

**TCEQ DOCKET NO. 2022-0326-MWD**

<b>APPLICATIONS BY HARRINGTON</b>	<b>§</b>	<b>BEFORE THE TEXAS</b>
<b>TURNER ENTERPRISES LP AND</b>	<b>§</b>	<b>COMMISSION ON</b>
<b>RESTORE THE GRASSLANDS LLC</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

**CLOUDS' REPLY TO RESPONSES TO HEARING REQUESTS/REQUESTS FOR RECONSIDERATION**

To the Texas Commission on Environmental Quality ("TCEQ"):

Our names, address, phone number and email address are submitted electronically to the TCEQ simultaneously with this reply.

We, the affected persons indicated below, respectfully provide the following reply to the Responses to Hearing Requests filed on April 25, 2022 by Applicants Harrington Turner Enterprises LP and Restore the Grasslands LLC (collectively "Applicants"), The Office of Public Interest Counsel, and the Executive Director of the TCEQ.

First, the Applicants seek a permit to take action which will result in damage to us personally as well as numerous other affected landowners and homeowners. If the original Application has been revised or if it is being revised, the public should be afforded an opportunity to inspect the revised Application with a new public notice and new comment cycle. The public should be given this opportunity.

We assert, and do not withdraw, our previously filed requests for a contested case hearing.

We assert, and do not withdraw, our previously filed requests for reconsideration.

We request the Commission deny Applicants' requests made in their Response that our request for reconsideration and our request for a contested case hearing be denied. Applicants provide no factual or legal basis for denial. We request the Commission agree that we are *affected persons*. We live within .3 mile or less to the proposed sewage plant site and within .1 mile or less from the discharge into Maxwell Creek.

We do not agree with the Executive Director's position that the requests for reconsideration, including our request for reconsideration, will become moot if the Commissioners grant any of the contested case hearing requests. The requests for reconsideration, including our request for reconsideration, if granted

and resulting in the denial of the permit sought by Applicants, would serve the valuable function of efficiency. Our timely filed request for reconsideration should be granted and the permit sought by Applicants should be denied in its entirety as TCEQ should not permit conduct of Applicants prohibited under Texas law.

We request the Commission decide not to follow the Executive Director's recommendation that all requests for reconsideration be denied as there is no basis to deny our request for reconsideration, nor is a valid basis provided. *We respectfully request that the Commission direct the Executive Director to reconsider the permit sought by Applicants, and deny, in its entirety, the permit sought by Applicants.*

We would like to correct an inaccuracy. On pages 12 and 13 of the Executive Director's Response to Hearing Requests he states that we disputed the Executive Director's responses numbers 16, 17, and 83 but he did not mention we timely disputed, as evidenced by the attached prior filing, Executive Director's responses numbers 24, 25, 32, 34, 49, 50, 72, 83, 105, and 111. We attach hereto and incorporate herein

## PART 2

by reference a copy of our timely filed request for reconsideration and request for a contested case hearing filed with the TCEQ on March 13, 2022. Our request for reconsideration should be fully reviewed and granted. As noted, we attach hereto and incorporate herein by reference a copy of our timely filed request for reconsideration and request for a contested case hearing filed with the TCEQ on March 13, 2022.

We note that the Executive Director and The Office of Public Interest Counsel agree with our position that we are *affected persons* and that our request for a contested case hearing be granted. We agree that we are *affected persons* as we satisfy all requirements for being classified as affected persons. We have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the Application filed by Applicants.

We disagree with The Office of Public Interest Counsel's position in her Response that the Collin County policy against one property owner causing adverse impacts to an adjacent property owner should not be considered on the ground the policy is local government policy. To the contrary, the Collin County published position we recite is a statement of Texas state law as established by the Texas Supreme Court in its decision in *Crosstex N. Tex. Pipeline, L.P. v Gardiner* 505 SW3d 580 (Tex. 2016). Texas state law opposes a legal injury or nuisance caused by one land owner which interferes with the use and enjoyment of property of another landowner. Therefore, we request that the issue of adverse impacts to result from the action for which Applicants seek a permit be added to the list of issues to be considered by SOAH because the sewage plant clearly will result in adverse impacts to us, our health and our property.

