UNITED STATES
EMVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

In the Matter of:	)	
	)	
Gaskey Construction Corporation	)	Docket No. CWA-06-2004-2335
	)	
Respondent.	)	

DE NOVO AMENDED INITIAL DECISION AFTER REMAND ('AIDAR")

PART ONE OF RESPONDENT'S ANSWER, REPLY, RESPONSE, REQUEST FOR HEARING AND PRAYERS TO DE NOVO AMENDED INITIAL DECISION AFTER REMAND ('AIDAR") OF THE PRESIDING JUDICIAL OFFICER, BEN J. HARRISON, REGIONAL JUDICIAL OFFICER, WHO REPLACED REGIONAL JUDICIAL OFFICER, AS PRESIDING OFFICER, ALL IN THE ABOVE CAPTIONED MATTER, WHO WROTE THE INITIAL DECISION AND DEFAULT ORDER ("IDADO") WHICH IDADO WAS REMANDED SUA SPONTE BY THE ENVIRONMENTAL APPEALS BOARD AS TO JUSTIFICATION OF THE CIVIL PENALITY ASSESSED.

PART I.
Analysis of Civil Penalty Criteria

In view of the primary concern of the Environmental Appeals Board ("EAB") as reflected in its Order Electing to Review Sua Sponte and Remanding to a Regional Judicial Officer ("Order"), Respondent will first address that Concern. It appears that in 2006 Judge Barra withdrew as Presiding Officer ("FPO") in this Case and Judge Harrison as an appointed Regional Judicial Officer as such has been assigned as the new Presiding Officer ("NPO") in this Case. The NPO noted in his "Amended Initial Decision after Remand " ("AIDAR") ("Because I am not privy to Judge Barra's thought processes in analyzing Complaint's proposed penalty and it would be inappropriate to discuss this matter with him, I am reviewing the penalty de novo")

In the AIDAR the NPO seemed completely devoted to affirming the FPO's view of the "Background and Default Status" and the "Findings of Fact and Conclusions of Law" as set forth in the FPO's "Initial Decision and Default Order" ("IDADO"). Accordingly, Respondent, in what Respondent believes to be a reasonable and proper – **Analysis of Civil Penalty Criteria** – "will assume" that the actions and inactions of Respondent were exactly as set forth by the Complaint, Amended Complaint, IDADO and AIDAR. Respondent firmly believes that the EAB was shocked by the Civil Penalty assessed by the FPO even assuming all of the dereliction and evils attributed by the FPO in the IDADO. Now the NPO carries forward the excess civil penalty by continuing the wrongful "Analysis of Civil Penalty Criteria". Fortunately, Respondent's defenses available to Respondent in this totally de novo proceeding, regarding the Complainants FPO and NPO's allegations asserted by the Complaint, Amended Complaint, IDADO and AIDAR can be fully challenged as set forth by Respondent in the succeeding Parts hereof.

The remainder of this Part I comments upon the portions of the AIDAR which purport to satisfy the Boards "Order Electing to Review Sua Sponte and Remanding to Regional Judicial Officer." Respondent quotes from the AIDAR and all emphasis is Respondent's.

"ANALYSIS OF CIVIL PENALTY CRITERIA"

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination and Suspension of Permits at 40 C.F.R. 22.27(b) states the following:

> "If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act."

Respondent acknowledges that a Presiding Officer ("PO") can, in a proper situation, access a civil penalty based on the evidence in accordance with stated penalty criteria.

"Section 309(g)(3) of CWA, 33 U.S.C. 1319(g)(3), establishes the factors governing the assessment of a civil penalty. Those factors are:

"... the nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."

NATURE

"The nature of this violation is failure to obtain a permit for discharge of pollutants to waters of the United States. The objective of the Clean Water Act, in part through the use of permitting, is to "restore and maintain the chemical, physical and biological integrity of the Nation's water". CWA section 101(a), 33 U.S.C. 1251(a), see Attachment G to Complainant's Motion for Default Order, Declaration of Everett H. Specer. Failure of facilities to obtain permits that limit discharges and ensure best management practices would thwart the stated purposes of the statute."

The "nature" of Respondent's alleged violation is "failure to obtain a permit for discharge of pollutants to waters of the United States".

Respondent's understanding and position regarding the necessity of a permit relating to a SWPPP was based upon the following:

> The Owner of the tract of land (about 1 acre) upon which Respondent contracted to build a bank upon being informed by Respondent that the EPA was asserting claims told Respondent that the Owner's legal department would handle the matter.
>
> The engineer and architect for the job told Respondent that no SWPPP was required to be included in the Plans and Specifications for the job, because only rural Brazoria County, Texas had governmental jurisdiction of the bank's less than one acre tract and therefore no SWPPP was required.
>
> Respondent got a building permit from Brazoria County, Texas, which governmental authority affirmed no need for a SWPPP. The survey shows 1.1810 acres.

All parties questioned by Respondent believed the subject project was governed by a State of Texas statutory general permit which required no SWPPP for a small tract project.

In summary, the nature of this violation does not appear to justify any civil penalty.

CIRCUMSTANCES

The FPO, NPO, IDADO and AIDAR all appear to avoid the "Circumstances", probably because the true facts surrounding the circumstances do not support any civil penalty. The project was substantially completed when the EPA began to question the lack of some type of permit.

Perhaps it is the position of the EPA that a party in the Respondent's position should comply, pay up or hire an environmental attorney. However, I am representing the Respondent as a pro bono accommodation to my old high school friend, Frank J. Gaskey, Jr., who is receiving treatment for congestive heart failure and a large cancer in the area of his neck and shoulders; chemo has been discontinued and proton radiation is scheduled to begin.

As a retired attorney for eight years after over forty years of private practice, both with a large firm and solo, I am appalled that the EPA would become as personally and emotionally involved as circumstances of this case reflect.

