

**SOAH DOCKET NO. 582-22-02856  
TCEQ DOCKET NO. 2022-0326-MWD**

<b>APPLICATION OF RESTORE THE GRASSLANDS LLC AND HARRINGTON/TURNER ENTERPRISES, LP (TPDES PERMIT NO. WQ0016003001)</b>	§ § § § §	<b>BEFORE THE STATE OFFICE  OF  ADMINISTRATIVE HEARINGS</b>
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**CITY OF MURPHY’S EXCEPTIONS TO PROPOSAL FOR DECISION**

**I. Introduction**

The City of Murphy (“Murphy”) files the following exceptions to the Administrative Law Judge’s (“ALJ”) Proposal for Decision (“PFD”) in this case. While not taking exception to the PFD’s recommendation on the Regionalization issue (Issue E), Murphy believes that, contrary to the PFD, the preponderance of the evidence supports its position on issues relating to water quality (Issues F, G and K); wildlife (Issue A); accuracy and completeness of the application (Issue H); and whether the applicants are legal entities (Issue I).

**II. Water Quality Issues (Issues F, G and K)**

Copper and Zinc. The PFD ignores the expert opinions of Mr. Pasch solely on the grounds that the Texas Surface Water Quality Standards (“TSWQS”) Implementation Procedures (“IPs”) only require copper and zinc limits for permitted wastewater flows of 1.0 MGD or more. However, Mr. Pasch testified that due to the widespread use of copper and zinc in new construction in fast-growth areas like the cities of Murphy and Parker, copper and zinc have become problems even for conventional wastewater plants like the proposed plant as they are simply not designed to remove copper and zinc which have toxic effects on aquatic life (Exh. CP-3, p. 9, lines 3 – 10). TCEQ is required to ensure the protection of all waters in the state in its wastewater permitting activities regardless of whether or not its IPs require it only for larger size wastewater plants. See Tx. Water Code Secs. 26.027 and 26.121 generally mandating the TCEQ to take any and all actions

necessary to protect waters in the state. The PFD also cites the testimony of Ashley Broughton, but it is clear that Ms. Broughton only testified as the engineer who prepared the application, that she did not do any independent evaluation of the contested issues in this case, and that all her opinions about the technical issues in this case such as wildlife impacts, human health impacts, compliance with the Texas Surface Water Quality Standards and Antidegradation Policy, and regionalization were solely based on the opinions of TCEQ staff (Tr. Vol. 3, p. 554, line 21 – p. 557, line 24; Tr. Vol. 3, p. 564, line 5 – p. 565, line 19).

Total Dissolved Solids. As with the PFD's recommendation on copper and zinc, the PFD solely relies on the fact that the IPs do not require TDS limits for discharges less than 1.0 MGD and ignores Mr. Pasch's testimony that there would be a probable exceedance of the Texas Surface Water Quality Standard for TDS (i.e., salinity). TDS exceedances are a common problem for domestic wastewater treatment plants in Texas such as the nearby Muddy Creek wastewater plant which has been required to conduct a TDS source identification and reduction study to address elevated levels of TDS in its effluent (Exh. CP-3, p. 10, lines 17 – 21). In fact, Mr. Pasch used the procedures required under the IPs to determine whether a TDS permit limit is needed (Exh. CP-3, p. 11, lines 6 – 10; Exh. CP-3, p. 12, lines 1 – 10). Using TCEQ's IPs, Mr. Pasch calculated an appropriate TDS permit limit of 562 mg/l in the interim permit phase and 530 mg/l in the final permit phase (Exh. CP-3, p. 13, lines 1 – 5) to ensure that the Texas Surface Water Quality standard for TDS is not exceeded and that existing uses of Maxwell Creek are not impaired (Exh. CP-3, p. 13, lines 8 – 9). Without such a TDS limit in the permit, the freshwater organisms within Maxwell Creek will suffer stress as they try to process the much higher-than-existing concentrations of TDS in the effluent and such TDS levels will likely eliminate microorganisms adapted to existing conditions (*Id.*). Because the Applicants' commonly used complete mix – activated sludge

proposed wastewater plant cannot remove TDS from wastewater, a wastewater treatment system using reverse osmosis, distillation, precipitation or membrane filtration is needed to avoid a violation of the Texas Surface Water Quality Standard antidegradation policy and to meet permit limits derived under the IPs (Exh. CP-3, p. 14, line 15 – p. 15, line 4).

