



**ENVIRONMENTAL REGULATORY HURDLES FOR
YOUR STORM WATER AND FLOOD CONTROL
PROJECT**

LOWER RIO GRANDE VALLEY
**16TH ANNUAL WATER QUALITY MANAGEMENT & PLANNING
CONFERENCE**

**APRIL 9-12, 2014
SOUTH PADRE ISLAND, TEXAS**

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What and How?

- Types of Projects:
 - On-Channel
 - Off-Channel
 - Retention facilities
 - Diversion Facilities
 - Flood Control
 - Pollution Control

- Regulatory Agencies:
 - TCEQ
 - TPWD
 - GLO
 - Texas Historical Commission
 - USACE
 - USFWS
 - EPA
 - Local Entities (county, city)



How?

- Types of permits/authorizations that may be required:
 1. 404 Dredge and Fill Permit and Wetlands Mitigation (USACE and EPA);
 2. Stormwater Construction General Permit (TCEQ);
 3. Water Right (TCEQ);
 4. Endangered Species Review (TPWD and USFWS);
 5. Sand, Marl, Gravel, Shell, and Mudshell Permits (TPWD);
 6. Antiquities Code Review (THC); and
 7. State-Owned Land-lease on Easement (GLO).



404 Permit and Wetlands Mitigation

- Regulatory Authority:
 - Rivers and Harbors Act 1899;
 - Marine Protection Research and Sanctuaries Act of 1972; and
 - Clean Water Act § 404.
- Activities Regulated by USACE Permits:
 - Dams or dikes in navigable waters;
 - Other Structures in navigable waters;
 - Excavation, dredging or disposal activities in navigable waters; and
 - Activities that alter or modify the course, condition, location, or capacity of a navigable water.



404 Permit and Wetlands Mitigation

➤ Criteria Considered in Permitting:

- Public interest;
- Effect on wetlands;
- Fish and wildlife;
- Water quality;
- Historical, cultural, recreational values;
- Effects on limits of the territorial sea;
- Property ownership;
- Compliance with coastal zone management program;
- Marine sanctuaries;
- Federal, state, and local requirements;
- Safety of impoundment structures;
- Floodplain management;
- Water supply and construction;
- Energy conservation and development;
- Navigation;
- Environmental benefits; and
- Mitigation.



404 Permit and Wetlands Mitigation

➤ Permitting Process:

- Nationwide Permits:

- ❖ All or a portion of a project may fall under a general permit of the USACE;

- ❖ Types of activities regulated by the NWP:

- Maintenance;
- Survey activities;
- Utility line activities;
- Bank stabilization;
- Minor dredging;
- Maintenance of existing flood control facilities;
and
- Stormwater management facilities.



404 Permit and Wetlands Mitigation

- ❖ May require a pre-construction notice to the USACE; and
 - ❖ Must follow the requirements of the NWP.
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- Individual Permits:
 - ❖ Application;
 - ❖ 401 Water quality certifications;
 - ❖ Public notice; and
 - ❖ Letters of permission.



404 Permit and Wetlands Mitigation

- Adverse Impacts on Wetlands:
 - USACE and EPA – Joint Rules 33 CFR 325 and 332; 40 CFR 230;
 - Required to avoid and minimize adverse impacts to wetlands;
 - Unavoidable impacts require compensatory mitigation;
 - Compensatory mitigation:
 - ❖ Restoration;
 - ❖ Creation;
 - ❖ Enhancement; and
 - ❖ Preservation.
 - Mechanisms:
 - ❖ Permittee-responsible mitigation;
 - ❖ Mitigation banking; and
 - ❖ In-lieu fee mitigation.



Endangered Species Requirements

- ESA § 9 Prohibitions:
 - It is unlawful to “take” an endangered species of fish or wildlife.
- ESA § 4(d) Prohibitions:
 - USFW may extend the prohibitions to threatened species.
- To “take” a species includes to harass, harm, pursue, hunt, shoot, and also means undertaking other activities that indirectly affect listed species.
 - Ex. Significant habitat modification.



Endangered Species Requirements

- Authorizing an incidental take:
 - Addresses unintentional take of a listed species incidental to an otherwise lawful activity;
 - § 7(a)(2) addresses federal projects;
 - § 10(a)(2) allows the USFW to issue an incidental take permit if the entity agrees to abide by a habitat conservation plan and other constraints suggested by the USFW; and
 - The ITP and HCP has assurances from the USFW through the “No Surprises” regulation. With this, the entity knows that the resources committed cannot be unilaterally increased by the USFW.



TPDES Construction General Permit TXR150000

- Authorizes discharges of stormwater runoff associated with small and large construction sites;
- Covers construction where 1 or more acres of land is disturbed;
- If more than 1 but less than 5 acres – small construction site:
 - Implement stormwater pollution prevention plan (SWP3);
 - Post site notice; and
 - Submit site notice to MS4 operator.
- If more than 5 acres – large construction site:
 - Implement SWP3;
 - Submit notice of intent to TCEQ; and
 - Submit notice of intent to MS4 operator.



Antiquities Code Review

➤ General Information:

- Texas Natural Resources Code Chp. 191; and
- Texas Historical Commission.

➤ Regulatory Requirement:

- Construction on state or local land;
- Notice to the THC is required so that the commission may determine if:
 - ❖ A historically significant archeological site is likely to be present at the project location;
 - ❖ Action is needed to protect the site; and
 - ❖ An archeological survey is necessary.
- 30 day window to make assessment; and
- For cities, counties, and special districts (drainage districts), advanced review is required for 5 acre area, or disturbs 5,000 cubic yards.



Water Rights

- Texas Water Code § 11.021:
 - The water in every river, stream, lake, bay is property of the state.
- Texas Water Code § 11.121:
 - No person may appropriate any state water or begin the construction of any work designed for the storage, taking, or diversion of water without first obtaining a permit from TCEQ.
- Whether a water right is required will depend on the type of project:
 - On-channel; and
 - Storage/diversion.



Marl, Sand, Gravel, Shell, and Mudshell Permits (TPWD)

- If the stream is perennial or is more than 30 feet wide, the state claims the bed and the sand and gravel is state-owned;
- No person may disturb or take marl, sand, gravel, shell, or mudshell under the management and protection of TPWD;
- General Permit:
 - Available for disturbances of less than 1,000 cubic yards.
- Individual Permits:
 - Subject to notice and hearing; and
 - Available for 3 years.





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