EXTENT

"The extent of the violation in this matter is a complete failure to comply with the statutory and regulatory permitting requirements. Respondent was informed of the need for a permit, the mechanism for obtaining such a permit and the requirements that would be included in a permit before the Complaint was filed. There were several months of discussion after the Complaint was filed in which Respondent could have come into compliance, yet failed to do so."

I understand the lack of some type of flimsy "plastic black silt fence" is the sole issue as a practical matter. This attempt to stretch the "extent" of the alleged violation so as to sound sinister "complete failure to comply with the statutory and regulatory permitting requirements" is silly. If this "violation" in this case makes its extent so significant, the intent of the statute is lost. The FPO, NPO, IDADO and AIDAR say the failure to get a permit is a complete failure so that a quintuple civil penalty is justified. This is pure bootstrap logic. It deserves no further comment.

GRAVITY OF THE VOILATION OR VOILATIONS

"The gravity of the violations here is significant. That no actual environmental harm is in evidence does not mean the violations are not significant. Harm to the regulatory scheme is also a consideration. The permitting program is essential to effective control of discharges into surface water. The allegation of five counts is appropriate given that Respondent failed to comply for five months"

Well here too, EPA's representatives again bootstrap "gravity". Noting that lack of any environmental harm in the record does not negate "gravity", but then finding somewhere that harm to the regulatory scheme is also a consideration. "The permitting program is essential to effective control of discharges into surface water. As a matter of fact all surface water in this area

drains into a very large detention pond nearby. Again, Respondent does not believe this position of gravity by the EPA meets any application of the "smell test"

WITH RESPECT TO THE VIOLATOR;
VIOLATOR'S ABILITY TO PAY

VIOLATOR'S PRIOR HISTORY OF VIOLATIONS

VIOLATOR'S DEGREE OF CULPABILITY

These headings seem to assume there is a "violator" needing to be punished by a civil penalty of the EPA.

The Respondent ("Violator") is bankrupt.

In the equity sense – cannot pay bills when due.

In the legal sense – liabilities greater than assets.

Continued existence is doubtful.

$400,000 of reserves lost on a bad investment in a masonry company.

Unable to bond jobs.

Office help, one secretary half a day, sometimes, who is now spending time helping Respondent type and timely file this Answer, Reply, Response and Prayer while Respondent's attempts to survive suffer.

Two sons have no assets to contribute to Respondent.

Mr. & Mrs. Frank J. Gaskey Jr. are both old, ill and do not have enough assets to contribute to Respondent.

The family has "pride" in Respondent, but must face the facts.

The sons, Joe and Bill Gaskey work in the business and are trying to get jobs.

"Respondent does not have a history of violations and there is nothing in the record to indicate Respondent is unable to pay the penalty sought by Complainant. Respondent's culpability, as demonstrated by Respondent's failure to achieve compliance, warrants the imposition of the penalty sought by Complainant."

The Respondent (violator)" has no prior history of violations." For a small third generation family business this factor should not continue to be ignored. The EPA treats this as a "throw away" criteria.

The Respondent (violator's) degree of Culpability is virtually non existent supported only by a paper chase and bootstrap arguments.

The EPA's representatives coast by the culpability issue by simply stating that **"Respondent's culpability, as represented by Respondents failure to achieve compliance, warrants the imposition of the penalty sought by complainant.** " This short shift treatment of the EAB illustrates that the NPO as set forth in the AIDAR just does not have the time or patience to seriously reply to the EAB in this "slam dunk" Case.

PRAYER, REPLY, RESPONSE AND ANSWER TO AIDAR

Nevertheless Respondent hereby and hereinafter:

(1) Files this Appeal to the Environmental Appeals Board within the required thirty (30) day time limit set forth in the NPO's Order. See AIDAR p. 8.
(2) Moves to set aside the Default Order. See AIDAR p.8.
(3) Respectfully requests that Environment Appeals Board elect, sua sponte, to review the Initial Decision within the 45 day period set forth in the NPO's Orders. See AIDAR, p.8.
(4) Requests all such full and complete Hearings available to Respondent with respect to the foregoing and all related matters, whatsoever, including without implied limitation, all such Hearings which are available with respect to the totally de novo proceedings in this Case as reflected by the AIDAR.

ECONOMIC BENEFIT OF NON COMPLIANCE

Complainant seeks $155.00 for the economic benefit of noncompliance. According to the Declaration of Everett H. Spencer, this figure represents what it would have cost Respondent to prepare and implement a Storm Water Pollution Prevention Plan, the requirement in the type of permit Respondent would have received had it ever sought to comply. There is nothing in the record to suggest that this is not an accurate assessment of Respondent's economic benefit.

This statement alone plainly illustrates the angry attitude of the representatives of the EPA in prosecuting this Case. So the "permit" the EPA sought for Respondent to acquire would have cost Respondent to expend $155 "to prepare and implement a Storm Water Pollution Prevention Plan, the requirement in the type of permit Respondent would have received had it ever sought to comply"

This case is just a vendetta by the representatives of the EPA to teach a small company owned and operated by several perceived pitiful citizens a lesson. A SWPPP if required would and should have been requested on the bid documents by the Owners (Chase Bank), Architect and Civil Engineers. The site plan in the bid documents could have shown a SWPPP layout with requirements. This would have been required so that all General Contractors bidding this project would have had the same bid guide lines.

After the EPA visited the construction site near the conclusion of the project, Respondent informed the Owner and his agents of the EPA's claimed SWPPP requirements. "The Owner and his agent's response was that a SWPPP was not required." Owner's agent told Respondent that projects in rural Brazoria County of less than 5 acres does not require a SWPPP. All correspondence from the EPA was forwarded to the owner's representatives as requested and "it would be taken care of. "As further correspondence came from the EPA to Respondent this was given to the Owner as requested. Just to show how a representive of the EPA "had fun" with Respondent, Respondent was asked "how about we settle for nine" and the reply was "that's ok", whereupon the EPA's representative said "what do you think nine means" and Respondent's

representative said "Nine hundred dollars", where upon the EPA representative laughed and said "No, nine thousand dollars". Its just good sport to make fun of the local dolts.

