

DOCKET NO. 2022-0763-UCR-E

IN THE MATTER OF THE	§	BEFORE THE
REQUEST BY THE CITY OF AMES	§	
UNDER TEXAS WATER CODE	§	
§ 13.041 FOR AN EMERGENCY	§	TEXAS COMMISSION ON
ORDER TO COMPEL THE CITY	§	
OF LIBERTY TO PROVIDE	§	
SEWER SERVICE	§	ENVIRONMENTAL QUALITY

**CITY OF AMES’ INITIAL BRIEF TO
MODIFY THE COMMISSION’S EMERGENCY ORDER**

TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the City of Ames, Texas, (“Ames”), and files this Initial Brief with the Texas Commission on Environmental Quality (“Commission”) regarding proposed modifications to the Emergency Order (“Order”) to Compel the City of Liberty (“Liberty”) pursuant to Texas Water Code § 13.041 and 16 Tex. Admin. Code § 35.202 to provide sewer service in response to Liberty’s notice of suspension of services and, in support thereof, would show the following:

**I.
PARTIES**

1. The City of Ames, Texas is a Type A General Law Municipality located within Liberty County, Texas.
2. The City of Liberty, Texas is a home-rule municipality located within Liberty County, Texas, and incorporated as the City of Liberty.

**II.
FACTUAL ALLEGATIONS**

On March 14, 2001, representatives for Ames and Liberty signed the Liberty-Ames Wastewater Disposal Contract (As Amended) (the “Contract”). *See* Ames Request for Emergency

Order (“Request”), Attachment A, Exhibit 2. “The purpose of this contract is to provide for the treatment and disposal of waste from [Ames sanitary sewer collection] system by LIBERTY’s wastewater plant.” *Id.* The Contract states that it “shall be in force and effect from the date of execution hereof until March 13, 2041.” *Id.*

Section 5.2 of the Contract detailed the “Charges” that Ames would pay Liberty each month for the wholesale wastewater service. Pursuant to Section 5.2(a), Ames was required to pay a “Service Charge” of \$0.75 per 1,000 gallons of water metered at the lift station. Ames also was required to pay a “Connection Charge” pursuant to Section 5.2(b) for each connection made to the Ames sanitary collection system after the day Liberty commences taking waste from Ames. Additionally, Section 5.2(c) of the Contract states as follows:

Additional Service Charge: AMES agrees to pay an additional charge for those volumes delivered in excess of the “Total Acceptable Volume” (“TAV”). The TAV shall be defined as 200,000 gallons per day and an aggregate of 6,000,000 gallons per month. Volumes in excess of the TAV shall be charged at three (3) times the highest rate, calculated on a per gallon basis, then existing for sewer service within LIBERTY, or FIVE HUNDRED AND NO/100 (\$500) DOLLARS per month, whichever amount is greater.

Liberty’s interpretation of this Section 5.2(c) in the Contract is disputed by Ames. Ames contends that Section 5.2(c) defines an exceedance of the “Total Acceptable Volume” as occurring when two conditions are met: (1) greater than 200,000 gallons per day, **AND** (2) an aggregate of 6,000,000 gallons per month. Only when a volume of wastewater is delivered by Ames that causes both of those conditions to be exceeded should Ames be required to pay an Additional Service Charge (three times the highest rate existing for sewer service, or five hundred dollars, whichever amount is greater) under the Contract.

By contrast, Liberty invoices Ames for Additional Service Charges whenever either of the two conditions are exceeded, regardless of whether the other condition is met/exceeded. Liberty

assesses an Additional Service Charge when: (1) Ames exceeds the daily condition, (2) Ames exceeds the monthly condition, or (3) Ames exceeds the daily and monthly conditions. This has resulted in Liberty invoicing Ames for much higher Additional Service Charges than what Ames contends is allowed under the Contract.

