

SOAH DOCKET NO. 582-06-1367  
TCEQ DOCKET NO. 2005-2089-UCR

APPLICATION OF THE CITY OF § BEFORE THE STATE OFFICE  
MERIDIAN TO AMEND ITS WATER §  
AND SEWER CERTIFICATE OF §  
CONVENIENCE AND NECESSITY (CCN) § OF  
NOS. 10884 AND 20349 IN BOSQUE §  
COUNTY, APPLICATION NOS. 35057-C §  
AND 35058-C § ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
2008 AUG 21 AM 10:34  
CHIEF CLERK'S OFFICE

THE CITY OF MERIDIAN'S  
REPLIES TO EXCEPTIONS TO PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS:

COMES NOW APPLICANT, THE CITY OF MERIDIAN, TEXAS ("City" or "Meridian"), and presents to the Texas Commission on Environmental Quality ("TCEQ" or "Commission") this its Replies to Exceptions to the Proposal for Decision ("PFD") submitted by the Executive Director ("ED") for the Commission. The City will respond to the arguments and specific exceptions made by the ED. Although the arguments made by the ED are merely a rehashment of his closing argument, it bears repeating that the City met its burden of proof as found by the Administrative Law Judge ("ALJ").

As the ED was the only party to except to the ALJ's PFD, the City will respond to each of the ED's "exceptions" in turn:

II. Exceptions

A. Procedural History, Overview, and Legal Standards

1. **Overview.** As Attachment 1 to the PFD is not in color, it is difficult to ascertain from Attachment 1 to the PFD which areas are being recommended for certification to the City. To the extent, Attachment 1 to the PFD does not account for some of the findings made by the ALJ in his PFD, then the City agrees with the ED that Attachment JEH-11 to Exhibit APP-2A reflects

the appropriate map for certification to the City. As such, the City will make recommended changes to the PFD below.

2. **The Legal Standard for Certification.** The City agrees that the TCEQ's Chapter 291 rules as adopted prior to the January 1, 2006, were applicable to this case.

**B. Discussion**

1. **Adequacy of Existing Service.** The ED attempts to make a strained argument that adequacy of existing service cannot be determined if one is not being provided the service. This argument, while novel, is contrary to the ED's opinion in many cases for which his staff has provided prefiled testimony or testified in. This opinion strains credulity and is against the great weight of the evidence.

The evidence presented at the hearing is clear and uncontroverted. Many residents in the requested area utilize private groundwater wells and the area is limited to diminishing groundwater resources without the provision of surface water from the City.<sup>1</sup> The City and Mustang Valley Water Supply Corporation ("Mustang Valley") are the only providers of water service in the requested water service area.<sup>2</sup> Mustang Valley only provides service to a small portion of the City's requested service territory.<sup>3</sup> It should be noted that although Mustang Valley and the City have executed an agreement regarding service to the requested service territory, Mustang Valley is currently not certificated to provide service to any of the City's

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<sup>1</sup> Tr. at 12, l. 17-19. APP Ex. 4, Attachments DWC-7 at APP0017 (Prefiled Testimony of Mr. Darrell W. Cline). All citations to the transcript are to the transcript of the Hearing, unless otherwise noted.

<sup>2</sup> APP Ex. 2A at 12, l. 9-13 (Prefiled Testimony of Mr. Johnnie E. Hauerland); APP Ex. 6 at 3, l. 4-7 (Prefiled Supplemental Testimony of Mr. Kerry D. Maroney, P.E.); ED 6 at 6, l. 117-8 (Prefiled Direct Testimony of Mr. Kamal Adhikari, E.I.T.).

<sup>3</sup> APP Ex. 2A, Attachment JEH- 11 (Prefiled Testimony of Mr. Johnnie E. Hauerland).

requested service territory.<sup>4</sup> Mustang Valley has not sought to provide water service to the entirety of the City's requested service territory.<sup>5</sup>

In order to meet the inadequacy in the existing water supply in the area, the City has contracted with the City of Clifton to obtain a surface water supply to supplement the City's groundwater supply.<sup>6</sup> Because the City will soon have a surface water supply,<sup>7</sup> the City is the only utility in the requested service area that is not in danger of running out of water.<sup>8</sup>

The City is the only provider of sewer service in the requested sewer service area.<sup>9</sup> Except for the portion of the service territory served by the City, there is no centralized wastewater system in the requested service area.<sup>10</sup> Thus, the wastewater service currently provided to the requested service area is inadequate.<sup>11</sup> The region that the City is located within has a chronic failure rate of on-site sewage facilities of 12%.<sup>12</sup> Certification of the requested service territory to Meridian will correct this inadequacy.