MATTERS AS JUSTICE MAY REQUIRE

"I find no other "matters as justice may require" for consideration. The fact that Respondent did not come into compliance is considered in the gravity and degree of culpability factors."

This treatment by the NPO of "matters as justice may require" shows a gross disregard of the subject "civil Penalty Criteria". The NPO follows the FPO in the "piggyback" use of "failure to come into compliance', "gravity". And "degree of culpability" to disregard "matters as justice may require".

This criteria: "matters as justice may require" is stuck in under the $155 penalty, consideration of economic benefit, and directly after the above quote as part of the same paragraph the NPO states: "Complainant was correct in not including any penalty amount under this factor ("economic benefit") as there is no evidence in the record that would support either an increase or decrease in the appropriate penalty for this particular factor." So the NPO and FPO believed "justice" was so severely limited.

Respondent believes it may be that the NPO considered "justice" only as such as can work against and not in favor of Respondent, thus using a "double kill" concluding that failure not to come into compliance was considered only as a part of the "gravity" and "degree of culpability" factors. So "justice" does not require any discussion of how Respondent was unjustly treated.

Then the NPO concludes that the $155 did not merit any penalty amount in view of the record. However it's the same old record that was applied to the $10,000 "permit" civil penalty. So the complainant just wanted to throw in a crumb of "justice" for Respondent rather than go for some multiple, perhaps the number of hours or days a permit was lacking.

It is unbelievable that the EPA can seriously maintain as the NPO does in the AIDAR, as well as the FPO in the IDADO.

Respondent apologies for not reading the Environmental Appeals Board's "Order Electing to Review Sua Sponte and Remanding to Regional Judicial Officer" ("EABO") again immediately prior to finalizing this Part I. Respondent was attempting to do with the NPO AIDAR exactly what the EAB could not do with the FPO's IDADO. Of course, the AIDAR does nothing toward: "... clarification on the penalty assessment." This, however, is exactly what the EAB ordered.

For convenience Respondent must quote the now pertinent portions of the EABO.

> "In assessing the penalty, the RJO appears to have relied, for the most part, on the Regions penalty calculation. In particular, the RJO cites to a summary prepared by Everett H. Spencer, a Region 6 enforcement officer, explaining the reasoning behind the penalty. This summary is set forth in an affidavit attached to the Region's July 1, 2005 memorandum in support of its motion for default in this matter. See Attachment G to Memorandum of Law in Support of Complainant's Motion for Default Order as to Liability and Penalty (July 1, 2005) (hereinafter "Affidavit"). According to the Affidavit, Mr. Spencer "calculated a penalty of $10,155 for five counts of violations which consists of five months of failure to have *** permit coverage." Affidavit at 8. According to the

Affidavit, this includes "$155 in economic benefit and $10,000 for the gravity of the violations." Id. (emphasis added). In his default order, however, the RJO states that he "find[s] no basis for Mr. Spencer's considering that this case involves five violations because [Gaskey] operated without the required permit for five months." Default order at 16. Nevertheless, the RJO, without explanation, adopts the Region's proposed $10,000 gravity-based penalty. Absent further explanation, the Board can not determine whether the RJO appropriately assessed the penalty in this case. We note further that the RJO states that the "economic benefit in this case was not significant." Id. Nevertheless, the Default Order, again without explanation, adopts the Region's $155 economic benefit calculation. Finally, the RJO states that although the Region's penalty calculation did not make any adjustments to the penalty for other factors as justice may require, "I did consider [Gaskey's] general recalcitrance in its dealings with EPA concerning the violation under this factor" Id. The Board is unable to determine from this statement exactly what "recalcitrance" the RJO is referring to or what affect this "recalcitrance" had on the penalty assessment. In addition, to the extent that the RJO adjusted the adjustment was consistent with Board precedent. See, e.g. In re Phoenix Const. Servs., Inc., 11 E.A.D. 379,414-15 (EAB2004).
Under these circumstances, the Board remands the penalty portion of the Default Order. On remand, the RJO must either provide further explanation and analysis regarding his rationale for the $10,155 penalty assessment or adjust the penalty in light of this decision and fully explain the rationale for such and adjustment."

Hopefully, as heretofore discussed in Part I., Respondent has shown that the AIDAR does no more than the IDADO to clarify, explain or otherwise justify the $10,155 civil penalty. As noted by the EAB, Mr. Spencer's Affidavit, said he "calculated a penalty of $10,155 for five counts of violations which consists of five months of failure to have... permit coverage" and further that "this includes $155 in economic benefit and $10,000 for the gravity of the violations: (emphasis added by EAB). Then the FPO, says in his IDADO ("Default Order") that he "finds no basis for Mr. Spencer's considering that this case involves five violations because [Gaskey] operated without the required permit for five months. Default Order at 16. the OEAB goes on to state: "Nevertheless, the RJO,, without explanation, adopts the Region's proposed $10,000 gravity based penalty. Absent further explanation, the Board can not determine whether the RJO appropriately addressed the penalty in this case. Who Could? So the NJO says simply "mo.x 5 penalty as to $155 economic benefit but "add a x 5 gravity based penalty of $10,000."
This cavalier "explanation" by Mr. Harrison (the NPO) of his ideas regarding the "thought process" of Spencer and Harrison, i.e. and Mr. Michael C. Barr's (the FPO) thought process (Mr. Barra went away) and because I am not privy to Judge Barra's thought process in analyzing Complainants proposed penalty and it would be inappropriate to discuss this matter with him. I am reviewing the penalty de novo." Then the NPO in his so called "Analysis of Civil Penalty Criteria" goes on to virtually adopt the IDADO. The NPO reviews: (i) the applicable law; (ii) factors relating to the civil penalty (then) distorts them as heretofore shown. (iii) ignores the directions and observations of the EAB in its Order of Remand. (iv) perverts the so called nature, extent and circumstances surrounding the nature of Respondent's evils (which were non-existent, as above and hereinafter shown); and (v) simply separates the $155 and $10,000 penalties to force an improper response to the EAB; (vi) uses "adjustments to the "penalty" for other factors as justice may require" stating that justice did not require any greater penalty, since all available justice had already been used up against Respondent in favor of Compliant in considering other required criteria.