III. **PENDING DISTRICT COURT CASE AND MEDIATION**

A. District Court Case in Liberty County

On June 26, 2018, Liberty filed a cause of action in the 75th District Court in Liberty County, Texas, for breach of contract against Ames and the City of Hardin,¹ alleging both cities had failed to pay the Additional Service Charges under each city's contract with Liberty for wastewater volumes in excess of identified Total Acceptable Volumes (Section 5.2(c)). Liberty filed a "Plaintiff's Amended Petition" on October 6, 2021, and it filed a "Plaintiff's Second Amended Petition" on February 18, 2022. *See* Ames Request, Attachment A. Liberty's Second Amended Petition alleged that, "[a]s of February 3, 2022, Ames' unpaid obligation to Liberty for outstanding invoices totals \$1,356,611.20, inclusive of a ten percent (10%) interest rate." *Id.* at ¶ 12.

Ames filed its "Defendant's Original Answer and Request for Disclosure" on August 8, 2018, its "First Amended Answer" on October 22, 2021, and its "Second Amended Answer" on December 7, 2021. As part of both its First Amended Answer and Second Amended Answer, Ames filed a Plea to the Jurisdiction arguing that the District Court did not have jurisdiction and that the damages alleged by Liberty were not recoverable under Chapter 271 of the Texas Local Government Code. A hearing was held in the 75th District Court on Ames' Pleas to the Jurisdiction

¹ Liberty also executed the "Liberty-Hardin Wastewater Disposal Contract (Amended)" on December 9, 2003, that is almost identical to the Contract between Liberty and Ames.

on February 28, 2022. Ames' Plea to the Jurisdiction was denied by the District Court. Ames has appealed the denial of its plea to the jurisdiction to the 9th Court of Appeals. That appeal is still pending.

B. TCEQ Mediation

Ames was contacted on April 29, 2022, by Todd Burkey, a mediator with the Alternative Dispute Resolution (“ADR”) Program of the Commission. Mr. Burkey stated that he had been contacted by counsel for the City of Liberty regarding that city’s potential interest in ADR efforts concerning the legal dispute between the City of Liberty and the Cities of Hardin and Ames surrounding wastewater conveyance and treatment services. [REDACTED]

[REDACTED]

**IV.
LIBERTY’S SUSPENSION OF SERVICES**

On January 5, 2022, Liberty’s counsel sent a letter to Ames’s counsel regarding “Suspension of Services re: March 14, 2001 Contract between City of Ames and City of Liberty for Sewer Disposal” (the “Suspension Letter”). *See* Ames Request, Attachment B. In the Suspension Letter, Liberty states that, “Ames is in arrears on payments owed to Liberty under the Contract for excess flows dating back to 2015 and owes City of Liberty in excess of \$1,035,605.60.” *Id.* The Suspension Letter also “provides notice to Ames that Liberty shall cease accepting wastewater flows as of July 1, 2022.” *Id.*

**V.
EMERGENCY ORDER**

Ames requested that the Commission issue an Emergency Order to avoid the threatened suspension of wholesale wastewater service in Liberty’s Suspension Letter to protect public health and safety during the pendency of District Court case and/or Commission ADR process that are

still ongoing. *See* Ames Request (filed June 16, 2022, with the TCEQ). Specifically, Ames sought an Emergency Order requiring Liberty to provide continuous and adequate sewer service pursuant to Tex. Water Code § 13.041(h), which provides as follows:

- (h) In accordance with Subchapter L, Chapter 5, the commission may issue emergency orders, with or without a hearing:
 - (1) to compel a retail public utility that has obtained a certificate of public convenience and necessity to provide water or sewer service, or both, that complies with all statutory and regulatory requirements of the commission if necessary to ensure safe drinking water or environmental protection; and
 - (2) to compel a retail public utility to provide an emergency interconnection with a neighboring retail public utility for the provision of temporary water or sewer service, or both, for not more than 90 days if necessary to ensure safe drinking water or environmental protection.

