

July 15, 2024

Texas Department of Transportation  
Tyler District  
2709 W. Front St  
Tyler, TX 75702

RE: Fence on FM 1667 in Henderson County, Texas

Greetings Mr. Vernon Webb,

This correspondence is in regards to an ongoing violation taking place within TxDOT right of way (ROW) along FM 1667 in Henderson County. The violation, which became apparent to the public in February of 2022, infringes rules of the ROW, currently demonstrates an unaddressed adherence to compliance, and is directly associated with ongoing environmental impacts which have been identified by the US Army Corps of Engineers (USACE; referencing Project Number SWF-2022-00119) and the Texas Parks & Wildlife Department (TPWD; Kills and Spills Team Event ID: 2022A12080). Therefore, the TxDOT divisions of Right of Way, Compliance, Environmental Affairs, and Government Affairs are being copied regarding this pressing matter.

The violation mentioned specifically addresses the placement of fill and fencing, both unauthorized, on TxDOT ROW along a state highway. Placement of fill within a floodplain or navigable stream, which are both circumstantial within and along this specific TxDOT ROW along FM 1667, is generally a prohibited activity without permits. Placement of fill or fencing on a ROW without permission is not allowed. As opined in *Texas Attorney General Opinion S-107*, placement of fencing within a highway ROW to prevent access to a navigable stream and its bed or banks, is not allowed. Because TxDOT had instructed the landowner to remove the fencing from the ROW on September 28 of 2022 with a 30-day deadline facing enforcement action, I am holding TxDOT accountable as the responsible party for allowing this egregious action to continue 626 days past the deadline date.

Penalties may be extensive from such a violation at the state, federal, and local level. The State of Texas prohibits such activities under Penal Code Section 42.03, Water Code Section 11.096, Parks and Wildlife Code Section 90.008, and Natural Resources Code Section 51.302. Provisions of Section 404 of the Clean Water Act are also applicable in this unaddressed adherence of compliance. Local floodplain ordinance in Henderson County prohibits such alterations to its floodplains, as made at this violation location, regardless of the presence of highway ROW, without proper permitting.

**Background:**

In February of 2022, an adjacent landowner to The Cutoff of the Trinity River (also known as The Cutoff, Creslenn Ranch Lake) illegally blocked access to the popular, state-owned waterway by placing unauthorized fill (referencing USACE Project Number SWF-2022-00119) and erecting illicit fencing within TxDOT ROW along FM 1667. Local citizens and state law

enforcement observed contractors dredging the waterway and filling parts of waterway and TxDOT ROW with local, and foreign fill, followed by the erection of steel-pipe fencing intended on preventing current recreational users of The Cutoff from accessing the waterway via the ROW as had been performed for years. During the unauthorized construction operation, USACE issued the landowner and operator a cease-and-desist letter, and construction was rushed via a 24/7 operation which concluded before the enforcement deadline date featured on the letter. A fish kill (TPWD Kills and Spills Team Event ID: 20222A12080) was identified to have occurred due to this unauthorized activity and lack of compliance which were made evident at the TxDOT ROW, Waters of the US, and at adjacent private property. Since then, zero actions have been made by TxDOT to effectively cure the lack of compliance at the violation location.

**Location:**

- Within 200 feet of the dead-end of FM 1667, Henderson County.
- 32° 5' 25.0074"N 96° 4' 25.356"W
- Adjacent impacted waterway to the immediate north and south is the Cedar Creek portion of The Cutoff of the Trinity River, a navigable stream according to property surveys.
- Adjacent landowner property belongs to Philip Surls of Iron River Ranch II LLC as Property ID 231,695 on the Henderson County CAD (Legal description: TR 1 AB 1086 T N JONES SUR, TR 1 (PT 1680.49 AC TR) (RE:TR 3, FN)). This same landowner is responsible for the mentioned construction operation and fish kill.
- The limits of the site are situated within the Creslenn Ranch United States Geological Survey topographic quadrangle map (Creslenn Ranch 7.5' Quadrangle, 1981).
- The entirety of the violation location, and the portions of TxDOT ROW and FM 1667 at the violation location, are within the 1% Annual Chance Flood Hazard (Flood Zone A – Special Flood Hazard Area), per the Federal Emergency Management Agency.
- The violation location is associated with several classified wetlands, including the former stream channels of Cedar Creek and the Trinity River.