It appears that the NPO in the AIDAR decided that it was not necessary to respond to the following inquiry of the EAB:

"Finally, the RJO states that although the Region's penalty calculation did not make any adjustments to the penalty for other factors as justice may require, "I did consider [Gaskey's] general recalcitrance in its dealings with EPA concerning the violation under this factor". Id. The Board is unable to determine from this statement exactly what "recalcitrance" the RJO is referring to or what effect this adjustment was consistent with Board precedent" In item 12 of Exhibit "A"

the perceived "recalcitrant attitude by Gaskey" was questioned. I suppose this pleading will further evidence Respondent's "stubborn resistance to being hammered unjustly." Anyway, Complainant feels this issue is none of the EAB's business

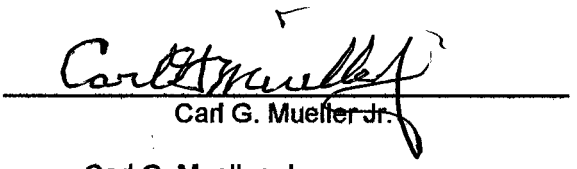
ANSWER, REPLY, RESPONSE AND PRAYER TO THE AIDAR OF THE NPO

Again, Respondent hereby accordingly:

(1) Files this Appeal to the Environmental Appeals Board within the required thirty (30) day time limit set forth in the NPO's Order. See AIDAR p. 8.
(2) Moves to set aside the Default Order. See AIDAR p.8.
(3) Respectfully requests that Environments Appeals Board elect, sua sponte, to review the Initial Decision within the 45 day period set forth in the NPO's Orders. See AIDAR, p.8.
(4) Requests all such full and complete Hearings available to Respondent with respect to the foregoing and all related matters, whatsoever, including without implied limitation, all such Hearings which are available with respect to the totally de novo proceedings in this Case as reflected by the AIDAR.
(5) Respondent further prays that in view of Respondent's foregoing ANALYSIS OF CIVIL PENALTY CRITERIA that the Presiding Judicial Officer, the Environmental Appeals Court and such other authorities as may be so empowered, dismiss the subject Complaint and these proceedings; or, to the extent appropriate, fully abate any and all civil penalties heretofore found to be appropriate by the Regional Judicial Officers as Presiding Judicial Officer or by any other party or parties with such authority, as the case may be.

SUBSEQUENT PARTS OF THIS ANSWER, REPLY, RESPONSE AND PRAYER WILL TIMELY FOLLOW.

Respectfully submitted,



Carl G. Mueller Jr.

Carl G. Mueller, Jr.
State Bar No 146600
#3 River Hollow
Houston, Texas 77027
Ph: 713-622-4183
Fax: 713-622-4183, when on.
Email: jymjoanne@aol.com
Attorney for Defendant,
Gaskey Construction Corporation

UNITED STATES
EMVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

In the Matter of:	)	
	)	
Gaskey Construction Corporation	)	Docket No. CWA-06-2004-2335
	)	
Respondent.	)	

Part II.

RESPONSE OF RESPONDENT TO AMENDED INITIAL DECISION AFTER REMAND, ("RORTAIDAP") AND ("AIDAR") AMD ANSWER OF RESPONDENT TO COMPLAINT

A.
BACKGROUND AND INITIAL DEFAULT STATUS

1. The "Amended Initial Decision After Remand" ("AIDAR") is a review of the penalty de novo as well as a de novo proceeding with respect to all aspects of the subject case. Accordingly, Respondent herein attempts to Respond to and Answer all issues involved here do novo. Although Respondent has heretofore appeared herein represented by the undersigned attorney "Of Counsel" such was ignored regarding Notice to Respondent relating to the AIDAR. However, Respondent's attorney has attempted to timely file Respondent's RORTAIDAR and answer timely, i.e. within thirty (30) days from the 9-18-06 date of the EPA's Certificate of Service regarding the AIDAR.
2. Although the Regional Judicial Office ("RJO") stresses that the Environmental Appeals Board ("EAB") remanded only the penalty portion of Judge Barbra's Initial Decision in the "Order" of the RJO it is stated, in part as follows:

"ORDER"
"Respondent is hereby ORDERED as follows:
"A....." (Explaining the $10,155.00 penalty and how it shall be paid)
"B" This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. () 22.17 (C). This Initial Decision shall become a final order unless (1) an appeal to the Environments Appeals Board is taken from it by any party of the proceeding within thirty (30) days from the date of service provided in the certificate of service accompanying this order; (2) a party moves to set aside the Default Order, or (3) the Environmental Appeals Board elects, sua sponte, to review the Initial Decision within forty-Five (45) days after its service upon the parties.!!!