In order to protect the health and well-being of the residents of the City of Ames, and to ensure environmental protection, Ames requested that the Commission immediately issue an emergency order to compel Liberty to continue to provide sewer service to Ames. *See* Ames Request at 5. Ames also noted that the Commission may also use any means in its power “to prevent a discharge of waste that is injurious to public health.” Tex. Water Code § 26.041.

On June 29, 2022, Ames’ Request was considered during the Commission’s agenda meeting. After receiving comments from both Ames and Liberty, the Commission issued an Emergency Order, dated June 29, 2022, providing that, “Liberty shall continue to provide to Ames continuous and adequate sewer service that complies with TWC Chapter 26, TWC § 13.041(h)(1), and 30 TAC Chapters 35 and 291 of TCEQ’s rules.” Commission Order at 3. The Order also specifies that it shall expire in 120 days, unless extended. *Id.*

VI.
ISSUES AFFECTING THE COMMISSION'S ORDER

Ames's paramount concern is ensuring that its customers continue to receive retail sewer service both through the duration and after the expiration of the Commission's Order, which could also result in serious environmental issues if wholesale service by Liberty is prematurely suspended. Liberty's arguments have focused solely on requiring Ames to identify alternative wholesale wastewater transport and treatment services, but this is impossible to do until Liberty provides details on how it plans to fulfill its own service obligations to Ames' customers that are located within Liberty's Certificate of Convenience and Necessity No. 20056.

The Contract provided the terms of Liberty's wholesale sewer service to Ames, but it also allowed Ames to provide retail sewer service within the Ames-Minglewood Water Supply Corporation ("WSC") water Certificate of Convenience and Necessity ("CCN"). Section 4.2 of the Contract states, "[t]he primary purpose of this contract is to provide sewer service to the CITY OF AMES and to allow AMES to provide sewer service within AMES' extraterritorial jurisdiction and the territory encompassed in the AMES-MINGLEWOOD WATER SUPPLY CORPORATION certificate of convenience and necessity." *See* Ames Request, Attachment A, Exhibit 2, Section 4.2. A large portion of the Ames-Minglewood WSC CCN is located within Liberty's active sewer CCN No. 20056. *See* Exhibit A, Maps of Liberty's CCN No. 20056. Specifically, one of Ames' sewer system lines extends into Liberty's CCN up to a large group of homes around Cardinal Drive and Bobwhite Drive in Liberty, directly adjacent to the Liberty Municipal Golf Course and Magnolia Ridge Country Club. *See* Exhibit B, Map of Ames' Sewer System.

Liberty suspended the Contract effective July 1, 2022. Liberty is only providing wholesale water service to Ames pursuant to the Commission's Order. Therefore, Ames no longer has

contractual authority to serve within Liberty’s sewer CCN No. 20056; instead, Liberty now has the legal obligation to provide retail sewer service to this area, and Ames is prohibited from providing retail sewer service within another entity’s sewer CCN. *See* Tex. Water Code § 13.250 (Liberty is now required, by law, to “render continuous and adequate service” to those areas which are within its CCN).

Ames assumes that, since January 5, 2022 (the date Liberty threatened to suspend service to Ames under the Contract in the Suspension Letter detailed above), Liberty has made significant/detailed plans to provide retail sewer service to areas within Liberty’s CCN that Ames is currently serving. However, Liberty has given no such indication to Ames. Liberty’s focus has been solely on Ames’ obligation to find another wholesale service provider and/or address issues with Ames’ system, but no consideration has been given to Liberty’s new obligations that result from the Suspension Letter, namely that Liberty is now required to serve (and Ames is prohibited from serving) customers within Liberty’s active sewer CCN.