Because of the inadequacy of, or absence of, water and sewer service in the requested service territory, the City received persons expressing interest in receiving water and/or sewer

<sup>4</sup> Tr. at 226, l. 22 through 227, l. 4.

<sup>5</sup> APP Ex. 2A at 13 and Attachment JEH-13 (Prefiled Testimony of Mr. Johnnie E. Hauerland).

<sup>6</sup> APP Ex. 4 at 4 and Attachment JEH-4 (Prefiled Testimony of Mr. Johnnie E. Hauerland); APP Ex. 4 at 14, l. 5-10 and Attachment DWC-5 (Prefiled Testimony of Mr. Darrell W. Cline); ED-6 at 7, l. 161-162 (Prefiled Testimony of Mr. Kamal Adhikari, E.I.T.).

<sup>7</sup> *Id.*

<sup>8</sup> Tr. at 112, l. 2-10.

<sup>9</sup> APP Ex. 2A at 12, l. 9-10 (Prefiled Testimony of Mr. Johnnie Hauerland); APP Ex. 3 at 10, l. 20-21 (Prefiled Testimony of Mr. Kerry D. Maroney, P.E.); ED-6 at 7, l. 154-155 (Prefiled Testimony of Mr. Kamal Adhikari, E.I.T.).

<sup>10</sup> APP Ex. 3 at 16, l. 16-17 (Prefiled Testimony of Mr. Kerry D. Maroney, P.E.); APP Ex. 6 at 3, l. 1-2 (Prefiled Supplemental Testimony of Mr. Kerry D. Maroney, P.E.); APP Ex. 4 at 11, l. 14-15 (Prefiled Testimony of Mr. Darrell W. Cline); ED-6 at 7, l. 154-155 (Prefiled Testimony of Mr. Kamal Adhikari, E.I.T.).

<sup>11</sup> *Id.*

<sup>12</sup> APP Ex. 4 at 12, l. 20-21 and Attachment DWC-4 at 39 (Prefiled Testimony of Mr. Darrell W. Cline).

Russell & Rodriguez, L.L.P.  
Attorneys at Law  
1633 Williams Drive, Building 2, Suite 200, Georgetown, Texas 78628

Phone (512) 930-1317

E-mail: arodriguez@txadminlaw.com

Fax (866) 929-1641

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August 21, 2008

Please Deliver the Following page(s) to:

Honorable Kerry Sullivan

Fax Number: (512) 475-4994

Mr. Scott Humphrey

Fax Number: (512) 239-6377

Ms. Stefanie Skogen

Fax Number: (512) 239-0606

TCEQ Docketing

Fax Number: (512) 239-3311

Mr. Jeffrey Hewlett

Email and U.S. Priority Mail

Ms. Marie Garland

Fax Number: (254) 435-2904

Mr. Pat Dillon

Fax Number: (972) 680-0003

Client Number: 970-00

From: Arturo D. Rodriguez, Jr.

Direct Phone: (512) 930-1317

Pages: 16 (Including Cover Sheet)

Re: APPLICATION OF THE CITY OF MERIDIAN TO AMEND ITS WATER AND SEWER CERTIFICATES OF CONVENIENCE AND NECESSITY (CCN) NOS. 10884 AND 20349 IN BOSQUE COUNTY, APPLICATION NOS. 35057-C AND 35058-C; SOAH DOCKET NO. 582-06-1367; TCEQ DOCKET NO. 2005-2089-UCR

Comments: Transmittal of City of Meridian's Replies to Exceptions.

CHIEF CLERKS OFFICE

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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service from the City.<sup>13</sup> Such requests would not have been provided if there was an adequate water and/or sewer system. There is no evidence to controvert the inadequacy of the water or sewer service currently provided to the requested service area.