Accordingly Respondent does hereby:

A. Appeal the "Default Order" of the "Initial Decision" "within thirty (30) days from the date of service provided in the Certificate of Service accompanying this order" (being September 18, 2006), to the EAB; and,
B. Move to set aside the Default Order; and,
C. Respectfully requests and the EAB elect, sua sponte, "to review the Initial Decision" "within forty-five (45) days after its service upon the parties "

B.
RESPONDENT'S APPEAL OF THE DEFAULT ORDER OF THE INITIAL DECISION AS SET FORTH IN THE AIDAR AND ANSWER TO COMPLAINT

The Respondent assumes that the Current Regional Judicial Officer, having been assigned as the next Presiding Officer ("NPO") in this case, in lieu of the former Presiding Officer ("FPO") and the NPO having noted that he "was not privy to" the FPO's "thought process in analyzing Complaints proposed penalty and it would be inappropriate to discuss this matter with him, I am reviewing the penalty de nova; the NPO merely regurgitated the work products of the FPO. That is, it would obviously be expedient for a NPO to simply repeat and attempt to justify and support the FPO's "Initial Decision and Default Order." This is indeed an expedient, if not an egregious manner in which to attempt to uphold actions of one such as the FPO. The Respondent is offended, as am I, in the manner in which this entire proceeding has been handled on behalf of the Environments Protection Agency; with the sole exception being the alert observations of the Environmental Appeals Board in detecting something amiss in this whole proceeding. The undersigned, as attorney for Respondent, totally agrees after review of the matters related in the AIDAR.

Respondent's understanding of the existing situation with the EPA is clearly reflected by Exhibit "A" hereto. Respondent contracted with Chase Bank to construct its Silverlake Branch. The AIRAR ignores and treats as irrelevant the fact that the Chase Bank Tract ("Tract") was under five acres (actually the Tract was right at one (1) acre, more or less). Unfortunately both the FPO and the NPO simply do not choose to consider:

> The less that one (1) and less than five (5) acre rules under the law – See, e.g. (a) Complaint of the EPA against Respondent, Paragraph II. Findings of Facts and Conclusions of Law, 9. (x); and (b) TCEQ General Permit Number TXR150000 ("TCEQGP") Relating To Discharges From Construction Activities, (Issued and Effective March 5, 2003) (Definitions – Common Plan of Development: Construction Site was not a Common Plan of Development – Operator (a) includes the "person or persons having operational control over construction plans and specifications" ("Plans")to the extent stated, or "person or persons having day to day operational control of activities at small or large construction sites so as to ensure compliance with a storm water pollution prevention plan for the site (appears to include a contractor or engineer regarding "to carrying out of "activities by the Storm Water Pollution Prevention Plan ("SWPPP"). There was no SWPPP regarding the subject construction site, as the engineer preparing the Plans for such site did not include a SWPPP in the plans because the construction site involved "Small Construction Activity" as defined by the TCEQGP. This was all well known by Respondent and the EPA; however, the EPA needed to ignore it in order to achieve its wrongful design and somehow punish respondent.

Although the EPA ex parte decided the ECEAGP was irrelevant – it was not. Why? Perhaps because the EPA did not like or recognize "Gaskey's Reply ("Answer") to the Complaint." See, Exhibit "A" attached.

In Texas as a generally accepted standard and professional practice a Contractor relies upon (a) the project civil engineer to furnish complete plans and specifications, including any appropriate SWPPP, and (b) the project architect and the surveyor regarding compliance regarding clause (a) immediately proceeding. The AIDAR, p.n. the NPO notes: "However, it is noted that Respondent submitted a letter dated April 12, 2006, signed by Mignonne Gaskey, to the Board regarding this matter. After a careful review of the record in this matter and weighing the Board's Order upholding Judge Barra's determination, I do not find any basis for reconsideration of the Default Order. In the April 12, 2006 letter, Mignonne Gaskey asserts, as President of Gaskey Construction Corporation, that she was unaware of the Complainant's claim against Respondent and that Respondent relied on "representations of Chase Bank and it's Architect and Engineer." The AIDAR then continues until any and all "guilty" parties if any, can be brought to justice on and on about its repugnant "paper chase", including all formalities followed by the EPA. How disgusting just send out the federal marshal and shut the job down. The immediately proceeding points clearly reflects that the FPO and NPO preferred to ignore the true facts and circumstances which Respondent attempting to communicate to the EPA, preferring to send letters stating threats, cite statutes and collect return receipts with respect to the laws; perhaps pertaining to the EPA, totally ignoring the true facts which the Respondent tried to covey. The EPA appears amused by the Respondent's proper and usual reliance on the Owner of the construction site and the engineers, architects, surveyors, lawyers and other professionals who consistently told Respondent that all was well regarding the EPA in view of the relevant facts and circumstances. Time and again asserting that no SWPPP was included in the Plans furnished to respondent because no SWPPP was appropriate under the facts and law. So what, Ho Ho per the EPA.

The Complaint of the EPA cites numerous "Findings of Fact" that are wrong, therefore, the cited "Conclusions of Law" are incorrect. However, again, ad nauseam the EPA exhibits its desire not to determine or be confused by the facts. Who cares? If some "facts" can be stated to support some convenient law.

The letter dated April 12, 2006 from Respondent (again which the undersigned attorney signed "of Counsel" on behalf of Respondent, which was overlooked in the Notice of the AIDAR to Respondent) to the EPA, United States Environments Protection Agency. (Environmental Appeals Board Panel, Environmental Appeals, Honorable Judges Edward E Reich, Katie A. Stein and Anna L. Wolgast; Katie A. Stein Presiding, MC-1103B) (the April 12, letter was given short shift by the NPO in AIDAR again in part, stating:

"The Board remanded only the penalty portion of Judge Barra's Initial Decision. However, it is noted that Respondent submitted a letter dated April 12, 2006, signed by Mignonne Gaskey, to the Board regarding this matter. After a careful review of the record in this matter and weighing the Board's Order upholding Judge Barra's determination, I do not find any basis for reconsideration of the

Default Order. In the April 12, 2006 letter, Mignonne Gaskey asserts, as President of Gaskey Construction Corporation, that she was unaware of the Complainant's claim against Respondent and that Respondent relied on 'representations of Chase Bank and it's Architect and Engineer'. The record in this matter shows receipt of all important filings and significant involvement by officials with Gaskey Construction Corporation. The Complaint in this matter was originally filed on September 21, 2004, and sent certified mail to Mr. Bill Gaskey, President. The return receipt was signed by Mrs. Gaskey (no first name was included in the signature block). The cover letter to the Complaint specifically references the provisions to request a hearing and is very clear in the consequences of failure to do so within 30 days of receipt of the Complaint. Section IV of the Complaint, paragraphs 25, 26, 27 and 28 include statements in bold regarding the proper manner in which to Respond and the address of the Regional Hearing Clerk is provided."