The list of issues to be submitted to SOAH needs to be complete. We request that the Commission add the disputed issues we have raised, all of which are relevant and material to the Application review process, to the combined list as proposed by the Executive Director and The Office of Public Interest Counsel (the current combined list being a total of 16 issues) to be referred to SOAH.

By way of example, but not exclusion, the issues of adverse impacts, flooding, loss of market value, and soil erosion, each of which we timely raised, are material and relevant to this permitting process. A portion of our Murphy property is in the flood plain surrounding Maxwell Creek. Thousands of gallons of water to be pumped into Maxwell Creek will result in foreseeable and damaging flooding and soil erosion (caused by Applicants, and not nature) of and to our property.

On its web site at [Top Subjects of Interest: Flood Control - Texas Commission on Environmental Quality - www.tceq.texas.gov](http://www.tceq.texas.gov) TCEQ states that flood control is a top subject of interest.

Flooding and soil erosion, as well as the other issues we have raised, are closely connected or appropriate factors to be reviewed in connection with the permit under consideration.

Flooding and soil erosion, along with the other issues which we have raised are important, essential relevant and material to a review by SOAH. .

Applicants are seeking a Texas permit to take action which will result in damage and injury to us, and others. One substantial issue of law, among many, is whether the TCEQ has jurisdiction to permit an action which does not maintain Maxwell Creek's designated uses, does not maintain groundwater quality, does not protect human health and aquatic life, and will result in material damage and negative impacts to adjacent landowners, including loss in market value of property, and the substantial degradation of water quality. We dispute that the TCEQ has jurisdiction to issue a permit for Applicant to take action in violation of law.

If TCEQ has jurisdiction to issue a permit for the actions for which Applicants seek a permit, then TCEQ has jurisdiction to deny the permit based upon, among many material and relevant grounds including without limitation, flooding, soil erosion, and other issue we have raised.

We respectfully request TCEQ to reconsider and withdraw/deny in its entirety with prejudice the draft permit sought by Applicants. If it does not and refers to the SOAH, the Commission should expand the current combined list of issues proposed by The Office of Public Interest Counsel and the Executive Director (a total of 17 issues on the current combined list) to also include each and every additional issue we timely raised.

As noted, to facilitate the TCEQ's determination of the number and scope of issues to be referred to SOAH we have attached hereto and incorporate herein by reference a copy of our timely filed request for reconsideration and request for a contested case hearing filed with the TCEQ on March 13, 2022.

We continue to reserve all of our rights, claims and remedies including, without limitation, our right to pursue a lawsuit for all relief available under applicable law, in court, and we do not waive any right, claim or remedy,

We restate, incorporate herein by reference and do not withdraw any filing (all of which are of record with the TCEQ) we previously made in connection with the permit with number WQ0016003001 sought by Applicants and related pending petition for permit number D-04122021-017.

We respectfully request TCEQ grant the relief sought herein and deny, in its entirety, the permit sought by Applicants.

Dated **May 9, 2022**

Respectfully submitted,

*Don Cloud Scheri Cloud*

Don and Scheri Cloud

CERTIFICATE OF SERVICE

The undersigned certifies that prior to 5:00 pm cst on **May 9, 2022**, this Reply was filed with the TCEQ Office of the Chief Clerk, and a copy was served via email on Counsel for the Parkview Parties, Counsel for Applicants, the Executive Director, Public Interest Counsel, TCEQ Alternative Dispute Resolution, and the TCEQ Docket Clerk at the following email addresses:

<https://www14.tceq.texas.gov/epic/eFiling/>

[nscott@coatsrose.com](mailto:nscott@coatsrose.com)

[tgreen@coatsrose.com](mailto:tgreen@coatsrose.com)

[mkoehne@coatsrose.com](mailto:mkoehne@coatsrose.com)

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*Don Cloud*

March 13, 2022

To the Texas Commission on Environmental Quality ("TCEQ"):

Our names, address, phone number and email address are submitted electronically to the TCEQ simultaneously with these requests and comments.

