



STATE REPRESENTATIVE  
LYLE LARSON

DISTRICT 122

December 4, 2019

The Honorable Ken Paxton  
Office of the Attorney General  
Attention: Opinions Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

RQ-0316-KP  
FILE # ML-48657-19  
I.D. # 48657

RE: Request for an Opinion

Dear General Paxton:

As Chairman of the House Natural Resources Committee and pursuant to the requirements of Section 402.042(c)(2) of the Texas Government Code, I respectfully request your formal written opinion on the following question raised in the attached letter addressed to me from Gattis Law Firm, PC on behalf of the Upper Brushy Creek Water Control and Improvement District: **Does the City of Austin have the authority to enforce its development ordinances on the dam building activities of the Upper Brushy Creek Water Control and Improvement District where these activities occur within its extraterritorial jurisdiction or within its city limits, or are such activities specifically and preemptively regulated by state and federal authorities?**

Please see the attached document, which includes supporting information as well as documentation of the applicable statutes. Should you need more information, please do not hesitate to contact Shannon Houston in my office at 512-463-0802 or [shannon.houston\\_hc@house.texas.gov](mailto:shannon.houston_hc@house.texas.gov).

Thank you in advance for your timely consideration of this matter and for your service to our state.

Sincerely,

  
Lyle Larson

**Upper Brushy Creek Water Control & Improvement District  
Request for Attorney General Opinion**

The Upper Brushy Creek Water Control and Improvement District (the "District"), organized under the provisions of Section 59 of Article XVI of the CONSTITUTION OF THE STATE OF TEXAS, is operated pursuant to Chapter 51 of the TEXAS WATER CODE with regulatory oversight from the Texas Commission on Environmental Quality ("TCEQ"). The building and rehabilitation of flood control and prevention facilities is a highly regulated activity. In fact, the District's activities regarding the design, construction, reconstruction, modification, enlargement, rehabilitation, alteration, or repair of a dam is specifically regulated by the Texas Commission on Environmental Quality pursuant to Title 30, Part 1, Chapter 299 of the TEXAS ADMINISTRATIVE CODE.

The District is responsible for operation and maintenance of 23 flood control structures within the Upper Brushy Creek watershed in the Brazos River Basin of Williamson County, Texas. Most of the dams are located around the cities of Austin, Round Rock, Leander, Cedar Park and Hutto. The District was originally a part of the Brushy Creek Water Control and Improvement District No. 1 of Williamson and Milam Counties. This original district, created in 1957, served as the local sponsor for the U.S. Department of Agriculture-Soil Conservation Service's construction of 46 dams within the Brushy Creek watershed. Built originally as low-hazard dams in rural areas at the time of construction, these structures are now in rapidly-developing areas and have a high-hazard risk classification.

Since 1957, the Upper Brushy Creek Water Control and Improvement District and its predecessor district have effectively managed the 23 dams in its jurisdiction. All of the District's 23 dams were constructed between 1959 and 1967. Beginning in the 1980s, federal and state laws

were enacted that required significantly more stringent design standards for dams to protect public safety and property.

In 2000, the District completed an assessment of its dams and began developing a dam safety program to satisfy state dam safety rules. The state's dam safety rules allowed for a variance to the Probable Maximum Flood (PMF) design criterion if dam owners can prove that economic and physical limitations prevents them from complying, and that they are capable of protecting the public's safety. The 2000 study estimated it would take nearly 30 years to structurally upgrade all of its dams to safely pass the PMF at a cost of \$65-98 million.

In November 2001, voters approved splitting the original WCID into two separate districts. In May 2002, voters in the newly formed Upper Brushy Creek WCID authorized an ad valorem tax of up to 2 cents per \$100 of property valuation to fund a Dam Safety Program for the District's 23 dams. The purpose of the District's Dam Safety Program is to upgrade the existing dams to these newer, more stringent State design and safety regulations.

Faced with limited economic resources and a sense of urgency in addressing public safety, the District adopted the following project approach:

- Implement the Dam Safety Program using a variance of the existing dam safety rules requiring all high-hazard dams to safely pass 100% of the PMF. In May 2003, the Texas Commission on Environmental Quality ("TCEQ") granted the District the first-ever variance allowing District dams to pass 50% PMF, with conditions.
- Upgrade the high hazard dams to safely pass the 50% PMF and install a flood monitoring system at each dam per the approved variance.

- Complement structural upgrades by developing emergency action plans, formal operation and maintenance programs, formal instrumentation and monitoring programs, flood monitoring systems, dam inspection programs, and public education.
- Establish a program to modernize all of the District's dams.

In January 2007, TCEQ published new "Hydrologic and Hydraulic Guidelines for the Design of Dams in Texas." The Guidelines present standards and acceptable procedures for the hydrologic and hydraulic analysis of existing dams. One of the most significant chapters is related to the determination of the design flood precipitation and, more specifically, to the temporal distribution of the rainfall. Basically, this guidance document provided new assumptions for how fast the Probable Maximum Precipitation (PMP) falls during a storm and can change the magnitude of the probable maximum flooding events.

The District re-evaluated all of its dams using the new hydrologic design criteria to determine the potential impact to the Dam Safety Program, including the five dams it upgraded to 50% PMF since the Fall of 2003. New models indicated that the new temporal distribution reduced the PMF in the District's dams. In fact, the reduction was significant enough that the District modified the program approach to provide 100% PMF protection to almost all dams. Further, even though the dams will ultimately meet the state design criteria and not utilize the variance from the dam safety rules, the District continues to maintain and operate the flood monitoring systems at each dam for the benefit of the local jurisdictions and general public.

This District has continued its modernization of dams under its jurisdiction to protect public safety and property and is currently working on the design for Dam #8 modernization as well as continuing to evaluate other high risk areas in the District in need for protection. Since 2016, the District's representatives met with City of Austin officials and other staff members on several occasions to inform the City of the District's activities and plans within the City of Austin's city limit, extraterritorial jurisdiction, or limited

purpose annexation areas. In 2018, at City of Austin Staff's urging and in an attempt to give clarity to the City's staff and to answer any questions the City's staff may have had regarding the pending projects, the District submitted a Site Development Plan Application to the City of Austin regarding the upgrade of Dam #8. It was then that the District became aware that City of Austin staff members believe that the District is required to perform its dam design, construction, and rehabilitation activities under the rules, regulations, ordinances and/or development codes adopted by the City. The District vehemently disagrees and believes the District's activities of construction or rehabilitation of dams under its control does not fall under the regulatory control or permitting process of the City of Austin. In fact, such activities are specifically regulated by the Texas Commission on Environmental Quality pursuant to Title 30, Part 1, Chapter 299 of the TEXAS ADMINISTRATIVE CODE.

Upper Brushy Creek Water Control and Improvement District seeks clarification as to whether its dam building activities are specifically and preemptively controlled by State and Federal Authorities or whether it must also meet the burdensome and expensive City of Austin's requirements to obtain a Site Development Plan and/or Permit from the City and also comply with the City's "rules, regulations, ordinances, and/or codes regarding "development" as it has to do with the District's dam building activities. The District does not dispute that it would be required to follow a municipalities rules and regulations when conducting activities such as building an office building or other such developmental actions but seeks clarification that its "dam building activities" in designing, constructing, reconstructing, modifying, enlarging, rehabilitating, altering, or repairing of a dam is not so regulated.