Mignonne Gaskey is the President and a major shareholder of the Respondent. Her husband, Frank J. Gaskey, Jr. is no longer active, and in fact is currently receiving treatment in and at M.D. Anderson cancer hospital in Houston, Texas. He is the second generation principal of Respondent.

Although I took part in preparation of the April 12, 2006 Letter, in view of the circumstances then surrounding this Case, the resulting form is as chosen. However, since the NPO received the April 12, 2006 Letter, it appears he just used it as fodder to support the position of the FPO.

C.
PRELIMINARY PRAYER:

In VIEW OF THE FORGOING THE Respondent respectfully (A) appeals the Default Order of the AIDAR and (B) moves to set aside such Default Order – all on the aforesaid grounds.

IV.
FURTHER ANALYSIS OF CIVIL PENALTY CRITERIA

Review of the "ability to pay" factor of Respondent indicates that upon an audit of Respondent's financial condition the EPA would clearly find that the Respondent is probably bankrupt by both the legal and equity standards. Almost all of the Respondent's capital surplus was invested in a masonry business that no longer exists. Respondent is unable to pay its bills as they become due and cash advances have recently been made to Respondent by Mignonne Gaskey personally. Neither Mr. nor Mrs. Frank J. Gaskey, Jr. have the financial ability to pour further funds into the Respondent. They are 77 and 75, respectively, both are ill and their financial situation is such that any investment in Respondent would be foolish and fiscally irresponsible. Neither of the Gaskey sons, Joe Gaskey and Bill Gaskey have any ability to advance funds to the Respondent. Respondent states that it cannot get bonding needed to bid jobs. The jobs currently being done by Respondent probably will not keep Respondent afloat. Assuming the facts as related by the Respondent are accurate, bankruptcy of Respondent appears likely. The undersigned attorney is assisting Respondent in this

matter pro bono as a very long time friend; but would seek whatever fee can be paid to him by Complainant under law.

Respondent has no prior history of such violations. The NPO appears to treat this very important factors a unimportant.

The amount of the Civil Penalty determined by the FPO and NPO – which is identical is ridicules based on any reasonable standard – evidence or penalty criteria.

The Civil Penalty is view of any economic benefit or savings (if any) resulting from the violation – FAILURE TO BUILD A $155.00 FENCE – i.e., "what it would have cost Respondent to prepare and implement a Storm Water Pollution Preventions Plan, the requirement in this type of permit Respondent would have received had it ever sought to comply. Respondent was never required under the facts or law, or both, to comply! There was no SWPPP ever required or prepared. The NPO in the AIDARP states: "Respondent's culpability, as demonstrated by Respondents failure to achieve compliance, warrants the imposition of the penalty sought by Complainant." This statement follows the observation that "Respondent does not have a history of violations and there is nothing in the record to indicate Respondent is unable to pay the penalty sought by Complainant." This reasoning confirms the old "no good deed goes unpunished and if pride keeps a man from crying he is detestable – sock it to 'em!!

Obviously neither the RPO nor the NPO could find anything whatsoever that in either of these minds would constitute "matters as justice may require". Hopefully, the belief that knowledge of the truth can enable one to be fair can prevail upon those called upon to dispense justice in the present circumstances and will prevail to benefit Respondent.

The statement that: "The allegation of five counts is appropriate given that Respondent failed to comply for five months" is patently false because the EPA inspector did not come upon the job site until "near the end of the project with a casual visit from the EPA to the jobsite." See Exhibit "A". Regardless of the apparent timing falsity, the idea of a penalty of five counts is just silly, and clearly reflects the hateful attitude of the EPA for some perceived idea that Respondent was not doing Complainants bidding when such was not possible or logical. RESPONDENT HAD NO SWPPP BECAUSE NONE WAS REQUIRED WITH RESPECT TO THIS CONSTRUCTION PROJECT, all as reflected by the plans and specifications. The Project was solely within the jurisdiction of Brazoria County, Texas which told Respondent et al that no Permit was needed as the Project was covered by the TCEQGP and to go away. Likewise, the City of Pearland declined participation and told Respondent to go away.

It appears the EPA felt that the Respondent should have produced Respondent's own Permit, SWPPP and any other item and action desired by the EPA whether or not Respondent was authorized, qualified, or otherwise deeming Respondent a slow moving target. Perhaps wrongfully Respondent did not blindly and foolishly try to do something not required by the facts and law or either, as Respondent was led to believe by the Owner, Engineer, Architect, Surveyor and Governmental Authorities.

E.
PRELIMINARY PRAYER REGARDING ANALYSIS OF CIVIL PENALTY CRITERIA

Respondent respectfully prays that Orders of the Former Presiding Officer and the New Presiding Office as set forth in the AIDAR be totally and finally set aside in review of the foregoing facts shown by the Respondent.

PART III.
REVIEW BY THE ENVIRONMENTAL APPEALS BOARD BY ITS ELECTION, SU SPONTE, TO REVIEW THE INITIAL DECISION

In view of the twice exhibited propensity of the FPO and the NPO: (a) to ignore the true facts and circumstances relating to this proceeding and the relevant applicable law properly applied; (b) to blindly exhibit their attendant dislike and animosity toward Respondent; and (c) the fact that this proceeding has been clearly opened de nova; the ability of Respondent to effectively move to set aside the Default Order. Respondent respectfully shows that the Environmental Appeals Board would be acting judiciously if it elects, sua sponte, "to review the Initial Decision within forty five (45) days after its service upon the parties." Respondent honestly believes that the NJO is not capable of fairly considering these Pleadings, unless the NJO is aware that the watchful eye of the EAB is present.

