

The following is taken from a **Hill Country Alliance Webinar** entitled “*Private Dams: Understanding the Permitting Process.*” (Other contributors to the webinar were [Beth Bendik](#), TPWD, [Trina Lancaster](#), TCEQ, [Joseph Shelnut](#), USACE, and [Myron Hess](#), PLLC.)

## **DAMSTERS BEWARE! Your plan to dam may be illegal.**

### **Demystifying the permitting process for PRIVATE DAMS on Texas waterways and help for those who have a concern about a proposed or unauthorized dam. Who to contact??**

Impoundments on streams and rivers are problematic because they are potentially so many permitting authorities involved. But definitions first:

“A dam is a barrier preventing the flow of water *or* of loose solid materials (such as soil or snow).”

Source: Merriam-Webster Dictionary.

Private dams are those built for private benefit.

#### **Why are dams built?**

- Flood control
- Public Water Supply reservoir
- Hydropower
- Erosion control
- Agriculture (irrigation) & Livestock water
- Recreation

#### **But why can dams be of concern? They can...**

- Impede aquatic organism passage
- Hold back water from downstream users
- Impair navigation up and down stream (such as kayakers)
- Destroy streambeds and release sediment during construction
- Disrupt natural stream flows
- Block sediment transport
- Cause stagnant water that can impact water quality
- Create a risk of dam breach

## **PART 1 - TCEQ: Exempt Reservoirs & Water Rights Permitting, by Law Office of [Myron Hess](#), PLLC**

The TCEQ regulates the taking or storing of “state water” under **Chapter 11** of the **Texas Water Code (TWC)**, i.e. **11.021**. The general concept involved is that water in a surface watercourse is state water, that can include the underflow of a surface river.

There is also a **TCEQ Rule (30 TAC\* Sec. 297.1 (52))** that stipulates “State water does **not include** percolating groundwater; nor does it include diffuse surface rainfall runoff, groundwater seepage, or Springwater before it reaches a watercourse.”

**\* Texas Administrative Code**

**A GENERAL RULE: A WATER RIGHT PERMIT FROM TCEQ IS REQUIRED TO STORE, TAKE, OR DIVERT STATE WATER:**

**TWC Sec. 11.121** Permit Required

***Except as otherwise provided in specific sections (such as 11.142\*) of the Texas Water Code, you must get a permit to appropriate any state water or begin construction for the storage, taking or diversion of state water.***

**\*TWC Sec. 11.142 Permit Exemption – THE ‘SMALL RESERVOIR’ EXEMPTION**

Without a permit, [you] may construct on your own property a dam or reservoir with normal storage of not more than 200 acre-feet for domestic and livestock purposes. Commercial operation not exempt.

Further:

- 1. Cannot be on a navigable stream.**
- 2. “Normal storage”** as defined in TCEQ Rules is the amount stored before uncontrolled release begins. Also, a person can temporarily store more than 200 acre-feet if the person can demonstrate no storage of more than 200 acre-feet on average in any 12-month period. This exemption applies for domestic and livestock use only. If storing over 200 acre-feet at any time, then reservoir capacity and water level data records must be kept to demonstrate compliance to TCEQ.
- 3. While we’re at it, what qualifies as “domestic” or “livestock use”?**

**Domestic use** is use by individual or household for drinking, washing, or culinary purposes; for irrigation of lawns or family garden and/or orchard, for watering of domestic animals, and for water recreation including aquatic and wildlife enjoyment, but generally: NO money-making activities.

**Livestock use** is open-range watering of livestock, exotic livestock, game animals or fur-bearing animals. Land for livestock purposes is NOT considered a commercial operation, and leasing property for hunting or trapping is allowed.

**A few more rules or versions of this exemption were added in 2001:**

4. The dam and reservoir could be for fish and wildlife purposes.
5. The property where located is qualified as open-space land, as defined by Sec. 23.51, Tax Code.