We respectfully submit to the TCEQ this supplement to our previously filed comments of on or about October 9, 2021, on or about November 9, 2021, and on or about December 6, 2021 to the application by Harrington/Turner Enterprises, LP and Restore the Grasslands LLC (collectively, "Applicant") TPDES Permit No. WQ0016003001 ("Application"). We incorporate our previously filed comments herein.

The Application is for a new Texas Pollutant Discharge Elimination System permit to construct on ETJ land in Collin County a wastewater treatment plant ("Sewage Plant") within .3 mile or less of our Murphy home. The Sewage Plant will discharge sewage into Maxwell Creek and downstream which runs within .1 mile or less of our affected Murphy home located in Collin County, Texas.

Request for Reconsideration - We request reconsideration of the TCEQ executive director final decision on permit with number WQ0016003001 dated February 11, 2022 ("TCEQ Decision"). The TCEQ Decision should be reconsidered and reversed for the reasons set forth herein.

Request for Contested Case Hearing - We request a contested case hearing on permit with number WQ0016003001 and the TCEQ Decision. We live within .3 mile or less to the proposed Sewage Plant site and within .1 mile or less from the discharge into Maxwell Creek. We will be negatively affected by emissions of air contaminants from the Sewage Plant. We disagree with the TCEQ Decision and we are "affected persons." We have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the Application. A portion of our Murphy land is in the flood plain created by Maxwell Creek, which flood risk will be substantially and materially increased should the Sewage Plant be permitted.

Private action (lawsuit) – The TCEQ states at least 16 times in its EXECUTIVE DIRECTOR'S RESPONSE TO PUBLIC COMMENTS dated February 4, 2022 ("EXECUTIVE DIRECTOR'S RESPONSE") that "the proposed permit does not limit the landowner's ability to seek private action against the Applicants". This statement inappropriately implies private actions or lawsuits may only be filed against Applicants. We request that the TCEQ amend and mail its amended EXECUTIVE DIRECTOR'S RESPONSE to all persons and entities to whom were mailed the original document to eliminate the confusion caused by the statement. To be accurate, the statement should be: the proposed permit does not limit the landowner's ability to seek or private action or lawsuit against the Applicants and/or any other entities and individuals. The public deserves immediate written clarification on the TCEQ statement on private actions or lawsuits.

In this submission, we describe how and why we would be adversely affected by the Sewage Plant and by the Harmful Activities, as defined herein. Each and every issue raised herein is relevant and material to the TCEQ Decision and was raised by us timely and in writing during the public comment period.

To facilitate the TCEQ's determination of the number and scope of issues to be referred to hearing, we: 1) specify the executive director's responses in the EXECUTIVE DIRECTOR'S RESPONSE to our comments that we dispute; 2) the factual basis of the dispute; and 3) disputed issues of law.

We dispute the below listed responses set forth in the EXECUTIVE DIRECTOR'S RESPONSE.

One substantial issue of law, among many, is whether the TCEQ has jurisdiction to permit an action which does not maintain Maxwell Creek's designated uses, does not maintain groundwater quality, does not protect human health and aquatic life, and will result in material damage and negative impacts to adjacent landowners and the substantial degradation of water quality. We dispute that the TCEQ has jurisdiction to issue a permit for Applicant to take action in violation of law and the policy of Collin County. As a matter of law, "but for" a TCEQ permit the construction and operation of the Sewage Plant, and the related discharge, ("Harmful Activities") could not occur.

The Harmful Activities and the effluent limits and conditions in the permit do not maintain Maxwell Creek's designated uses, do not maintain groundwater quality, and do not protect human health and aquatic life, and will result in material damage and negative impacts to adjacent landowners and the and the substantial degradation of water quality. (please see attached pdf of complete comments)

PART B of comments filed today 3-13-22

Response 16 on page 9 - This response fails to address our comment about water quality. TCEQ's claim that adding a total phosphorus limit of 0.5 mg/L addresses our concern is factually incorrect and legally insufficient. This measure will not maintain Maxwell Creek's designated uses, will not maintain groundwater quality, will not protect human health and aquatic life, and will not prevent the substantial degradation of water quality.