**Impedances to the rights of citizens, concerning the violation:**

- Rights to fish on public, state-owned waters impeded by the fencing due to TxDOT's lack of compliance enforcement.
- Rights to navigate vessels on navigable stream impeded due to TxDOT's lack of compliance enforcement.
- Rights to hunt on navigable stream impeded due to TxDOT's lack of compliance enforcement.

**Impedances to the enforcement of law, concerning the violation:**

- Enforcement of state laws within the Texas Parks and Wildlife Code are impeded due to TxDOT's lack of compliance enforcement as Game Wardens with the Texas Parks & Wildlife Department are unable to access the state property.
- Enforcement of federal laws within the Code of Federal Regulations are impeded due to TxDOT's lack of compliance enforcement as the Law Enforcement Authority within the US Fish & Wildlife Service is unable to access Waters of the US on public property.

### **Native Flora and Fauna of Concern:**

The US Fish and Wildlife Service 'Information for Planning and Consultation' (IPaC) program was parsed as it provides Threatened and Endangered species distribution and proposed listings. Further information can be found on the ECOS website.

-Bald Eagle, Tricolored Bat, Piping Plover, Alligator Snapping Turtle (found in the stream), Texas Fawnsfoot (found in the stream), and Texas Heelsplitter (found in the stream) are but a few of the species that are protected at either the Federal, State or both levels of government within this portion of the Trinity River watershed where the violation is located.

-Water quality impairments as a result of the illegal fill placed within TxDOT ROW at the violation location are very likely taking place downstream in locations that are associated with Waters of the US, riverine habitat of the old Trinity River channel, and adjacent wetlands and waterfowl habitat that divert water from The Cutoff.

### **Cure:**

Large amounts of unauthorized, locally sourced fill and foreign fill in addition to an authorized fence now exist on TxDOT ROW along FM 1667 and the Cedar Creek portion of The Cutoff of the Trinity River. These items not only violate TxDOT ROW rules and several pieces of law mentioned within this letter, but also may constitute water quality violations that may be addressed by state and federal environmental agencies. Local citizens have identified the source of foreign fill at the violation site which includes portions of a deconstructed airstrip, circa-1950s, notably in operation before the banning of dichloro-diphenyl-trichloroethane (DDT). This potential biological hazard may affect natural habitats and species downstream of the violation location. In addition, hazards in such fill will change the chemical properties of the nearby Waters of the United States. The watershed outfall downstream is the Trinity River, a 303d listed impaired waterbody.

The cure for this violation must include an immediate removal of unauthorized items placed within the ROW to restore public access and potential cleanup of environmental hazards or mitigation. An ultimate cure for this will include an exploration of all legal avenues of prevention and prosecution for such a violation. This will ensure that the poor stewardship and lack of oversight evidenced here will never take place within this vicinity or similar vicinities again. Texans expect our most visible state agencies to have the foremost adherence to the law and adherence to their own compliance rules. Citizens and law enforcement in Texas also expect such agencies to respect the rights and needs of accessing public property such as The Cutoff or any other navigable stream through preestablished legal means. This ongoing, unaddressed adherence to compliance is unlawful. The fact that this remains unaddressed is setting a new precedent for unlawful activity to take place. This is wrong, and it's thoroughly embarrassing for the State of Texas.

Respectfully,

/s/ Alexander Neal

Alexander Neal

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/s/ Ryan Buege

Ryan Buege  
Backcountry Hunters & Anglers  
Texas Chapter

cc: Kyle Madsen, Right of Way Division Director, TxDOT  
Trent Thomas, Government Affairs Director, TxDOT  
Doug Booher, Environmental Affairs Division Director, TxDOT  
Parsons Townsend, Compliance Division Director, TxDOT