6. Must be in an unincorporated area.
7. For commercial\* or noncommercial wildlife management, including fishing, but not fish farming. (\*specifically **defines commercial operation in this context**). **Not** eligible for the exemption is the use of land for industrial facilities, industrial parks, aquaculture facilities, fish forming facilities, or housing developments.
8. **One more thing about this exemption, it allows Surface Coal Mining Reservoirs**, not limited to 200 acre-feet; no stated size or ownership limit: Only applies for reservoirs used as part of a *permitted* surface coal mining operation (under Chapter 134, Natural Resources Code) and only if the water used is solely for: sediment control or fire or dust suppression.

#### **Key References:**

Texas Water Code Sections **11.021, 11.121, 11.134, 11.142, and 11.143**

Texas Administrative Code, Title 30, Chapter 297, Sections 297.1 & 297.21

#### **OK, so how many private “EXEMPT RESERVOIRS” ARE OUT THERE?**

***The following is an excerpt from a LCRA staff presentation to the LCRA Board on June 18, 2024 (Agenda Item 4)***

UNFORTUNATELY, there is no registration process for these EXEMPT reservoirs, so it is difficult to tell what impact they are having on our water supply! In 2024, the LCRA (Lower Colorado River Authority) attempted a count for the Highland Lakes Subwatersheds, with a verdict of (over time) **more than 40,000 reservoirs!** Most are much smaller than 200 acre feet, but regardless, WE DON'T REALLY KNOW. Needing a permit would likely result in many landowners finding alternate sources of water...

#### **What if your OPEN-SPACE Land Use changes?**

IF YOUR OPEN-SPACE LAND CHANGES to a subdivision or fracking or otherwise to the selling of water, THEN PUBLIC NOTICE IS REQUIRED, likely followed by a PUBLIC HEARING to find out any unintended consequences. A complex application is also required. In general, the new use of the land cannot impair someone else's water rights, must be recognized as beneficial use (but this is a low bar), must not be detrimental to the public, and the project's environmental impact must be accurately calculated.

**The TCEQ website has a Water Rights Viewer** that can help you determine who owns water rights near you... go to the [TCEQ homepage](#), click on **Water**,

then click on **Surface Water Rights and Availability**, then click on **TCEQ Water Rights Viewer**.

ALSO, you can use the TCEQ website to submit a complaint about a **potentially unauthorized Dam**: go to the [TCEQ homepage](#), click on **Reporting**, then click on **Make an Environmental Complaint**.

## **PART 2: WHAT ABOUT TCEQ's DAM SAFETY Program?**

TCEQ's [Trina Lancaster](#) addressed this topic.

The TCEQ's Office of Compliance and Enforcement first looks at the maximum height of each dam: dams that are 6' or less are not covered by TCEQ jurisdiction. Higher than 6', both dam height and the degree of hazard assigned to the dam determine whether the TCEQ regulates it.

### **Exceptions (dams NOT regulated):**

- Dams designed/constructed/owned by federal agencies.
- Embankments constructed of roads and railroads unless also designed to function as a detention dam.
- Dikes/levees designed to prevent inundation by floodwater.
- Off-channel impoundments authorized by Texas Water Code Chap. 26.
- Above-ground water storage tanks.

**A dam is also EXEMPT from TCEQ's Safety Program if it meets ALL of the requirements below:**

- Located on private property.
- Has a maximum capacity of less than 500 acre-feet.
- Has a hazard classification of low or significant.
- Located in a county with a population of less than 350,000.
- Not located inside the corporate limits of a municipality.

**CARE TO SEE A NATIONAL INVENTORY OF DAMS? GO to:** <https://nid.sec.usace.army.mil/#/>

### **What to Know About DAM HAZARD CLASSIFICATION**

Hazard classification is a description of the potential for the loss of downstream life or property in the event of a failure of the dam. It is NOT a description of the condition of the structure.

#### **LOW HAZARD DAMS**

No loss of life expected; minimal economic loss.

## **SIGNIFICANT HAZARD DAMS**

Loss of life possible, 1-2 homes.

Appreciable economic loss, such as interruption of utilities, secondary highways, minor railroads.