Preliminary Prayer: Respondent respectfully prays that the EAB will take the immediately requested action.

PART IV.
RESPONDENTS REQUEST FOR A HEARING REGARDING ALL ASPECTS OF THIS PROCEEDING WITH RESPECT TO WHICH RESPONDANT IS LEGALLY AND JUSTLY ENTITLED; WHICH REQUEST RESPONDENT INTENDS TO BE FULLY CONSISTENT WITH LAW.

Respondent requests a hearing regarding all aspects of this proceeding with respect to which respondent is legally and justly entitled.

Prayer for Hearing

Respondent respectfully prays that a hearing be granted regarding all aspects of this proceeding with respect to which Respondent is legally and justly entitled.

Respondent requests such hearing to contest all material allegations contained in the subject Complaint, and to contest the appropriateness of the amount of the proposed and assessed penalty pursuant to Section 309 (g) of the Act, 33 U.S.C. 31319 (g), and otherwise. It appears that Respondent's file does not include the procedures for hearings set out at 40 C.F.R. Part 22 (no such copy having been found with Respondent's Complaint file); including 40 C.F.R. 22.50 through 22.52. Please again note that attorney only recently received the AIDAR and has been diligently attempting to prepare and timely respond thereto.

EXHIBIT "A"

GASKEY CONSTRUCTION CORP
P O BOX 247
BELLAIRE, TX 77402-0247

PHONE (713) 349-0080 FAX (713) 349-0090

FAX MEMO

DATE: 01-06-05

TO: JP Morgan Chase Bank

ATTN: Doug Dehart

Fax: 713-216-2245

SENDER: Bill Gaskey

RE: Silverlake Branch

MESSAGE:

This all started near the end of the project with a casual visit from the EPA to the jobsite. At the time nothing was said about violations because we were under the impression they were not a party to this project because it was less than 5 acres.

However, many months latter we received the complaint from the EPA. After going back and forth and receiving no help from the project civil engineer we are now at this point.

Enclosed are the pertinent documents between Gaskey and the EPA.

1. Original Administrative Complaint.
2. Gaskey's reply to the complaint
3. Status Report 10-18-04
4. Notice of Assignment and Initial Scheduling Order
5. Joint Status Report 12-03-04
6. Status Report 01-04-05 (last chance to do something)

DM

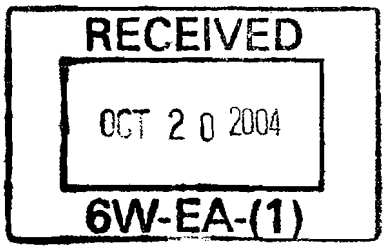
GASKEY CONSTRUCTION CORPORATION
GENERAL CONTRACTOR

HOUSTON:
P.O. BOX 247
BELLAIRE, TEXAS 77402-0247
(713) 349-0080
(713) 349-0090 FAX

DALLAS/FT. WORTH:
6309 N. O'CONNOR #205
IRVING, TEXAS 75039-3509
(972) 831-8678
(972) 831-8307 FAX

10-19-04

United States Environmental Protection Agency
Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733
Attn: Mr. Everett H. Spencer 6EN-WT



Re: NPDES #TXU010332
Chase Bank
10611 Broadway
Pearland, Texas 77584

Mr. Spencer,

In response to the letter received September 21, 2004, Gaskey Construction Corporation does not understand how this "Administrative Complaint" could be filed. This project was under five [5] acres total land area (Paragraph 9). The property in question was owned by J.P. Morgan Chase Bank. Their architect The Wingfield Sears Group and civil engineer, Jones & Carter Inc. did not include in any of the bid or construction documents, drawings or instructions for a pollution prevention plan. Gaskey Construction relies on the Owner and its representatives to inform us of the need for a pollution prevention plan. The project was under [5] acres and the lack of a pollution control plan did not seem out of place.

A previous plan for the surrounding property would be information that the Owner or his representative would have known about, but was not part of any documentation to our contract or construction documents.

During construction of this project no other construction was on going or had been started north of FM518 east of State Hwy 288 or west of County Rd. 94. No signs for future development or other construction took place during the construction of this Chase Bank.

EXHIBIT "B"
JOINT BUILDING PERMIT
AND PROPERTY METES
AND BOUNDS

CLASS A
BRAZORIA COUNTY BUILDING PERMIT

THIS NOTICE CONFIRMS THAT BRAZORIA COUNTY PERMIT NO. 25496, DATED 6/24/03, WAS ISSUED TO GASKEY CONSTRUCTION CORP FOR CONSTRUCTION OF IMPROVEMENTS AT THE FOLLOWING BUILDING SITE: HT&BRR SURVEY ABSTRACT 675 - PART OF LOT 3 - BLOCK 24 1.19 ACRES - 10611 BROADWAY BANK IN BRAZORIA COUNTY TEXAS. THE BUILDING SITE HAS BEEN FOUND TO BE OUTSIDE THE DESIGNATED 100-YEAR FLOOD PLAIN, AND NO INSPECTION OF THE WORK IS REQUIRED.

Melissa Stokes
PERMIT OFFICER

CLASS A
BRAZORIA COUNTY BUILIDNG PERMIT

THE STATE OF TEXAS
COUNTY OF BRAZORIA

PERMIT ***25496***

1. This permit is issued on ***JUNE 24, 2003*** and is effective immediately.

2. This permit is issued to ***J.P. MORGAN CHASE/ GASKEY CONSTRUCTION CORP.*** and is not transferable.

3. This permit authorizes the permittee to construct or improve structures or improvements on the following described property:

   HT&BRR SURVEY – ABSTRACT 675 – PART OF LOT 3 – BLOCK 24

   1.19 ACRES – 10611 BROADWAY

4. The permittee applied to Brazoria County for a building and/or development permit on the above-described location. The application has reviewed and it has been determined that the construction improvements ***are not in the designated 100 year floodplain*** and the permittee may therefore proceed with the work without inspection by the Floodplain Administrator.