Comment 17 on page 10 states that "Don Cloud and Scheri Cloud commented that the draft permit should include secondary treatment and the requirement for disinfection." We did not submit this comment. No amount of secondary treatment and disinfection could make the Sewage Plant discharge safe. Our comment was that we dispute the statement cited in the October 6, 2021 Statement of Basis/Technical Summary and Executive Director's Preliminary Decision that effluent levels, limitations and conditions in the draft permit comply with federal and state law, including without limitation, requirements for secondary treatment and the requirement for disinfection.

Therefore, we respectfully ask TCEQ to promptly amend and resubmit its EXECUTIVE DIRECTOR'S RESPONSE.

Response 18 on page 10 – This response fails to address our comment about flooding. TCEQ states that it does not have the authority to regulate flooding in the wastewater permitting process unless there is an associated water quality concern. However, the flooding is associated with water quality concerns arising from sewage discharge causing flooding. Therefore, TCEQ does have jurisdiction to prevent, by not permitting, the flooding which will result from the Harmful Activities. TCEQ states that the draft permit does not authorize the *invasion of personal rights*

nor any violation of federal, state or local laws or regulations and does not limit any landowner's ability to seek private action *against the Applicants*.

The permit permits actions which will cause adverse impacts to us as adjacent landowners and will violate Collin County policy and applicable law. Also, we note private actions are not limited to Applicants.

Response 24 on page 12 - This response fails to address our comment about regionalization and we dispute that the policy of regionalization has been satisfied.

Response 25 on page 13 - This response fails to address our comment about regionalization and we dispute that the policy of regionalization has been satisfied.

Response 32 on page 15 - This response fails to address our comment that the permit would allow activity which violates Collin County policy. Our comment was that the Harmful Activities will violate existing Collin County policy. The Collin County Commissioners Court in a published report dated September 28, 2020 stated this important policy:

*Adverse impacts shall not be allowed within the County. Adverse impacts take place when the actions of one property owner adversely affects the rights of another property owner.*

In response the TCEQ stated that the draft permit does not grant the permittee the right to use private or public property for conveyance of wastewater along the discharge route. Clearly, the response from TCEQ does not respond to our comment. Our comment was about adverse impacts and not rights to use. We request an updated response from TCEQ to our comment.

Response 34 on page 16 - This response fails to address our comment about inaccuracies in the Application. TCEQ states that it relies on the representations made in the Application, signed under penalty of perjury. TCEQ never states how or when the Applicant is held to account for material inaccuracies.

Response 49 on page 21 - This response fails to address our comment about lack of notice. We live within .3 mile of the proposed Sewage Plant. Applicant did not notify us of the Application as required by law. TCEQ cannot allow Applicant to benefit from its no notice tactic.

Response 50 on page 22 - This response fails to address our comment about lack of notice. We live within .3 mile of the proposed Sewage Plant. Applicant did not notify us of the Application as required by law. TCEQ cannot allow Applicant to benefit from its no notice tactic.

Response 72 on page 28 - This response fails to address our comment about flooding and erosion. TCEQ states that it does not have the authority to regulate flooding in the wastewater permitting process *unless there is an associated water quality concern*. However, flooding and erosion are associated with water quality concerns arising from discharge causing flooding and erosion. Therefore, TCEQ does have jurisdiction to prevent, by not permitting, the flooding and erosion to surrounding land, including to historical cemeteries, which will result from the Harmful Activities.

Response 83 on page 32 - This response fails to address our comment about endangered or threatened species. TCEQ states that the discharge is not expected to have an effect on any federal endangered or threatened aquatic or aquatic dependent species or proposed species or their critical habitat. The determination is subject to re-evaluation due to subsequent updates or amendments to the biological opinion and the EPA definitely should be requested a review.

Response 105 on page 37 - This response fails to address our comment about harm caused by the Sewage Plant to property values claiming lack of jurisdiction. TCEQ cannot claim lack of jurisdiction over property value damage when it is the TCEQ permit which will allow the activity which will result in damage to property value.