2. **Need for Additional Service.** It appears from the PFD that the ED does not dispute that the City has shown that there is a need for additional service. It only disputes to the extent the demonstration was made. However, it is important to note that the ED did not provide a single shred of evidence to controvert the testimony proffered by the City. In fact, the ED makes a concession to state that the Commission "could grant another 200 feet (i.e. two-thirds of a football field) on that side of the road so any establishments, such as houses or businesses, along the road will be included."<sup>14</sup> The ED concedes that there is a possibility that the artificiality of using roads as landmarks may not make sense from a provision of utility standpoint. The ED attempts to argue that even if the Commission does not include the additional areas in the City's CCN, the City can provide retail utility service without a CCN. What the ED overlooks in his argument is the financial risk to the citizens of the City if the City extends lines and increases facilities in order to provide service to an area it is not certificated to and then another service provider applies for and is successful at getting the area at issue certificated to them. The ED witness was able to recognize this possibility at the hearing on the Merits on June 4, 2008.<sup>15</sup> There is no reason that the citizens of the City should have to bear the cost of future litigation in order for the City to protect its investments in the extension of service to an area it has already

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<sup>13</sup> APP Ex. 2A at 14 and Attachments JEH-7 and JEH-11 (Prefiled Testimony of Mr. Johnnie E. Hauerland); APP Ex. 3 at 10, l. 4-5 and Attachment KDM-4 (Prefiled Testimony of Mr. Kerry D. Maroney, P.E.); APP Ex. 6 at 4, l. 5-7 and Attachment KDM-8 (Prefiled Supplemental Testimony of Mr. Kerry D. Maroney, P.E.); ED-6 at 6, l. 125-126 (Prefiled Testimony of Mr. Kamal Adhikari, E.I.T.).

<sup>14</sup> *Executive Director's Exceptions to the Proposal for Decision* at 4 (hereinafter "ED Exceptions").

<sup>15</sup> See Tr. at 389-390.

requested be certificated to the City and that the City has shown a need for service as well as an ability of the City to provide continuous and adequate service.

There is no question that the area in which the City seeks to serve is growing. The ED, having full opportunity to produce controverting testimony or solicit such testimony in cross-examination, failed to produce a scintilla of evidence that the area in the requested area is not growing. It can only make arguments by persons not qualified to make such an assertion. For making its exception to the PFD, the ED merely rehashes his closing argument. As such, the City can equally point to each and every piece of evidence that establishes need in the requested service area.

The need for service is evidenced by Meridian's projected growth. The trend has been, and the evidence supports, that the area around the corporate limits of the City is going to continue to grow at a rate faster than the area inside of the corporate limits.<sup>16</sup> This is important because currently the City is only certificated to provide wastewater services inside a portion of its corporate limits and ETJ. The City does provide water services beyond the City's corporate limits and ETJ.<sup>17</sup> Meridian's expert, Mr. Kerry D. Maroney, P.E., opined that such growth and annexations lead one to the conclusion that a need for water and sewer service exists in the proposed service territory.<sup>18</sup> Even the ED's expert witness, Mr. Kamal Adhikari, found the population evidence presented by Mr. Maroney to be persuasive.<sup>19</sup>

Even if one were to ignore the record in this case and assume that the ED is right in asserting that the record does not demonstrate need along every inch of the City's requested

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<sup>16</sup> Tr. at 125, l. 5-9.

<sup>17</sup> APP Ex. 11 and APP Ex. 12; Tr. at 255, l. 8-12.

<sup>18</sup> Tr. at 113, l. 7-10.

<sup>19</sup> *Id.* at 276, l. 11-16.

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(FAX)512 930 7742

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service area, it is interesting that the ED appears to rely solely on this argument to recommend a smaller service territory. The ED fails to recognize that "need" is merely but one of eight factors to consider in considering the City's application. Nowhere in the Commission's rules or the Texas Water Code does it state that "need" is a factor that should be afforded more weight than the others. Indeed, the ED does not state what other factors the City failed to demonstrate to warrant a smaller service territory.