## **HIGH HAZARD DAMS**

Loss of Life expected, 3+ homes.

Excessive economic loss: public utilities, main highways, major railroads.

## **DAM SAFETY & WATER RIGHTS**

DAM SAFETY can be part of a WATER RIGHTS application (but not always).

TCEQ will determine if the dam is jurisdictional, and add applicable requirements to the permit, such as a plan and specifications review, and specific design requirements.

## **REPORTING A DAM PROBLEM**

**When reporting on a dam you may be concerned about, please call your TCEQ Region Office, then give the specific location, the height of the dam, and approximate size of the reservoir.**

There will first be a “desktop” review, and then a field inspection if jurisdictional. But the Dam Safety Program has limited enforcement, often having to wait until a dam collapse is imminent to be able to take action. They try to work with the dam’s owner first, but if all else fails, the Texas Attorney General can be involved.

## **PART 3: TPWD’s Inland Fisheries Division – Marl, Sand, Gravel, Shell & Mudshell Permitting Program**

Presented by [Beth Bendick](#), TPWD.

**TPWD’s Jurisdiction and Authority**, per Chapter 86, Parks & Wildlife Code

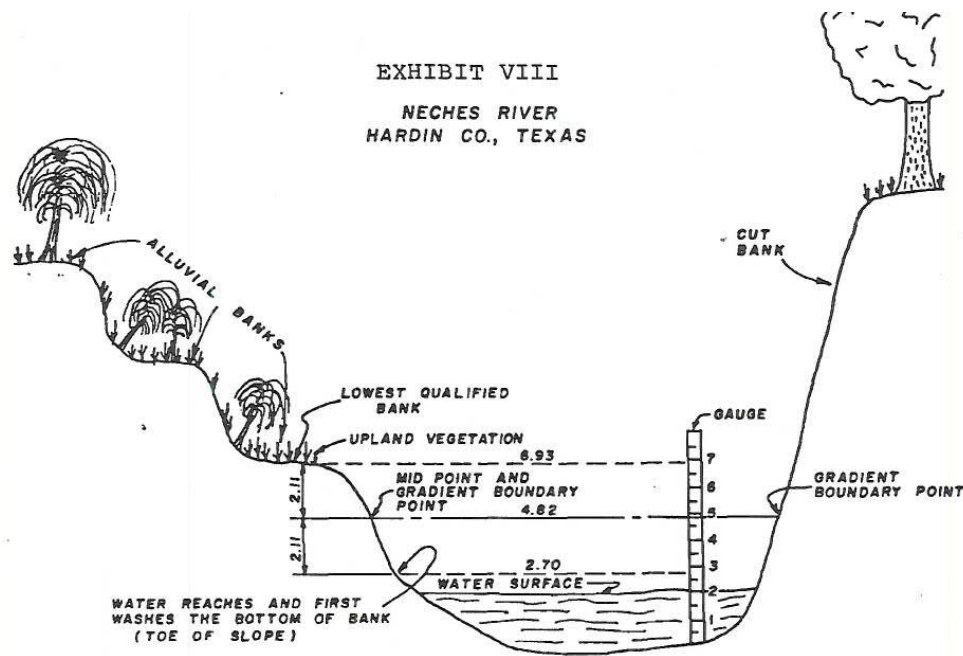
*“The commission shall manage, control, and protect marl and sand of commercial value and all gravel, shell and mudshell located within the tidewater limits of the state, ... and within freshwater areas of the state not embraced by a survey of private land... and on islands within those areas.” “No person may disturb or take marl, sand, gravel, shell or mudshell... without first having acquired from the commission a permit...”*

TPWD has jurisdiction across 3 categories:

- 1) Navigable Streams – navigable in fact or by statute, that includes State-owned Streambeds – navigable streams with publicly-owned beds, and “Small Bill” Streams (navigable streams with privately-owned beds).
- 2) Spanish and Mexican Land Grants – perennial streams where the sovereign never relinquished title.
- 3) Coastal Waters – Means high tide to 10.35 miles offshore.

