24, which is closest to the project site and the FEMA Galveston County Flood Profile P-P on Lower Highland Bayou, which crosses the project site. Coastal Transect #24 extends from the Gulf of Mexico, east of Pirates Beach, to past FM 1764, west of Gulf Greyhound Park. The 10-year flood stillwater elevations on Coastal Transect #24 range from +6.0 feet NAVD 88 at the Gulf of Mexico to +8.3 feet NAVD 88 at the northwestern end. FEMA Galveston County Flood Profile P-P shows the 10-year floodplain elevation to be approximately +8.75 feet NAVD 88. Based on the 2018 StratMap LiDAR data, the wetlands are above +10 feet NAVD 88. Therefore, the review area, including the wetlands, is above the 10% annual chance flood and does not

get inundated from Highland Bayou or any other water of the United States in a typical year.

7. Based on the APT tool analysis, LiDAR elevation information, floodplain information and available desktop resources, we determined that the wetlands on this site do not abut an (a)(1) – (a)(3) water; are not inundated by flooding from an (a)(1) – (a)(3) water in a typical year; are not physically separated from an (a)(1) – (a)(3) water only by a natural berm, bank, dune, or similar natural feature; and are not physically separated from an (a)(1) – (a)(3) water only by an artificial dike, barrier, or similar artificial structure that allows a direct hydrologic surface connection between the wetlands and an (a)(1)-(a)(3) water in a typical year through a culvert or similar artificial feature. Wetlands, under normal circumstances, have sufficient wetland hydrology indicators, a dominance of hydrophytic vegetation and exhibit hydric soils and are identified utilizing the Atlantic and Gulf Coastal Plain Region Supplement to the 1987 Corps of Engineers Wetland Delineation Manual. Therefore, the wetlands are not subject to Section 10 of the Rivers and Harbors Act or Section 404 of the Clean Water Act and a Department of the Army permit is not required prior to the discharge of any dredged and/or fill material into these wetlands. This AJD will remain valid for five (5) years from the date of the final letter unless new information warrants revisiting or re-issuance prior to the expiration date. No violation of Section 10 or Section was found and Case SWG-2020-00039 is closed as of the date of this memo.



Lee Hardy
Regulatory Specialist
Compliance Branch

MEMO TO CLOSE FILE

1. **CASE SWG-2020-00039**

2. **RESPONSIBLE PARTY(S):** Oaks Texas City, LLC

Address (mailing): Oaks Texas City LLC

P.O. Box 16504

Galveston, Texas 77552

Telephone: 409-682-2501

E-Mail: Beau.Yarbrough@dswhomes.com

3. **PROJECT LOCATION:**

Waterway: Lower Highland Bayou

County: Galveston

City (closest): Hitchcock

Coordinates: 29.354082°, -95.029167° W

4. **REPORT ORIGIN:**

Reported by: Ms. Kristen Schlemmer on behalf of the Bayou City Waterkeeper

Telephone: 512-619-1583

Date Reported: 8 September 2020

Investigation Date: 1 October 2020 (☒ Field ☐ Office)

Investigated by: Lee Hardy & John Davidson

5. **AUTHORITY:**

 A.10 X B.404 C.10&404 D.N/A

6. **SUMMARY OF INVESTIGATION:** An alleged unauthorized activity was reported on 18 September 2020. The report claimed the alleged discharge of fill material into wetlands associated with the construction of a subdivision. The location of the activity is located northeast of the State Highway 6 and FM 2004 intersection, in Hitchcock, Galveston County, Texas.

A site visit was conducted on 1 October 2020. Present were Mr. Beau Yarbrough, Mr. Lee Hardy and Mr. John Davidson. Mechanized land clearing was observed, and fill material covered the southern portion of the site. Three wetlands were identified and documented.

Based on our APT tool analysis, LiDAR elevation information, floodplain information and available desktop resources, we determined that the wetlands on this site do not abut an (a)(1) – (a)(3) water; are not inundated by flooding from an (a)(1) – (a)(3) water in a

typical year; are not physically separated from an (a)(1) – (a)(3) water only by a natural berm, bank, dune, or similar natural feature; and are not physically separated from an (a)(1) – (a)(3) water only by an artificial dike, barrier, or similar artificial structure that allows a direct hydrologic surface connection between the wetlands and an (a)(1)-(a)(3) water in a typical year through a culvert or similar artificial feature. Therefore, the wetlands are not waters of the United States and are not subject to Section 10 of the Rivers And Harbors Act (Section 10) or Section 404 of the Clean Water Act (Section 404).

7. **FINAL DISPOSITION (if applicable):** As a result of this investigation, we have determined that the discharge of dredged and/or fill material occurred within wetlands on the subject property. The wetlands are not subject to Section 10 or Section 404 and a Department of the Army permit is not required prior to the discharge of any dredged and/or fill material into these wetlands. Therefore, no violation of Section 10 of the Rivers and Harbors Act or Section 404 of the Clean Water Act has occurred. This case is closed, and no further enforcement action will be pursued at this time.
8. **DATE CASE CLOSED: 14 June 2021**

Lee Hardy
Inspected by: Lee Hardy

14 June 2021
Date Finalized

John Davidson
Reviewed by: John Davidson
Chief, Compliance Branch

14 June 2021
Date Reviewed