Response 110 on page 38 - This response fails to address our comment about noise and light pollution. TCEQ states that such matters are outside of TCEQ's jurisdiction despite that "but for" a permit from TCEQ there would not be noise and light pollution. In issuing a permit TCEQ is exercising jurisdiction over the Harmful Activities. Therefore, TCEQ does have jurisdiction to prevent, by not permitting, the noise and light pollution which will result from the Harmful Activities.

Response 111 on page 39 - This response fails to address aesthetics claiming a lack of jurisdiction.

TCEQ states that such matters are outside of TCEQ's jurisdiction despite that "but for" a permit from TCEQ there would not be damage to the area aesthetics. In issuing a permit TCEQ is exercising jurisdiction over the Harmful Activities. Therefore, TCEQ does have jurisdiction to prevent, by not permitting, the aesthetics harm which will result from the Harmful Activities.

#### PART C of comments filed today 3-13-22

Although we are affected property owners we did not receive the formal notice required for the Application. We received informal notice from a neighbor only on October 8, 2021. Applicant's failure to provide required notice to affected residents and entities and troubling inaccuracies are material defects in the Application which cannot be remedied, and should not be rewarded, under the law.

Applicant seeks to build a Sewage Plant on purported ETJ land in Collin County which sits between the cities of Murphy and Parker. Murphy, settled in the 1800's, is already fully developed. Parker, settled in the 1800's, is already fully developed. The substantial and material lowering of water quality is NOT necessary for important economic or social development.

The policies of regionalization and anti-degradation will be violated should the Application be approved and the permit sought by Applicant issued. The TIER 2 review does require a tier 3 review and the reconsideration and denial of the Application.

We respectfully refer to the letter dated November 10, 2021 from Texas Parks & Wildlife to the TCEQ regarding the Application. Texas Parks & Wildlife does not support the Application. Texas Parks & Wildlife points out material inconsistencies in the Application and recommends seeking alternatives to the Sewage Plant. On its official web site Murphy has posted its approved \$44,472,286 2022 budget. In that document on page 9 Murphy lists as a guiding principle that we will have attractive and inviting parks and trails. Murphy has already spent millions of taxpayer dollars on developing, improving and promoting its natural centerpiece, Maxwell Creek, which will be ruined by the Sewage Plant. Murphy also lists the guiding principle of we will seek innovative solutions for local issues.

The actions for which Applicant seeks TCEQ permission will violate existing Collin County policy. The Collin County Commissioners Court in a published report dated September 28, 2020 stated this important policy:

*Adverse impacts shall not be allowed within the County. Adverse impacts take place when the actions of one property owner adversely affects the rights of another property owner.*

A portion of our Murphy land is in the flood plain created by Maxwell Creek, which flood risk will be substantially increased should the Application be approved and the permit sought be issued. Maxwell Creek is a valuable year round flowing natural creek surrounded by areas of

exceptional recreational, such as parks and hiking trails, and ecological, such as aquatic and other wildlife, significance. The quality of Maxwell Creek and its substantial high quality aquatic life and downstream cannot be maintained or protected if the Harmful Activities are permitted.

The Harmful Activities will result in the substantial degradation of water quality of Maxwell Creek and downstream by more than a *de minimis* extent and as a result existing uses will be materially impaired. The Harmful Activities will cause substantial and material degradation of waters in Maxwell Creek and downstream that exceeds fishable/swimmable quality and should not be allowed.

To illustrate the historic important value of a clean, safe and protected Maxwell Creek to the city of Murphy, kindly consider this description from the city of Murphy web site:

*Maxwell Creek Trails is a master planned hike and bike trail system with adjacent park sites / trail heads located on various sections of the trail system. Maxwell Creek Trails, when completed, is envisioned to be a greenbelt extending north to the City of Parker and south to the City of Wylie and Sachse. It will ultimately link to a regional Collin County Trails System. The greenbelt system encompasses the floodplain of Maxwell Creek. It includes concrete hike and bike trails, off-road secondary dirt trails, granite nature trails, parks, bridges, benches, and open space. Two active park sites / trail heads include The Preserve (670 North Murphy Road behind Kimbrough Stadium) and Water's Edge Park (403 Waters Edge Way and Creekside Drive in the Maxwell Creek Subdivision). These facilities were constructed in 2008.*