## Jurisdiction – the GRADIENT BOUNDARY

- The gradient boundary of a stream is the line between private uplands and public riverbed.
- Formally, surveyed by an experienced Licensed State Land Surveyor or a Registered Professional Land Surveyor
- Informally, the gradient boundary is about half-way up the lowest qualifying earthen bank, also keeping mind the useful visual tool of Persistent Upland Vegetation.



## TPWD Jurisdictional Activities

*“No person may disturb or take marl, sand, gravel, shell or mudshell... without first having acquired from the commission a permit...”*

Common Project Types:

- Excavation, such as clearing a buildup of sediment behind a low water crossing
- Bulkheads
- Low water crossings
- Pipelines

## COMMON EXEMPTIONS (from permitting)

- Disturbance or taking what is necessary or incidental to navigation or dredging under state or federal authority.

- Projects to restore or maintain the storage capacity of existing public water supplies.
- Maintenance projects carried out by public utilities for non-commercial purposes.
- Public road projects of the Texas Dept. of Transportation.

**TPWD Permitting Considerations, i.e. how will the project affect:**

- Fish & Wildlife Habitats – aquatic and riparian.
- Erosion – bed and banks, upstream and downstream.
- Sediment budget – aggrading or degrading (to prevent changing the elevation of a river’s channel bed over time).
- Riverine Structure – shallow riffle versus pool structure, bed banks.
- Water Quality – turbidity, sedimentation.
- Hydraulics & Hydrology.
- Bank Stability.
- Effects on recreational use and navigation of the waterway.

**THE TPWD PERMITTING PROCESS/ Sand and Gravel Permit**

**§86.004 The commission may grant a permit... if the commission finds ... the {activity] will not:**

- 1) Damage or injurious affecting any island, reef, bar, channel, river, creek, or bayou used for navigation, or any oysters, oyster beds, fish, or wildlife in or near the water used in the operation.
- 2) Change or injuriously affect any current that would affect navigation.
- 3) Significantly and injuriously change the hydrology...
- 4) Significantly increase downstream nonpoint source pollution...
- 5) Significantly accelerate erosion upstream or downstream...

**TAC §69.108. The director may consider the following:**

- 1) Past performance of the applicant with respect to obedience and strict observance of past permits.
- 2) Whether or not the applicant shows evidence of financial responsibility.
- 3) Ability of the applicant to operate, including its facilities for operation.
- 4) Existence of sedimentary materials in the area applied for.
- 5) Whether the granting of the permit will have a material adverse effect on recreational activity...

- 6) Whether the granting of the permit will have a material adverse effect on commercial fishing or the general seafood industry...
- 7) The effect, if any, on navigation in the general area affected by the permit.

### **TPWD Sand & Gravel PERMIT APPLICATION REQUIREMENTS**

- **Written application** form (provided by TPWD).
- **Notice must be published** in the daily or weekly newspaper with greatest circulation in the county or counties affected... and in one newspaper published for the community closest to the proposed area of disturbance, if any (minimum 3 times total).
- **Proof of Mailed Notice:** applicants must notify by certified mail all alongshore property owners within one river mile upstream and downstream of the proposed area of disturbance.
- **Sediment Impact Assessment:** must be approved by the department; must include an evaluation of sediment budget, erosion rates of the river segment to be affected, and the effect on coastal and receiving water.
- **Project Description** as established by 31 TAC 69.105(b)(5)

### **TPWD Sand & Gravel PERMIT APPLICATION & REVIEW**

- Once an application is deemed administratively complete, TPWD will begin a **30-day public comment period** by publishing notice of the application in the Texas Register.
  - All comments and requests for **contested case hearings** must be received within this 30-day period.
- During the public comment period TPWD will hold a **public comment hearing**.
- After the close of the public comment period, TPWD will either issue the permit, issue the permit with conditions, or deny the permit.
- **CONTESTED CASE HEARING**
  - If a contested case hearing is requested the matter will be referred to the **State Office of Administrative Hearings (SOAH)** within 45 days after the close of the public comment period.

