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**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6  
DALLAS, TEXAS**

2004 DEC 29 AM 9:47

ENVIR. APPEALS BOARD

In the Matter of:

Gaskey Construction Corporation

Respondent.

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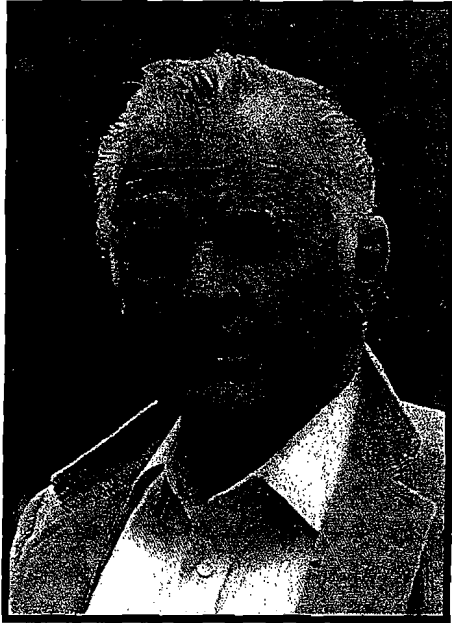
Docket No. CWA-06-2004-2335

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## NOTICE OF DEATH

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*Frank J. Gaskey, Jr.*

December 22, 1928 – November 29, 2006

*In Memory*  
*Frank J. Gaskey, Jr.*

*The Memorial Service*

Four o'clock in the afternoon  
Monday, the 4<sup>th</sup> of December 2006  
The Jasek Chapel of  
Geo. H. Lewis & Sons

*Officiating*  
Dr. Tom Pace

*Pianist*  
Dr. Robert C. Bennett

Please join the family for a reception  
In the Pavilion following the service



**GEO. H. LEWIS & SONS**

*The Funeral Directors - Since 1936*

1010 BERING DRIVE  
HOUSTON, TEXAS 77057

Unfortunately the founder of Gaskey Construction Corporation did not survive the conclusion of this proceeding. However, he was very concerned about it and its reflection on the company. He was also stressed about the company's current financial status. Hopefully, in view of this notice, the EPA will allow this pleading to be filed and considered even if it may be past due.

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In the Matter of:	)	
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Gaskey Construction Corporation	)	Docket No. CWA-06-2004-2335
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**(A) SUPPLEMENTAL RESPONSE OF RESPONDENT TO AMENDED INITIAL DECISION  
AFTER REMAND AND (B) SUPPLEMENTAL ANSWER OF RESPONDENT TO COMPLAINT;  
AND, (C) REPLY OF RESPONDENT TO COMPLAINANT'S BRIEF IN RESPONSE TO  
RESPONDENT'S APPELLATE BRIEF; AND, (D) INCLUSION OF RESPONSIBLE THIRD  
PARTIES ("RTP")**

Rather than risk the needless drill of treating the captioned (A), (B), (C) and (D) separately, Respondent will attempt to bring this proceeding into acute focus, as follows:

1. Some of the basic factual misstatements in Part I of Complainant's Brief which are essential to Complainant's Complaint follow:
  - a. The construction site (1.1810 acres) was not in Pearland, Texas but on the other hand, it was located in rural Brazoria County, Texas.
  - b. The construction site was not a part of any "Commercial/retail shopping center complex".
  - c. Respondent did file an answer to the Complaint dated October 19, 2004, and at all times Respondent did desire a hearing consistent with 40C.F.R. §22.15. Somehow the E.P.A. did not wish to honor the spirit of the law.
  - d. Respondent was repeatedly told by the Owner of the construction site that any E.P.A. issues had been handled by the Owner.
  - e. The City of Pearland refused to take any regulatory actions whatsoever regarding the construction site which was not in Pearland.
  - f. Brazoria County, Texas, refused to act regarding a SWPPP because none was required.
  - g. The self-serving and legally deficient statements of those acting on behalf of the E.P.A. are fully controverted by the affidavits attached hereto.
  - h. The attached controverting affidavits further reflect good cause for Respondent's actions with respect to the construction site.
2. Respondent has always contended that: (i) the construction site was not subject to the jurisdiction of the E.P.A.; and (ii) Respondent was totally correct in relying upon the following parties who are brought into this proceeding as Responsible Third Parties ("RTP");

J. P. MORGAN CHASE, 712 Main Street 25<sup>th</sup> Floor, P.O. Box 2558, Houston, Texas 77252-8089 whose duly authorized representative is: Douglas L. Dehart, Vice President, Project Manager, Real Estate Manager, Real Estate Business Services, Texas Region.

This RTP was the owner of the construction site and its Silver Lake Branch constructed by Respondent.

THE WINGFIELD/SEARS GROUP, INC., ARCHITECTS, 2900 Wesleyan, Suite 310 Houston, Texas 77027-5109

This RTP was employed by J.P. Morgan Chase to act as the architect for its Silver Lake Branch, and showed the construction site as more than one acre and less than five acres. No SWPPP was included in its plans and specifications for the Silver Lake Branch construction site.