The Harmful Activities will cause many material and substantial adverse impacts to us personally given our extremely close proximity, as noted above, to the proposed Sewage Plant and to Maxwell Creek, including, without limitation, the adverse impacts of: (1) material and substantial degradation of the water quality in Maxwell Creek and downstream; (2) material and substantial erosion of soil in and around Maxwell Creek and downstream; (3) material and substantial damage to two historical landmarked cemeteries, each of more than 100 years old, which are adjacent to Maxwell Creek; (4) material and substantial degradation and harm to aquatic life in Maxwell Creek and downstream; (5) material and substantial risk of known harm to our health; (6) material and substantial damage to the local and surrounding economies as residents will have no choice but to relocate; (7) material and substantial damage to wildlife, including protected and/or endangered species in and around Maxwell Creek and downstream; (8) material and substantial visual, noise and odor harmful nuisances; (9) material and substantial decrease in the market value of our Murphy, Texas home; (10) material and substantial enhanced flood risk from Maxwell Creek, both upstream and downstream, as a portion of our land is already in the flood plain created by Maxwell Creek; and (11) material and substantial degradation of important vegetation in and around Maxwell Creek. All of these adverse impacts are foreseeable. Maxwell Creek flows adjacent to and/or in close proximity to many schools including, without limitation, Tibbals Elementary, Hunt Elementary, Murphy Middle School, and McMillen High School, playgrounds and other recreational features such as hiking trails, Liberty Ridge Park, Waters Edge Park, and Murphy Central Park in Murphy, as well as City of Parker recreation areas. We and other residents pay for these amenities and schools through taxes. The Harmful Activities will cause many material and substantial adverse impacts to thousands of residents of Murphy, Parker and surrounding communities.

Our list of disputed facts includes any and all facts, or purported facts, Applicant and any other person or entity asserts in support of the Application and/or in opposition to any of our claims and assertions set forth herein. In addition, we dispute, and include on our list of disputed facts, these disputed facts and conclusions cited in the October 6, 2021 Statement of Basis/Technical Summary and Executive Director's Preliminary Decision, namely,

- (1) We dispute the statement that existing water quality uses of the water in Maxwell Creek will not be impaired by the permit action;
- (2) We dispute the statement that numerical and narrative criteria to protect existing uses in Maxwell Creek will be maintained;
- (3) We dispute the statement that a Tier 2 review is not required and we dispute the statement that no exceptional, high, or intermediate aquatic life uses water bodies have been identified in the discharge route;
- (4) We dispute the statement that existing uses in Maxwell Creek will be maintained and protected should the Application be approved;
- (5) We dispute the statement that the discharge from the permit sought by Applicant is not expected to have an effect on any federal endangered or threatened aquatic or aquatic-dependent species or proposed species of their critical habitat;
- (6) We dispute the statement that the permit sought by Applicant does not require EPA review with respect to the presence of endangered or threatened species;
- (7) We dispute the statement that the effluent levels in the draft permit will maintain and protect existing instream uses;
- (8) We dispute the statement that existing water quality uses in Maxwell Creek will not be impaired by the permit action; and
- (9) We dispute the statement that effluent levels, limitations and conditions in the draft permit comply with federal and state law, including without limitation, requirements for secondary treatment and the requirement for disinfection.

Parker, adjacent to the purported ETJ at issue, generally has required septic tanks, which have worked fine for years, and required lot sizes necessary for septic tanks. Murphy, also adjacent to the purported ETJ at issue, provides city sewer services. The Harmful Activities will cause an unauthorized property taking and foreseeable damages. All parties who will be involved in the Harmful Activities have been, and remain, on proper notice for substantial liability and damages.

We kindly request that the TCEQ grant our request for a contested case hearing, reconsider the TCEQ Decision and deny the Application in its entirety, as no amendment can save the Application. We reserve our rights to submit additional arguments. Kindly include us on the applicable notice mailing list and please let us know the status of your TCEQ process.



Thank you,

Wade and Scheri Cloud