### **What if Someone Breaks These Rules? (Unauthorized dam)**

#### **Chapter 86, Parks & Wildlife Code**

§86.022 (a) Violation is a Class B Parks and Wildlife Code misdemeanor.

§86.024 A person in violation of this chapter, or rule, permit, or order of the department issued or adopted... is subject to a civil penalty of not less than \$100 or more than \$10,000 for each act of violation and for each day of violation...



## ENFORCEMENT – CIVIL

- TPWD may issue a Notice of Violation (NOV) for unauthorized takings or disturbances.
- NOV's may be resolved by creating a restoration plan approved by TPWD.
  - TPWD does not issue after the fact permits
- Unresolved violations may be forwarded to the Office of the Attorney General for further enforcement.
- Criminal enforcement is a separate matter and handled by the local prosecutor and game wardens.

## WHO TO CONTACT AT TPWD ABOUT POSSIBLE VIOLATIONS

The [Sand and Gravel Program](#) (email)

[Beth Bendik](#), 512-389-8521

[Sue Reilly](#), 512-389-8622

## PART 4: The U.S. Army Corp of Engineers (USACE) Regulatory Program: DAMS AND WATERS OF THE UNITED STATES

Purpose: To restore/maintain the integrity of the Nation's Waters.

Presented by [Joseph L. Shelnut](#), Biologist, Regulatory Technical Lead, Regulatory Div., Fort Worth District

The Fort Worth district is in the Southwest Division, that is a large part of Texas.

### AUTHORITIES:

**CLEAN WATER ACT, Section 404** that regulates the discharge of dredged and/or fill material into waters of the United States).

**Section 10 of the Rivers and Harbors Act of 1899:** Waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce (*protects navigable capacity*). Includes part of the Trinity, Brazos and Colorado River affected by tides, but...

- Coastal Waters are not covered.

**Section 103 of the Ocean Dumping Act** – regulates transport and discharge of dredged materials – protecting marine resources.

## FEDERAL JURISDICTION LIMITS (Waters of the United States):

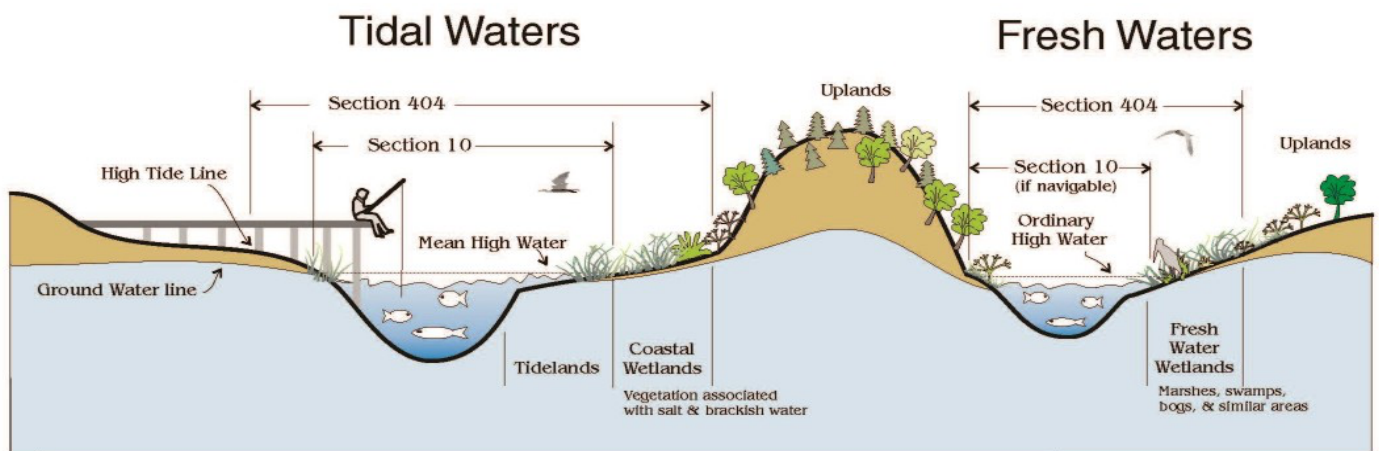
**Ordinary high-water mark (OHWM) is a Line on shore or bank established by water fluctuations.** Evidenced by Shelving, Soil changes, destruction of Terrestrial Vegetation, Presence of Debris. Look for “scour” marks from past floods.