The E.D. did not provide testimony or evidence to address or impeach this testimony of Chris Pasch but merely relied on the fact that the IPs do not require a TDS limit for discharges of less than 1.0 MGD. However, TCEQ is required to ensure the protection of all waters in the state in its wastewater permitting activities regardless of whether or not its IPs require it only for larger size wastewater plants. See Tx. Water Code Secs. 26.027 and 26.121 generally mandating the TCEQ to take any and all actions necessary to protect waters in the state.

Chlorine and WET Testing. In the same fashion as it addressed copper and zinc and TDS, the PFD solely relies on the fact that the IPs do not require dechlorination for discharges of less than 0.5 MGD nor do they require whole effluent toxicity testing (“WET”) testing for discharges of less than 1.0 MGD. However, Mr. Pasch testified that the residual levels of chlorine in the wastewater effluent as allowed under the draft permit (1.0 mg/l to 4.0 mg/l) will likely cause an immediate negative impact on aquatic life in Maxwell Creek (Exh. CP-3, p. 17, lines 15 – 20). Therefore, in order to protect aquatic life in Maxwell Creek, the draft permit should require removal of toxic levels of chlorine through dechlorination (Exh. CP-3, p. 17, lines 20 – 22), or alternatively, the disinfection process should be changed to UV disinfection (Exh. CP-3, p. 18, line 7). Such a permit condition would be consistent with a similar TCEQ wastewater permitting case involving the City of Dripping Springs’ wastewater discharge flowing to Onion Creek which, like Maxwell Creek, has a high aquatic life use classification (Exh. CP-3, p. 17, line 25 – p. 18, line 8). Because the proposed wastewater plant has a significant potential to exert toxicity in Maxwell

Creek, the permit should include a requirement to conduct acute and chronic WET testing to ensure that the high aquatic life use for Maxwell Creek is not degraded (Exh. CP-3, p. 18, lines 10 – 20).

The PFD's approach of relying solely on the IPs without considering any expert testimony on water quality impacts subverts TCEQ's antidegradation policy and the environmental risks of failing to include a dechlorination requirement for this particular case. TCEQ is required to ensure the protection of all waters in the state in its wastewater permitting activities regardless of whether or not its IPs require it only for larger size wastewater plants. See Tx. Water Code Secs. 26.027 and 26.121 generally mandating the TCEQ to take any and all actions necessary to protect waters in the state.

Dissolved Oxygen. The PFD discounts the water quality testimony of Murphy's expert Chris Pasch on dissolved oxygen ("D.O.") and adopts the opinions of TCEQ water quality modeling witness Gunnar Dubke despite the fact that Mr. Dubke acknowledged that Mr. Pasch correctly pointed out TCEQ's original failure to model the existence of pools downstream of the discharge point on Maxwell Creek (Exh. CP-3, p.7, lines 12 – 17). This failure to account for the pools in Maxwell Creek meant that TCEQ underestimated the extent to which D.O. would be depleted in the creek because in pooled areas, D.O. concentrations decrease due to slowed velocities which provides biological processes additional time to consume D.O. (Exh. CP-3, p. 7, lines 19 – 28).

In an attempt to rectify this error, Mr. Dubke re-ran the QualTx model to account for the bathymetry of Maxwell Creek and the presence of pools in Maxwell Creek. Although Mr. Dubke asserted that the results of the re-run model show the effluent limits in the draft permit would maintain the D.O. criterion of 5.0 mg/l for Maxwell Creek, he acknowledged that the re-run model indicated an "observable difference" in the predicted D.O. levels in Maxwell Creek from TCEQ's

