

Public Right of Use for Texas Waterways – by Sabrina Hauser

As you will quickly learn, TCEQ is legislated to follow the rules of the [Texas Water Code](#) and [Texas Administrative Code, Title 30](#). Texas government deems all waters of the state as the States' personal stomping ground to do with it whatever they want. As long as the developers meet the letter of the law in terms of administrative and technical requirements as dictated in TCEQ regs, and TAC, regardless if it is on your public property, your water quality & quantity, and wells WILL be affected.

I've coined the new term, 'the FLINT affect'.... As you will read below, if a person goes onto another persons' land to use a public waterway without permission, it is deemed as trespassing, but our good ole government can and will use your waterway on your public property to transport waste water, and can do so without telling you.

Unfortunately, cities and counties have little input into this PRIOR to TCEQ approval. They can essentially only address after the fact when there is an environmental catastrophe. I was told that if the flood waters that include waste sludge enter onto my road and get drug into my business and grape vine watering, then the county will intervene and maybe fine the offenders REALLY!~ (how long will that take and who is responsible for my lost sales... i can only recoup if i take the supposed offenders to court!...the onus to prove who the offenders are and financially salvage damage is always upon the business owner!~)

Thus TCEQ is legislated to approve the dumping of waste water and other crap into the waters of the state. (Do Not be misled into the argument that the disposal waste water is meeting requirements and is therefore non-harmful!. The question should always be...**is the disposal waste water- potable?...**meaning will they drink it and feed it to their kids? If you do not receive a resolute and staunch response that they will drink it and feed it to their kids, then all disposable waste water is NOT GOOD!

The writer of this NB HZ article appears to be alluding to the issue related to Terrell Graham and his family's extended court battle with the developer DBJH (Johnson Ranch off 1863 and 281 - google it and you will see the battles they have had to fight) and TCEQ; whereby the TCEQ determined that a 'dry swale' on his property to be a 'waterway'. Many of us attended the hearing and it was a farce...how can a 'swale' that fills with water only during heaving rains be deemed a 'navigable' waterway....but they did!!! (Can you say payola!)

As such, there is a need for Texans to develop and institute a groundswell of citizens to write and vote for CHANGE so as to limit and protect Texans' land that will be used in the future and to limit Texas legislation from such groups as TCEQ from overtaking a landowners' swales/streams/rivers and the rights to swales/streams/rivers for the purpose of development!

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This article is not a substitute for the advice of an attorney.

Two weeks ago, I [wrote about a New Mexico Attorney General opinion](#) dealing with the right of the public to fish on streams running across private land in New Mexico. Today, we will look at this issue under Texas law.



The Question

Does someone in Texas have the right to fish (or canoe, kayak, etc.) on a stream or other body of water flowing across private property?

The Law Regarding Ownership of Streambeds

The answer to this question depends on whether the stream is “navigable.” Under Texas law, the streambed and minerals underlying a navigable stream are the property of the State. Conversely, the streambed and minerals underlying a non-navigable stream are the property of the private landowner. **It is important to note, however, that all water in a watercourse—whether navigable or not—is owned by the State of Texas.**

Essentially, the ability of the public to use the stream depends upon who owns the bed. If the state owns the streambed (meaning that the stream is navigable), the public has the right to use the bed and banks and the adjacent landowner may not prevent persons from doing so. *See Texas Water Code Section 11.096.* If, on the other hand, the private landowner owns the streambed (meaning that the stream is classified as non-navigable), the public has no right to use the bed and banks and the landowner may erect barriers to prevent the public from doing so.

What Makes a Stream “Navigable?”

Because both ownership and the public’s right to use the streambed depends upon classification, it is important to understand the test for whether a stream is considered to be “navigable.” In Texas,

there are two separate navigability tests and a stream meeting either of the two is considered to be navigable.

The first test is to determine if a stream is “navigable in fact” and looks to determine whether the river or stream can serve as a “common highway for trade and travel” in its natural and ordinary condition. If the answer is yes, it is navigable in fact and the streambed is owned by the state. Courts interpreting this definition have considered a number of factors, including whether commercial or pleasure boats could travel along the waterway and even whether logs could float down the waterway.

Courts will look to determine if a stream is “navigable in law” under the second test. The “navigable in law” test is based upon a Texas statute and looks at the size of the waterway. If the streambed maintains an average width of 30 feet from the mouth up, it is considered “navigable in law.” *See* Texas Natural Resources Code Section 26.001(c). This distance refers to the entire bed, not the portion where water may be flowing. Although the court is the final decision maker as to whether a stream is navigable in fact or in law, state agencies, including the TCEQ and the General Land Office often make these determinations as part of their rulemaking authority.

Access to the Stream

Like the New Mexico Attorney General concluded under New Mexico law, Texas law also prohibits the public from entering private property in order to access a public streambed. A person who does so without permission from the private landowner may be guilty of trespass. For example, if a boater is able to launch his boat from the highway and then travel down a stream crossing private property, he has committed no criminal or civil wrong. If, however, the boater drove his pick up across private property to launch his boat, he could be guilty of trespass.

How Much of the Banks May Be Used?

On a navigable stream, the public has the right to use the streambed and the banks of the river only up to the point where public ownership ends and private ownership begins. This is known as the gradient boundary line, which is defined as the line located midway between the lower level of the flowing after that just reaches the cut bank and the higher level just to the top of the bank. This definition is complicated and the line will differ for each property.

Additional Information

Here are a few helpful resources on this topic that provide additional information.

[Texas River Guide by Texas Parks & Wildlife](#)

[River Rights by Lou Ellen Ruesink](#)

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