**3. The Effect of Granting a Certificate on Meridian and on Any Retail Public Utility of the Same Kind Serving the Proximate Area.** It is unfortunate that the ED has chosen to ignore the record in order to bolster his argument that is against the great weight of the evidence. The ED appears to argue that the acquisition of surface water will not serve to economically benefit the area around the City. Such statements are contrary to the record. Mr. Darrell Cline, a financial expert, testified that granting the CCN to the City promotes development throughout the area. Such increase in development "will not only benefit the City economically, but also will benefit the area surrounding the City, including other retail public utilities serving the proximate area."<sup>20</sup> This testimony was uncontroverted. Mr. Cline further testified that the surface water contract will benefit the surrounding the water providers by slowing down the depletion of the groundwater in the area.<sup>21</sup>

The ED's assertion that evidence of economic benefit was not provided is merely false. Evidence was provided and not contradicted by any party. Because all parties conceded this point at hearing by not cross-examining the witnesses or providing contrary testimony does not mean that the evidence was not there. The ED merely does not like that contrary evidence was not provided.

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<sup>20</sup> APP Ex. 4 at 19, l. 11-13 (Prefiled Testimony of Darrell W. Cline).  
<sup>21</sup> Tr. at 188, l. 1-2.

Regarding the location of neighboring utilities, I believe the record is clear that the closest CCN service territory is within 3.6 miles of the City's proposed service territory. The assertion that Mustang Valley may have facilities within the City's requested service territory does not mean that Mustang Valley may lawfully provide said service as its service territory extends farther than ¼ mile from its CCN service territory. The City has merely stated that there is no other retail public utility that has sought to provide the service, except for Mustang Valley, which executed a Settlement Agreement with the City. As such, the only affected retail public utility has consented to the service sought to be provided by the City.<sup>22</sup>

4. **Probable Improvement in Service or Lowering of Costs to Consumers in the Area.** The ED fails to make a cogent argument in this area. The City relies on the arguments made in its closing brief. Additionally, the City relies on the following testimony provided by Darrell Cline. Mr. Cline, provided uncontroverted testimony regarding the lowering of costs to consumers by providing the following testimony:

19 Looking at the boundaries in ED-13 that have  
20 been delineated by the Executive Director, it fails to  
21 recognize or at least provide an incentive for the  
22 economies of scale that are inherent within a water  
23 and wastewater utility, specifically with regards to  
24 how the boundaries have been drawn with regards to the  
25 roadways. For example, when you look at ED-13 to the<sup>23</sup>

1 south along Highway 6, there's been proposed to have  
2 the CCN amended for areas east of Highway 6. However,  
3 the areas west of Highway 6 have been excluded.  
4 When you look at Highway 22 south on the  
5 west side -- or east side of the map have been  
6 excluded, and the areas on Highway 144 east and on  
7 Highway 174 west, those areas have been excluded. And  
8 then the areas on the west side of Highway 22, on the  
9 south part have been excluded.<sup>24</sup>

<sup>22</sup> APP Ex. 2A, Attachment JEH-3 (Prefiled Testimony of Mr. Johnnie E. Hauerland).  
<sup>23</sup> Tr. at 468.  
<sup>24</sup> Tr. at 469.

The ED's own witness recognizes that by granting the ED's proposed map economics of scale will not be realized. Mr. Kamal Adhikari, the ED's expert witness, when asked about the ED's proposed map conceded that economics of scale (i.e. lowering costs to consumers) were not considered by the ED and some possible effects may result from failure to consider them.

The ED's representative testified as follows:

25 Q So if a line is installed that goes south<sup>25</sup>

1 along Highway 6 to service the property -- this pink  
2 property on Highway 6, doesn't it make sense then,  
3 Mr. Adhikari, based on that testimony that people on  
4 the west side of that road would seek service as well?

5 A They could.

6 Q Wouldn't it be prudent engineering practices  
7 then to possibly seek to size a line appropriately to  
8 serve both sides of that road, Highway 6?

9 A Yes.

10 Q Wouldn't it then be -- if the city was unable  
11 to provide services on both sides of that road because  
12 it was -- there was no guarantee of return on  
13 investment because it would not be granted the west  
14 side of Highway 6, that possibly the city would  
15 undersize that line?

16 A That is possible.

17 Q So there would then be possibly not only two  
18 effects from that -- one is a financial effect in that  
19 the economics of scale aren't being fully realized by  
20 that line if it was undersized. Correct?

21 A That's correct.

22 Q And also there could be some environmental  
23 factors that should be considered as well if that line  
24 is undersized and someone else comes in to provide  
25 services to the west side of that, we've got then<sup>26</sup>

1 environmental impacts of two lines or parallel lines  
2 when there really only needed to be one. That's a  
3 possible effect, isn't it?

4 A Yes, it is.

<sup>25</sup> Tr. at 388.