original model run (Exh. ED-GD-1, p.9, lines 19 – 23). Mr. Dubke acknowledged that even though actual in-stream sampling of Maxwell Creek showed naturally existing DO levels of 11.4 mg/l, 8.7 mg/l and 9.4 mg/l at three locations downstream of the proposed outfall, he did not use this site-specific data in his modeling exercise (Tr. Vol. 3, p. 741, line 17 – p. 742, line 3). Mr. Dubke further admitted that his D.O. Modeling Review Checklist includes hydraulic coefficient factors and model results only for one of the five reaches (Reach 1) for which site-specific data is available and that this is critical information that is missing from his memo (Tr. Vol. 3, p. 748, line 23 – p. 749, line 19). As it is, Mr. Dubke’s re-run model projects a D.O. level in Maxwell Creek of only 5.08 mg/l – a scant 0.08 mg/l above the minimum required D.O. level of 5.0 mg/l (Exh. ED-GD-5) which is clearly a substantial degradation of naturally existing DO levels. In light of these weaknesses in Mr. Dubke’s re-run model, the preponderance of the evidence on this issue clearly favors Mr. Pasch’s testimony.

Phosphorus. In connection with Issue G on Antidegradation Review, the PFD summarizes the relevant expert testimony of Mr. Pasch and the E.D.’s witness Jenna Lueg, but the ALJ does not state why Ms. Leug’s testimony should be accorded greater weight than Mr. Pasch’s testimony. Mr. Pasch provided extensive expert testimony that, based on the measured site-specific “non-detectable” levels of orthophosphate in Maxwell Creek, even a small increase in orthophosphate in wastewater plant effluent will change the trophic status of the creek from oligotrophic (a stream suitable for organisms adapted to low nutrient levels) to mesotrophic or even eutrophic (Exh. CP-3, p. 15, lines 11– 28; CP-3, p. 16, lines 2 – 14). Because orthophosphate is the major portion of total phosphorus, Mr. Pasch estimates that the wastewater effluent discharged from the proposed wastewater plant will result in a tenfold increase in orthophosphate concentrations. (Exh. CP-3, p. 16, lines 12 – 14).

Even though the E.D. is now recommending a total phosphorus limit of 0.5 mg/l, there is nothing in the Application or the evidence in this case showing that a 0.5 mg/l phosphorus limit will be protective of Maxwell Creek (Exh. CP-3, p. 15, lines 21 – 28). Even under a total phosphorus permit limit of 0.5 mg/l, the proposed wastewater discharge will cause significant degradation of the trophic state of Maxwell Creek which will certainly be more than de minimis (Exh. CP-3, p. 17, lines 5 – 8). In Mr. Pasch’s opinion, a permit limit of 0.1 mg/l for total phosphorus is conservatively needed (Exh. CP-3, p. 17, lines 10 – 11).

Testifying for the E.D., Ms. Lueg only vaguely stated that her recommended permit limit of 0.5 mg/l “should help prevent the excess accumulation of algae in the receiving waters by reducing the nutrient load in the water body” (Exh. ED-JL-1, p. 11, lines 3 – 5), but this does not address the crucial fact that site-specific data for Maxwell Creek showed non-detectable levels of orthophosphate. Ms. Lueg’s simple guesswork that 0.5 mg/l will not result in degradation of Maxwell Creek is insufficient to counter the expert opinion of Chris Pasch on the appropriate permit limit for total phosphorus.

### **III. Wildlife Impacts Issues (Issue A)**

In the PFD, the ALJ concludes that Dr. Morrison’s concerns about the adverse effects of the wastewater discharge on various species were for the most part not associated with effluent quality that would violate the draft permit (e.g., pH outside the permitted range 6.0 to 9.0 standard units; DO below the permitted minimum of 4.0 mg/l). But in his expert testimony, Dr. Morrison expressed his concern that pH higher than 8.0 standard units has been shown in several scientific studies to increase mortality in various stages of amphibian development (Exh. MLM-3, p. 10, line 25 – p. 11, line 7). The pH levels allowed by the draft permit of between 6.0 to 9.0 standard units would also have potential adverse impacts on freshwater fish and invertebrates. Dr. Morrison also

testified that the draft permit's minimum DO level of 4.0 mg/l is inconsistent with the "high aquatic life use" classification as various studies have shown that any DO level in Maxwell Creek lower than 4 ppm (= mg/l) starts to substantially and negatively impact amphibians (Exh. MLM-3, p. 12, lines 12 – 26). Any conditions in Maxwell Creek that could cause a lowering of DO (e.g., creation of summertime algae blooms in pools or plant operational deficiencies) could easily bring the discharged effluent to a concentration of lower than 4 ppm (Exh. MLM-3, p. 12, lines 24 – 26).