**Wetlands** are treated differently.

**As of now, does not include ephemeral streams.**

**Does not include upland areas** (they are above the **OHWM**).

## CORPS OF ENGINEERS REGULATORY JURISDICTION



Typical examples of regulated activities	<b>Section 103</b> Ocean Discharge of Dredged Material Ocean discharges of dredged material	<b>Section 404</b> Disposal of Dredged or Fill Material (all waters of the U.S.) All filling activities, utility lines, outfall structures, road crossings, beach nourishment, riprap, jetties, some excavation activities, etc.	<b>Section 10</b> All Structures and Work (navigable waters) Dredging, marinas, piers, wharves, floats, intake / outtake pipes, pilings, bulkheads, ramps, fills, overhead transmission lines, etc.
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## THERE ARE TWO DIFFERENT KINDS OF USACE Permits:

### 1) General and 2) Standard Individual

- 1) General permits can be nationwide or regional.** For example, there is a Nationwide Permit (NWP) for “Agricultural Activities” that could apply to private dams, *but only if the dam adversely impacts no more than .5 acre* (that includes the footprint of the dam, the resource, and the open water that is created). **Unless you meet the NWP criteria for Agricultural Activities, a new private dam is likely to need an individual permit.**

- 2) Individual Permit applicants MUST PROVE that their project has the least damaging environmental impact possible – a high hurdle. There is a potential for Public Notice, a Public Comment period, and Public Hearing.
- 3) Note that any endangerment of a Federally protected species could deny a permit.

### **POTENTIAL EXEMPTIONS:**

Section 404(f)(1), Regarding Dams:

(c) For the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches.

NOTE: Farm or stock ponds must be sized for the need, and cannot be used for other purposes (like recreation) to keep the exemption.

### **APPLICATION PROPOSALS, Web Link:**

<https://www.swf.usace.army.mil/Missions/Regulatory/Permitting/>

Electronic Submittal Instruction:

<https://rrs.usace.army.mil/rrs>

### **VIOLATIONS/ ENFORCEMENT POLICIES AND PROCEDURES**

Applies to activities performed without the required Dept. of the Army permits and to activities not in compliance with the terms and conditions of issued Dept. of the Army permits.

*But note that enforcement is discretionary – because of lack of personnel, often only for the more egregious activity.*

#### **The Investigation Process**

- Confirm whether a violation exists and is it within the Corps jurisdiction?
- Identify the extent of the violation and the parties responsible.

#### **IF A VIOLATION DOES EXIST**

If the work is not complete = Cease & Desist Order

If the work has been completed = Notice of violation.

## **RESOLUTION OPTIONS:**

- No Further Action
- Voluntary Restoration
- Initial Corrective Measures
- After-the-Fact Permitting
- EPA Referral
- Referral to the local U.S. Attorney
- Section 404(s)(4) – Class I Penalty: \$64,619/Day

## **REPORTING UNAUTHORIZED ACTIVITY TO THE USACE**

<https://rrs.usace.army.mil/rrs>

<https://www.swf.usace.army.mil/Missions/Regulatory/Enforcement/>

## **CONTACTS:**

Fort Worth District Regulatory Program

[www.swf.usace.army.mil/Missions/Regulatory](http://www.swf.usace.army.mil/Missions/Regulatory)

Permits: [CESWF-Permits@usace.army.mil](mailto:CESWF-Permits@usace.army.mil)

Enforcement: [CESWF-Compliance@usace.army.mil](mailto:CESWF-Compliance@usace.army.mil)

Regulator-Of-The-Day: 817-886-1731

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