JONES & CARTER, INC., CIVIL ENGINEER, 6335 Gulfport, Suite 100 Houston, Texas 77081 Attn: Michael Harney.

This RTP maintained in its owner drawings that the construction site of the J.P. Morgan Chase Silver Lake Branch would not require a Pollution Prevention Drawing and Layout in Brazoria County, Texas.

3. Respondent is appalled that Complainant does not understand that the NPO held that we now have a totally de novo proceeding. This was made essential because the NPO was not able to explore the entire record with respect to the E.P.A.'s initial Complaint without input of the FPO which was not available. Respondent is extremely curious regarding the fears of the E.P.A. concerning a full review of the E.P.A.'s strong arm activities at a time when Respondent was without legal representation. The views of Respondent and the RTP's are treated as unimportant by Complainant. Obviously the lengths to which the Complainant has gone to try and bring the construction site into its jurisdiction revealed its desperate grasp.
4. Again the Complainant misstated that the facts as to liability are undisputed and that Respondent has waived all rights to dispute them. Not so, in this de novo proceeding.
5. Complainant mistakenly avers that the construction site required permit coverage and a SWPPP.
  - a. The total construction site was 1.1810 acres and in truth and in fact less than one acre of land was disturbed by construction and it was not a part of a larger plan disturbing five or more acres.
  - b. The construction site was not a part of a larger plan of development or sale which would ultimately disturb equal to or more than five acres.
  - c. Clearly, it would be necessary to employ an environmental law firm to ever attempt to question a dictate of the EPA. This is repugnant where a small contractor is relying on qualified third parties such as the RTP's

6. It is silly for Complainant to state in V. that "the penalty assessed in the Initial Decision and the Initial Decision after remand is fair, appropriate, and consistent with the record and the act"

This is confirmed by the "reasoning" on pages 14-17 of Complainant's Brief. One would need to smoke several joints of Acapulco Gold to make any sense of Mr. Spencer's calculations. Maybe Respondent needs a BEN model. Perhaps Respondent does understand that for whatever reason, to argue about the Assessment of a \$155.00 economic benefit penalty is foolish.

7. The "Calculation" of the gravity portion of the proposed penalty is not supported or "clarified" by Mr. Spencer's affidavit. To believe that any idea of "reasonableness" is established is totally foolish.

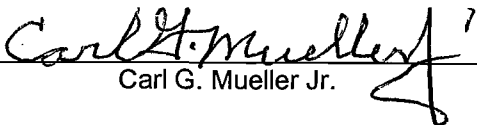
The inadequate allegations and "proof" of rainfall at the construction site during any relevant period are useless and without merit.

- a. Complainant states an unfounded fact that seventeen (17) rainfall events happened at the construction site. This statement is without any foundation in fact. Moreover, the idea that precise amounts of rainfall occurred at various times is without merit.
  - b. No rain gage existed at the construction site. To estimate any rainfall amount at the construction site based upon some weather station miles away is unsound reasoning.
  - c. Foolish inferences based upon unfounded rainfall data can not form the basis for the assessment of a proposed penalty.
  - d. The ridiculous idea that a false premise can be used to support other false premises makes no sense.
  - e. The E.P.A. just dreams up a number of days of rainfall at the construction site and further embellishes the dream by guessing an amount for daily rainfall.
  - f. Then the E.P.A. says 17 days X \$11,000 would have allowed an authorized penalty of \$187,000 as the gravity portion of the penalty. However, overcome by kindness (or guilt, or reality) the E.P.A. believed a gravity calculation of \$2,000 X 5 months (the duration of the job) "would accomplish the goals of the act's penalty authority". Respondent sincerely believes it was Respondent's failure to bow down and kiss the ground upon which Spencer, AuBuchon and Shivers walked – reflecting in their respective minds, and in the mind of Smith the filing (and perhaps drafting) paralegal – a despicable omission of Respondent which caused the RJO to state "I did consider [Gaskey's] general recalcitrance in its dealings with the E.P.A. concerning the violation under this factor." The EAB will never know "exactly what 'recalcitrance' the RJO is referring to or what effect this adjustment had and whether it was consistent with Board precedent."
8. The affidavits of the RTJ's reflect that each basis of Complainant's case is totally without merit. See Exhibits hereto (affidavits) which are incorporated at this place herein for all relevant purposes.
  9. Respondent will timely file financial statements reflecting its financial status and its current inability to pay.

10. Respondent respectfully requests that it be allowed the time which was required to file this pleading in view of the death of Frank J. Gaskey Jr.

Respondent repeats all of its prayers for relief heretofore stated in Respondent's Pleadings herein.

Respectfully submitted,

  
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Carl G. Mueller Jr.

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Gaskey Construction Corporation

## **SUPPLEMENTAL COMMENTS TO SUPPLEMENTAL RESPONSE**

The controverting Affidavits and Financial Data mentioned in the foregoing Response will be sent for attachment to the foregoing as soon as they are available.