The PFD dismisses these concerns because "Dr. Morrison did not testify that any of the amphibian, fish or invertebrate species whose sensitivities to pH or DO levels he discussed are present in Maxwell Creek." (PFD at p. 19). But Dr. Morrison's testimony described adverse impacts on amphibians, freshwater fish and invertebrates generally and in this context he was not purporting to express an opinion about particular Maxwell Creek species (as he did with respect to the Alligator Snapping Turtle, the Whooping Crane, the River Otter and the Monarch Butterfly). Clearly, and without expert testimony, it may be reasonably presumed that there are amphibians, freshwater fish and invertebrates that exist within Maxwell Creek and the PFD's dismissal of Dr. Morrison's concerns simply because he did not testify that this wildlife exists within Maxwell Creek entirely misses the point of his testimony.

The PFD also finds some credibility weakness simply because Dr. Morrison did not calculate the distance downstream from the point of discharge that pH would be expected to remain above 8.0 standard units. But Dr. Morrison's testimony about adverse impacts on any amphibians, freshwater fish or invertebrates from a pH of 8.0 or higher is sufficient to demonstrate adverse impacts of the wastewater discharge on this wildlife without calculating a specific point on Maxwell Creek where pH would remain above 8.0 standard units and this is sufficient to rebut the presumption of no adverse impacts.

#### **IV. Application Deficiency Issues (Issue H)**

##### Status of Harrington/Turner Enterprises LP as Legitimate Co-Applicant and Co-Permittee.

The PFD concludes that, even though Harrington/Turner Enterprises LP (“HTE”) has no intention of acting as a co-permittee or doing anything required by the permit, it was obligated to apply for the permit. HTE’s sole role in this matter is as a landowner who is going to sell the land to the developer, and at no point will HTE have an ownership interest, or any other kind of interest, in the proposed development or the wastewater plant (Murphy Exh. 11, p.17, lines 1 – 24). Moreover, HTE will not be involved in the operation and maintenance of the wastewater plant (Murphy Exh. 11, p. 17, line 25 – p. 18, line 7) and will have no responsibilities whatsoever with respect to the wastewater permit or the treatment plant (Murphy Exh. 12, p. 37, line 20 – p. 38, line 11). Testifying as HTE’s representative, Ms. Turner admitted that she does not know anything about the wastewater treatment plant (Murphy Exh. 11, p. 68, lines 1 – 7). HTE has not even reviewed the draft permit (Murphy Exh. 11, p. 18, lines 12 – 16), and Margaret Turner admitted that she just signed the permit application for HTE without even reading the application (Murphy Exh. 11, p. 19, lines 5 – 19). Under these facts, the PFD’s conclusion that TCEQ rules require the agency to issue a TPDES permit to HTE is manifestly wrong as the TCEQ’s issuance of a TPDES permit to a particular person cannot be presumed to be a meaningless act.

The Falsely Sworn Attestation of Co-Applicant Harrington/Turner Enterprises LP. The facts show that HTE filed a sworn statement in the Application attesting under penalty of perjury that it vouched for the application as true and correct when in fact HTE had not even read the application nor done anything with respect to preparing the application. Yet the PFD shockingly characterizes this as a mere “inaccurate attestation” that “is not ideal” and concludes that the application was sufficiently accurate. This conclusion of the PFD is not supported by the law or



the facts as TCEQ Rules at 30 TAC §305.66 provide that a permit may be suspended or revoked for “*the permittee’s failure in the application or hearing process to fully disclose all relevant facts, or for permittee’s misrepresentation of relevant facts at any time.*” Moreover, the E.D.’s witness Alfonso Martinez testified that a possible remedy for filing such a sworn misrepresentation is to remand the case to the E.D. and return the application to the Applicants. (Tr. Vol. 3, p. 664, lines 11 – 22).