5. This property may not lie within the 100-year floodplain, but the County ***recommends that permittee build at least 18 inches above natural ground*** in case of local drainage problems.

6. A **Notice of Permit** has been issued with this permit which should be posted in a location where it will be protected from weather and secure from vandalism, and it will remain posted until the work is complete.

7. Any structure that is used for commercial or a public facility must adhere to the International Fire Codes. Contact the Emergency Management Coordinator of Brazoria County for inspections required.

Floodplain Administrator
Brazoria County, Texas

FIELD NOTES FOR 1.1810 ACRES

Being a 1.1810 acre tract of land located in the H.T. & B. R.R. Co. Survey, Section 4, Abstract 675 in Brazoria County, Texas and the Allison-Richey Gulf Coast Home Co. Subdivision recorded in Volume 2, Page 99 of the Brazoria County Map Records (B.C.M.R.) and being a portion of the remainder of a call 44.5342 acre tract of land recorded in the name of Argovitz Interests, Ltd., in Clerk's File Number 95-038845 of the Official Records of Brazoria County (O.R.B.C.) Texas and a portion of a call 5.1719 acre tract recorded in the name of Argovitz Interests, Ltd., in Clerk's File Number 02-047101 of the O.R.B.C.; said 1.1810 acre tract being more particularly described by metes and bounds as follows (all bearings are referenced to the east line of said 44.5342 acre tract of land):

Beginning at a 5/8-inch iron rod with plastic cap stamped "COSTELLO INC RPLS 4416" set for the southeast corner of said 5.1719 acre tract and the southwest corner of said 44.5342 acre tract, same being on the north line of F.M. 518 (120-feet wide) as shown on the Texas Department of Transportation (TxDOT) Right-of-Way (R.O.W.) Map, Sheet Number 2, Account Number 6012;

1. Thence, with the south line of said 5.1719 acre tract, South 87 degrees 25 minutes 15 seconds West, a distance of 64.93 feet to a 5/8-inch iron rod with plastic cap stamped "COSTELLO INC RPLS 4416" set;

2. Thence, through said 5.1719 acre tract, North 03 degrees 15 minutes 04 seconds West, at a distance of 56.75 feet pass the common line of said 5.1719 acre tract and aforesaid 44.5342 acre tract, in all, a total distance of 282.85 feet to a 5/8-inch iron rod with plastic cap stamped "COSTELLO INC RPLS 4416" set;

3. Thence, trough said 44.5342 acre tract, North 86 degrees 44 minutes 56 seconds East, a distance of 183.06 feet to a 5/8-inch iron rod with plastic cap stamped "COSTELLO INC RPLS 4416" set on the west R.O.W. line of County Road 94 (80-feet wide) as recorded in Volume 2, Page 99, 107 and 108 of the B.C.M.R. and in Clerk's File Number 02-020483 of the O.R.B.C.;

4. Thence, with said west R.O.W. line, South 03 degrees 15 minutes 04 seconds East, a distance of 253.61 feet to a 5/8-inch iron rod with plastic cap stamped "COSTELLO INC RPLS 4416" set on a cut-back line at the northwest intersection of said County Road 94 and aforesaid F.M. 518;

5. Thence, with said cut-back line, South 41 degrees 44 minutes 56 seconds West, a distance of 42.43 feet to a 5/8-inch iron rod with plastic cap stamped "COSTELLO INC RPLS 4416" set on the north R.O.W. line of said F.M. 518;

6. Thence, with said north R.O.W. line, South 86 degrees 44 minutes 56 seconds West, a distance of 88.14 feet to the Point of Beginning and containing 1.1810 acres of land.

CERTIFICATION

WSTRONG, A REGISTERED PROFESSIONAL LAND SURVEYOR IN THE S, DO HEREBY CERTIFY THAT THE SURVEY SHOWN HEREON WAS THE GROUND UNDER MY SUPERVISION DURING THE MONTH OF 2 AND CONFORMS TO THE CURRENT TEXAS SURVEYOR'S TANDARDS AND SPECIFICATIONS FOR A CATEGORY 1A, LAND TITLE SURVEY.

CERTIFICATE OF SERVICE

I, Carl G. Mueller, Jr., the attorney for Respondent, Gaskey Construction Corporation, hereby certify that a true and correct copy of the FIRST ANSWER, REPLY, AND PRAYER OF RESPONDENT TO THE Amended Initial Decision After Remand in Docket No. CWA-06-2004-2335, was served upon the parties or their counsel of record on the date and in the manner set forth below:

Eurika Durr
U. S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC1103B)
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460-0001

U.S. Certified First Class Mail
Return Receipt Requested

Yerusha Beaver
U.S. Environmental Protection Agency
1455 Ross Ave.
Dallas, Texas 75202

U.S. Certified First Class Mail
Return Receipt Requested

Lorena S. Vaughn
Regional Hearing Clerk (6RC-D)
U.S. EPA
Region 6
1445 Ross Ave.
Dallas, Texas 75202-2733

U.S. Certified First Class Mail
Return Receipt Requested

U.S. EnvironmentalProtectionAgency
Clerk of the Board, Environmental Appeals Board (MC1103B)
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460-0001

U.S. Certified First Class Mail
Return Receipt Requested

Ammetle Duncan
Secretary, Environmental Appeals Board (MC1103B)
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460-0001

U.S. Certified First Class Mail
Return Receipt Requested

Ben J. Harrison,
Regional Judicial Officer
U.S. Environmental Protection Agency
1455 Ross Ave.
Dallas, Texas 75202

U.S. Certified First Class Mail
Return Receipt Requested