Therefore, Ames requests that Liberty provide details on its plans to provide retail sewer service to areas within Liberty’s CCN that Ames is currently serving. Once Ames knows the number of customers it will serve in the future, it can fully explore the costs and feasibility of alternatives to dispose of its wastewater. Since a good number of its current customers are located within Liberty’s CCN, it is impossible for Ames (at this time) to develop accurate calculations associated with any alternatives.

VII.
PROPOSED MODIFICATIONS TO THE ORDER

Based on the foregoing, Ames proposes that the Commission modify the Emergency Order with the following changes:

- a) In the Findings of Fact section, add an additional Finding of Fact (to become number

8), to state as follows: “As of June 29, 2022, Liberty has not identified whether it can currently provide retail sewer service to Ames’ current customers located within Liberty’s Certificate of Convenience and Necessity No. 20056.”

- b) In the Ordering Provisions section, add a new Ordering Provision (to become number 4), to state as follows: “Within 90 days of the date of this Order, Liberty shall provide detailed plans to TCEQ, the Public Utility Commission of Texas, and the City of Ames associated with its service of Ames’ current customers located within Liberty’s Certificate of Convenience and Necessity No. 20056.”

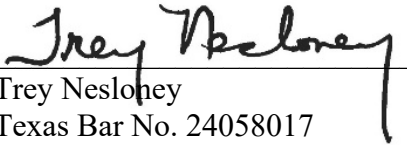
Liberty must first identify whether it is going to serve the retail sewer customers within its service area before Ames can accurately identify and obtain cost estimates for feasible alternative wastewater treatment options. Liberty has a statutory obligation to provide service to this area. Including these modifications in the Emergency Order will ensure that Liberty will divulge its long-term plans to the Commission, the Public Utility Commission of Texas, and Ames, and it will allow Ames to use that information in order to explore alternative treatment options for its remaining customers.

VIII. PRAYER

WHEREFORE, PREMISES CONSIDERED, Ames respectfully requests that the Commission modify the Emergency Order to include Ames’s proposed revisions as outlined in Section VII above. Ames also requests any such further relief to which it may be entitled.

Respectfully submitted,

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ATTORNEY FOR CITY OF AMES

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via email on July 15, 2022, to the following:

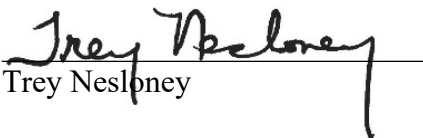
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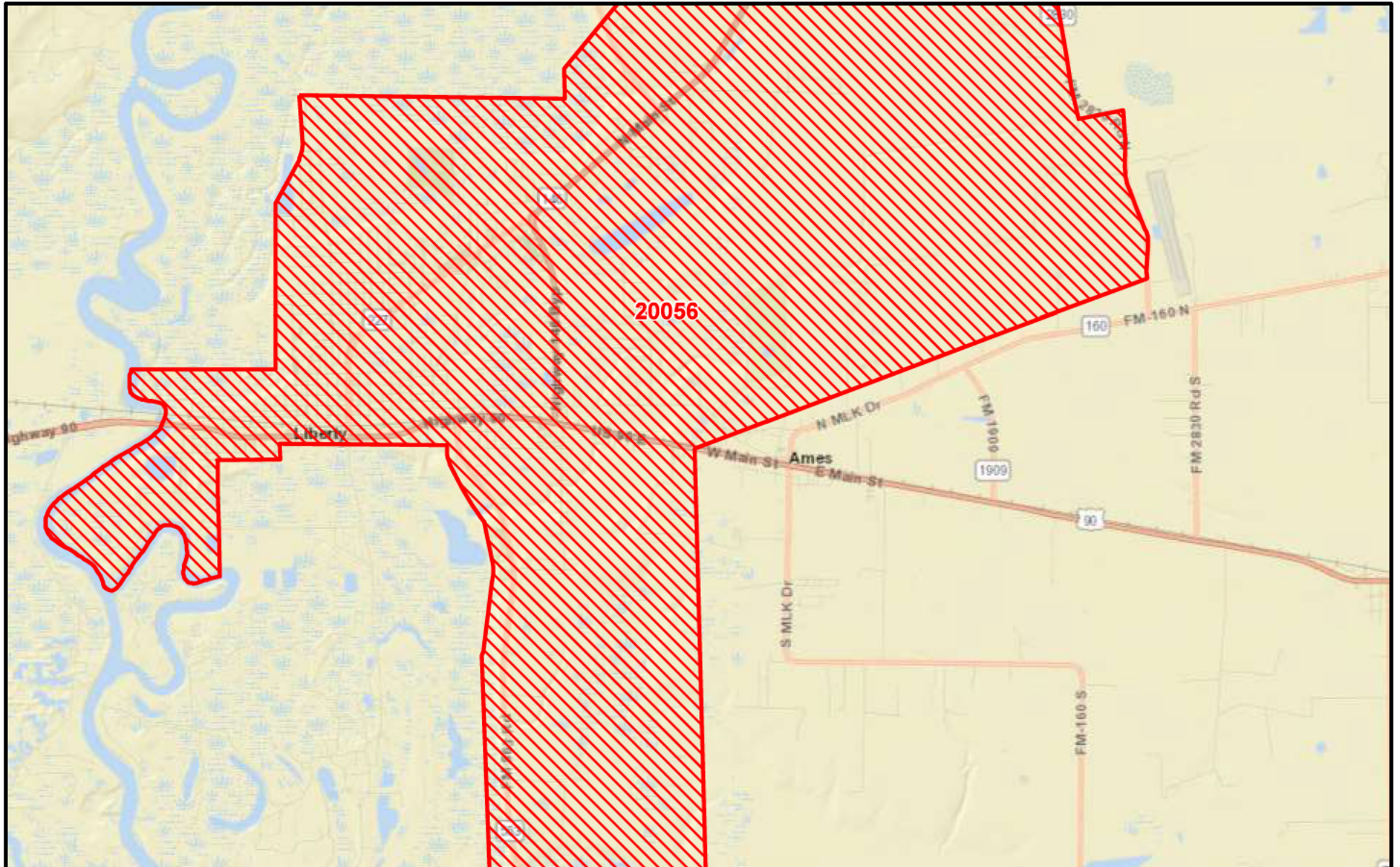
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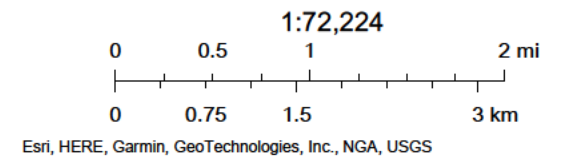