Therefore, the two options supported by the record of this case of admitted false attestation of the application is to either dismiss the application, or to return it to the E.D. for further review. Allowing a permit applicant to willfully and intentionally file a false attestation of the application directly compromises the integrity of TCEQ’s wastewater permitting process. There needs to be some form of accountability for such an egregious misrepresentation by the co-applicant HTE.

#### **V. Whether Co-Applicant HTE is a Valid Legal Entity (Issue I)**

The PFD acknowledges that at the time HTE filed its application, the charter and corporate privileges of HTE’s general partner, Harrington/Turner Enterprises Management, LLC (“HTEM”), had been forfeited for the prior nine years. The PFD further notes that the withdrawal of a general partner from a limited partnership requires winding up of the limited partnership unless within one year after such withdrawal, the remaining partners agree to continue the partnership or appoint a new general partner. However, the PFD improperly presumes without evidence that HTEM was properly reconstituted -- in effect putting the burden on Murphy to show that HTEM was not properly reconstituted, rather than putting the burden on HTE, as such burden should be placed, to show that HTEM existed as a valid corporate entity at the time it filed its application.

To the extent the evidentiary record does not show the date when HTEM’s corporate privileges were reinstated, the ALJ is entitled to take judicial notice of the Secretary of State’s

records which show that the date of HTEM's reinstatement was December 10, 2021 (see attached Exhibit 1 printout from the Secretary of State's website), a date well after the date that HTE filed its application at TCEQ.

Because HTE had no valid general partner on May 26, 2021 when HTE filed its application, HTE could not and did not exist as a valid limited partnership. A person ceases to be a general partner of a limited partnership upon termination or revocation of the general partner's certificate of formation. Tx. Bus. Org. Code § 153.155(a)(10)(B). Without a general partner, HTE itself did not exist as a valid legal entity when it filed the permit application and it is the burden of HTE to show how it was a valid legal entity at the time it filed its application.

## **VI. Summary and Conclusion**

As discussed in these closing arguments, the great preponderance of the expert evidence in this case on water quality and wildlife impacts favors the City of Murphy because the only party who presented qualified expert evidence to counter the opinions of Mr. Pasch and Dr. Morrison was the E.D. However, the attempts of the E.D.'s witnesses to address the detailed points made by Mr. Pasch and Dr. Morrison were cursory at best and mostly consisted of conclusory statements unsupported by any reasons addressing the specific concerns and opinions expressed by Murphy's experts. The E.D.'s reliance on compliance with the Texas Surface Water Quality Standards IPs is not determinative of whether waters in the state will be protected when expert testimony has been presented to the contrary.

There are also serious questions about whether HTE is a legal entity due to Margaret Turner's disavowal of the trusts that comprise HTE's general partner and because HTE's general partner did not exist as a legal entity at the time HTE filed the application. Further, the application contains a falsely sworn representation by HTE on the most important page of the application: the

certification page signed by HTE as co-applicant. For these reasons, the City of Murphy respectfully requests that the ALJ reconsider the PFD and modify it to address the points raised in these exceptions.

Respectfully submitted,

*/s/ Stephen C. Dickman*

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**ATTORNEY FOR CITY OF MURPHY**


### **CERTIFICATE OF SERVICE**

I certify that on May 17, 2023, the foregoing was Emailed to the below-listed parties:

*/s/ Stephen C. Dickman*

Stephen C. Dickman

<p><b><u>For the Applicant:</u></b>  Natalie B. Scott  Coats Rose, P.C.  Terrace 2  2700 Via Fortuna, Suite 350  Austin, TX 78746  Email: <a href="mailto:nscott@coatsrose.com">nscott@coatsrose.com</a></p>	<p><b><u>For the TCEQ Executive Director:</u></b>  Kathy Humphreys, Staff Attorney  Aubrey Pawelka, Staff Attorney  TCEQ, Environmental Law Div., MC-173  P.O. Box 13087  Austin, TX 78711-3087  Email: <a href="mailto:Kathy.Humphreys@tceq.texas.gov">Kathy.Humphreys@tceq.texas.gov</a>  Email: <a href="mailto:Aubrey.Pawelka@tceq.texas.gov">Aubrey.Pawelka@tceq.texas.gov</a></p>
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<p><b><u>For the City of Parker:</u></b>  Art Rodriguez  Messer Fort McDonald Law Firm  4201 W. Parmer Ln., Ste. C-150  Austin, TX 78727  Email: <a href="mailto:art@txmunicipallaw.com">art@txmunicipallaw.com</a></p>	<p><b><u>For the Permit Protestants:</u></b>  David G. Cabrales  Foley and Lardner  2021 McKinney Ave., Ste. 1600  Dallas, TX 75201  Email: <a href="mailto:dcabrales@foley.com">dcabrales@foley.com</a></p>
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<b>Form 801 (Revised 05/11)</b>	This space reserved for office use.
Submit in duplicate to: Secretary of State P.O. Box 13697 Austin, TX 78711-3697 512 463-5555 FAX: 512 463-5709 <b>Filing Fee: See instructions</b>	 <b>Application for Reinstatement And Request to Set Aside Tax Forfeiture</b>