<sup>26</sup> Tr. at 389.

5 Q The same actually goes through for the rest  
6 of the -- for the rest of this service territory.  
7 Mr. Adhikari, wouldn't it -- if you look at the very  
8 northern part of your requested service territory on  
9 ED No. 13, you left out a large area between 144  
10 and 174. Is that correct?  
11 A Yes.<sup>27</sup>

The ED recognizes that economies of scale are not considered in his plan, but also provides no testimony refuting that economies of scale will be realized with the expansive testimony. The ED appears to state that despite the uncontroverted testimony regarding the requests for service provided by persons currently not receiving service, the growing population of the City, the growing population of the area surrounding the City, and the testimony that this creates economies of scale, the City's proposed map should not be issued because what was testified to may not happen. Yet, there is no testimony by the ED that even suggests that what he predicts may happen will happen. Without such testimony, the ED's argument should be given no weight.

### III. Corrections to the Order

The City makes the following suggestions based on the exceptions proposed by the ED.

- Proposed Change to Finding of Fact No. 7 --The City agrees that the preliminary hearing was held on May 2, 2006. The City concedes that the error may have been caused by a typographical error contained in the City's draft proposed findings of fact.
- Proposed Change to Finding of Fact No. 26 - The City agrees with the ED's correction. The City concedes that the error may have been caused by a typographical error that occurred in the conversion of the document from Microsoft Word to Wordperfect.

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<sup>27</sup> Tr. at 390.

- Proposed Change to Finding of Fact No. 27 – There is no need to make the proposed change as the ALJ’s proposed findings of fact accurately reflect the status of service in the area.
- Proposed Change to Finding of Fact No. 28 – The City agrees with the ED’s correction.
- Proposed Change to Finding of Fact No. 33 – The City believes that the record accurately reflects the Finding of Fact as proposed by the ALJ.
- Proposed Change to Conclusion of Law No. 3 – The City does not disagree with the ED’s proposed change.
- Proposed Change to Conclusion of Law No. 7 – The City agrees that some correction may be necessary and suggests the following language: “Meridian’s water and sewer CCN amendment should be granted for the entire area set out in its amended requested service territory.”
- Proposed Change to Ordering Paragraph No. 2 – The City agrees that some correction may be necessary and suggests the following language: “The CCNs shall include the area described in Findings of Fact Nos. 10 and 11 and shown on Attachment 1.” The City hereby provides Attachment 1 which reflects the CCNs requested service areas after the amendments made as described in Findings of Fact Nos. 10 and 11.

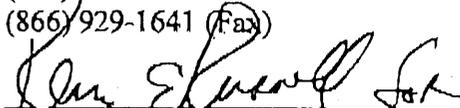
The City respectfully requests that the Commission deny the ED’s request to reduce the City’s requested service territory. However, the City does request that the Commission make the

suggested changes to the order as described above.

Respectfully submitted,

**RUSSELL & RODRIGUEZ, L.L.P.**

1633 Williams Drive  
Building 2, Suite 200  
Georgetown, Texas 78626  
(512) 930-1317  
(866) 929-1641 (Fax)



ARTURO D. RODRIGUEZ, JR.  
State Bar No. 00791551

**ATTORNEY FOR CITY OF MERIDIAN**

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of August, 2008, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, or hand-delivered to the following counsel or party representatives of record:

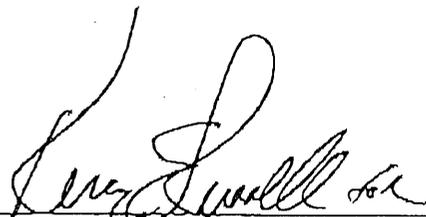
Mr. Kerry Sullivan  
Administrative Law Judge  
300 West 15<sup>th</sup> Street  
Austin, Texas 78701  
Fax: 475-4994

Ms. Stefanie Skogen, Attorney  
Environmental Law Division  
TCEQ - MC 173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Fax: 239-0606

Mr. Jeff Hewlett  
10370 Highway 6  
Meridian, Texas 76665

Mr. Scott Humphrey, Attorney  
Office of Public Interest Counsel  
TCEQ - MC 103  
P.O. Box 13087  
Austin, Texas 78711-3087  
Fax: 239-6377