Trey Nesloney

City of Liberty CCN 20056

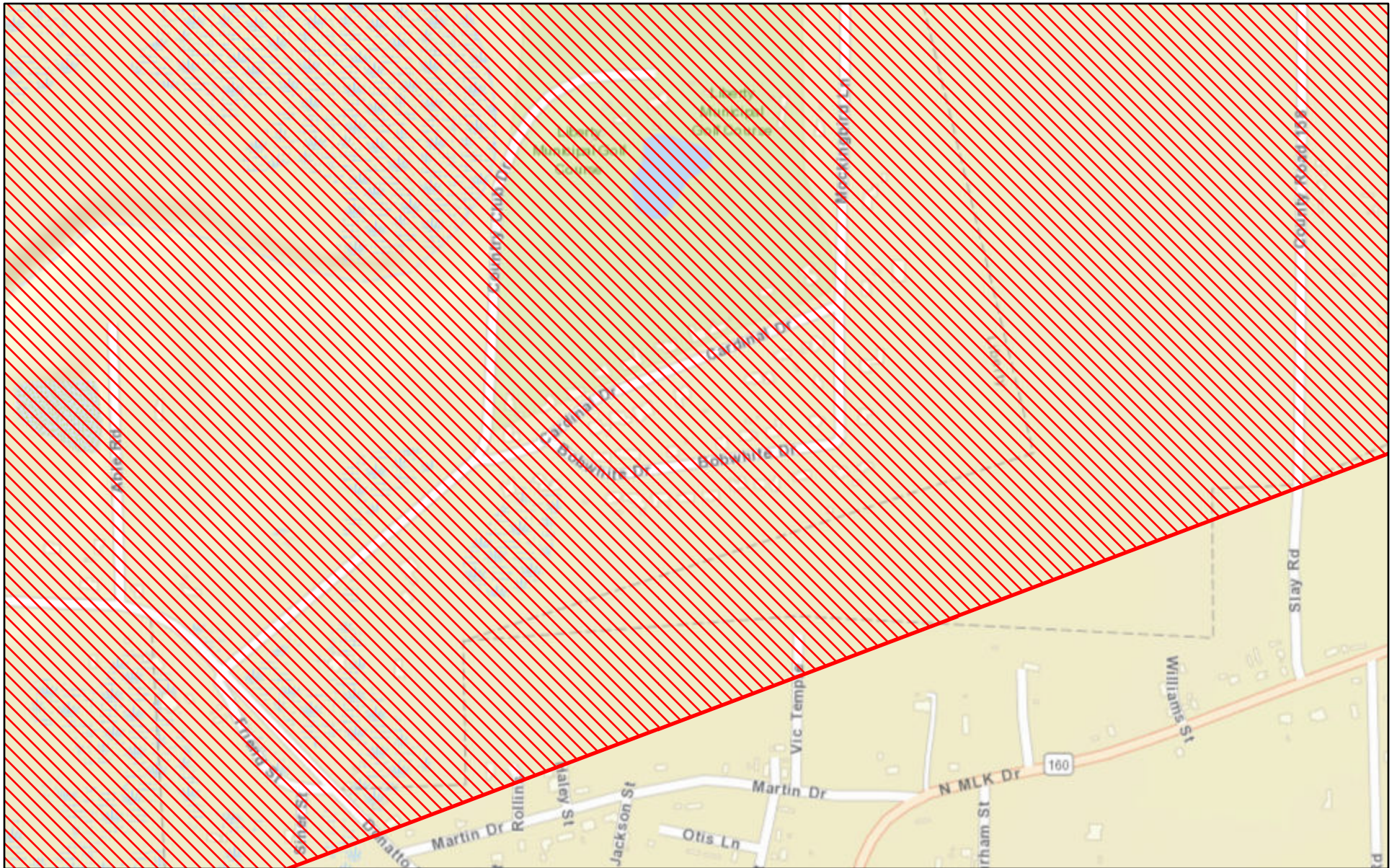
EXHIBIT A



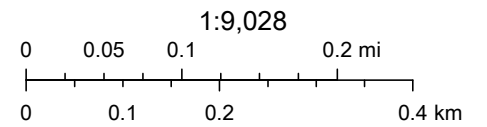
July 15, 2022



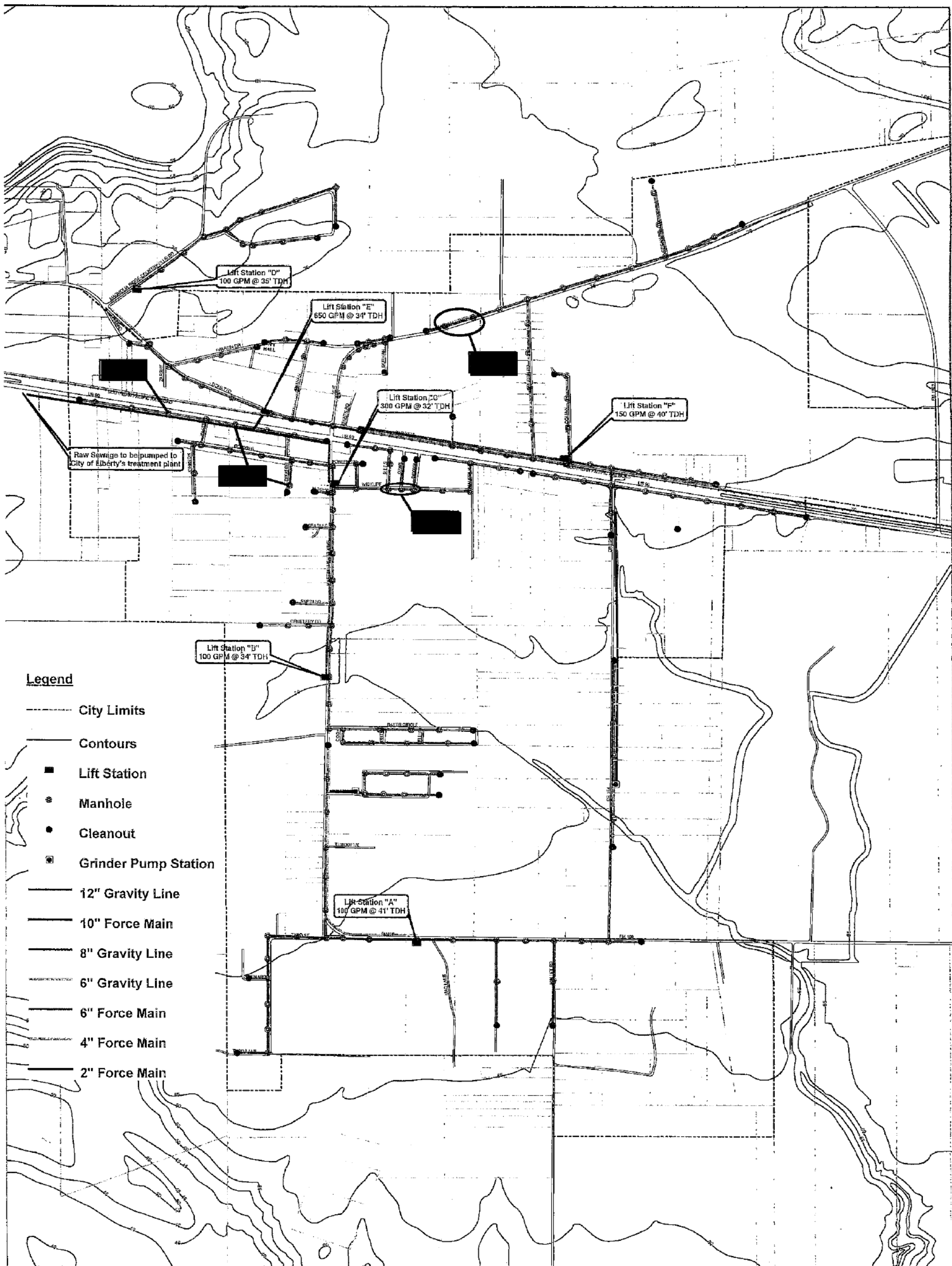
City of Liberty CCN 20056



July 15, 2022



Esri, HERE, Garmin, GeoTechnologies, Inc., Intermap, NGA, USGS



Legend

- City Limits
- Contours
- Lift Station
- Manhole
- Cleanout
- Grinder Pump Station
- 12" Gravity Line
- 10" Force Main
- 8" Gravity Line
- 6" Gravity Line
- 6" Force Main
- 4" Force Main
- 2" Force Main

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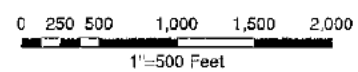
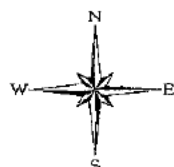


EXHIBIT "L"
 2007
CITY OF AMES, TEXAS
EXISTING WASTEWATER
COLLECTION SYSTEM