1. The entity name is: HARRINGTON/TURNER ENTERPRISES MANAGEEMTN, LLC

The entity is a foreign entity that was required to obtain its registration under a name that differs from the legal name stated above. The name under which the entity is registered is:

2. The file number issued to the entity by the secretary of state is: 0800991011

3. The entity was forfeited or revoked under the provisions of the Tax Code on: 02/10/2012  
mm/dd/yyyy

4. The undersigned requests that the forfeiture or revocation of the entity be set aside, and certifies that:

a. The entity has filed each delinquent report that is required by chapter 171 of the Tax Code and has made payment for the tax, penalty, and interest imposed and that is due at the time of this application as evidenced by the attached tax clearance letter; and

b. On the date of forfeiture or revocation, the undersigned person was:

- an officer, director or shareholder of the above-named for-profit or professional corporation; or
- an officer, director, shareholder or member of the above-named professional association; or
- an officer, director, or member of the above-named nonprofit corporation; or
- a member or manager of the above-named limited liability company; or
- a partner of the above-named limited partnership; or
- a trustee or beneficial owner of the above-named statutory or business trust.

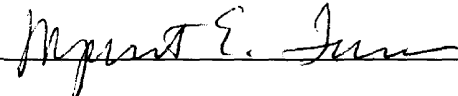
#### Additional Required Documentation or Filings

- Comptroller of Public Accounts Tax Clearance Letter
- Letter of Consent or Amendment to Certificate of Formation or Registration (Required when entity name is no longer available.)

#### Execution

The undersigned declares under penalty of perjury, and the penalties imposed by law for the submission of a materially false or fraudulent instrument, that the undersigned is authorized to make this request; that the statements contained herein are true and correct, and that tax clearance was not obtained by providing false or fraudulent information.

Date: 12/10/2021

BY: 

Signature of authorized person (see instructions)

MARGARET E TURNER

Printed or typed name of authorized person

TEXAS COMPTROLLER *of* PUBLIC ACCOUNTS

P.O. Box 13528 • AUSTIN, TX 78711-3528



December 10, 2021

HARRINGTON/TURNER ENTERPRISES MANAGEMENT, LLC  
3510 DUBLIN RD  
PARKER, TX 75002-6516

**TAX CLEARANCE LETTER FOR REINSTATEMENT\***

To: Texas Secretary of State  
Corporations Section

Re: HARRINGTON/TURNER ENTERPRISES MANAGEMENT, LLC  
Taxpayer number: 32037292581  
File number: 0800991011

The referenced entity has met all franchise tax requirements and is eligible for reinstatement through May 15, 2022.

MARIA SANTIBANEZ  
Enforcement - Dallas NW  
Field Operations - Enforcement  
(972) 792-5800

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*\*The reinstatement must be filed with the Texas Secretary of State on or before the expiration date of this letter. After this date, additional franchise tax filing requirements must be met, and a new request for tax clearance must be submitted.*

*You can file for reinstatement online at [www.sos.state.tx.us/corp/sosda/index.shtml](http://www.sos.state.tx.us/corp/sosda/index.shtml). Forms and instructions for reinstatement are available at [www.sos.state.tx.us/corp/forms\\_option.shtml](http://www.sos.state.tx.us/corp/forms_option.shtml) or by calling (512) 463-5555. This tax clearance letter must be attached to the reinstatement forms.*