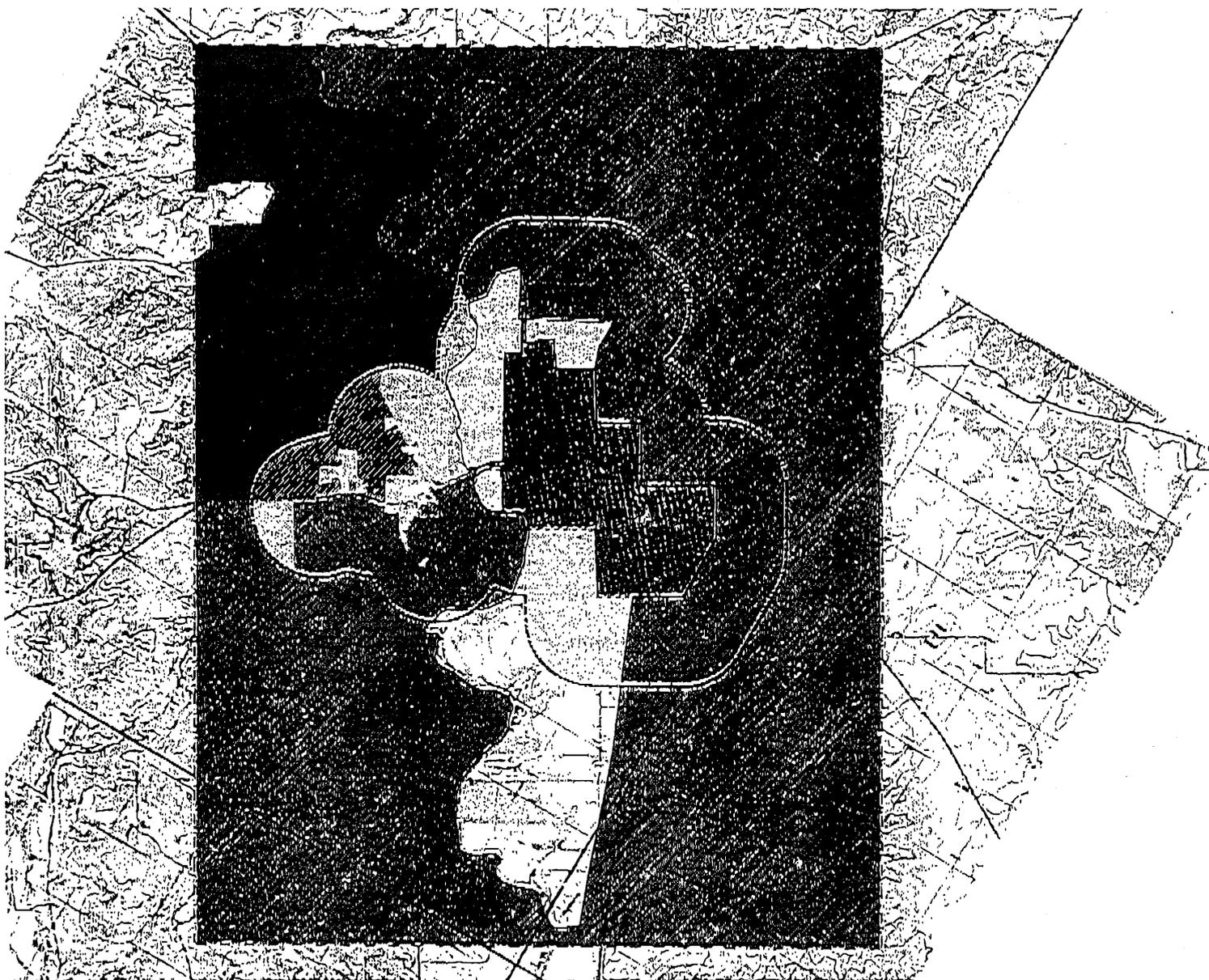
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Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087  
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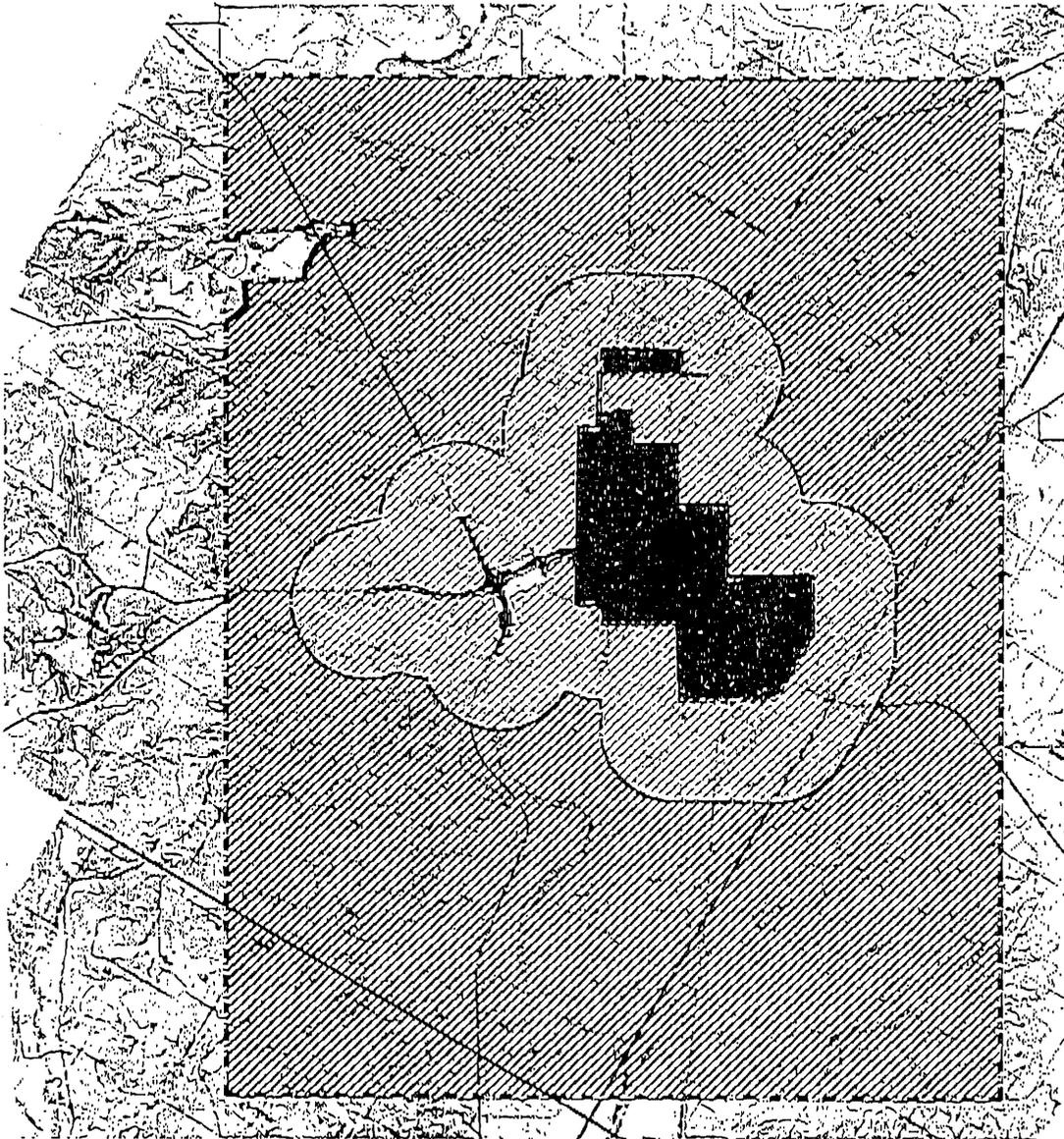
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-  **MERIDIAN CITY LIMITS**
-  **MERIDIAN ETJ**
-  **LIMITS OF PROPOSED MERIDIAN WATER CCN**
-  **Dual Water CCN Certification with Mustang WSC**
-  **Meridian Single Water CCN Certification**
-  **Overlap Water CCN area**  
(i.e., Mustang < 1 acre or ag; City > 1 acre, non-resid & non-ag use)

**CITY OF MERIDIAN**

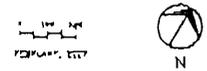




**MERIDIAN PROPOSED SEWER CCN**

-  **MERIDIAN CITY LIMITS**
-  **MERIDIAN ETJ**
-  **LIMITS OF PROPOSED MERIDIAN SEWER CCN**

**CITY OF MERIDIAN**



**PROPERTY LINES BASED ON COUNTY CAD MAPS**