UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

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| In the Matter of | § | |
| | § | |
| Gaskey Construction Corporation, | § | |
| a Texas corporation, | § | |
| | § | |
| Respondent | § | Docket No. CWA-06-2004-2335 |

**COMPLAINANT'S BRIEF IN RESPONSE TO RESPONDENT'S APPELLATE BRIEF**

The Complainant, the Chief of the Water Enforcement Branch of the Compliance Assurance and Enforcement Division of the United States Environmental Protection Agency Region 6 ("EPA"), by and through his attorney, files this Brief in Response to Respondent's Appellate Brief ("Response Brief"), pursuant to 40 C.F.R. § 22.30. Respondent's Appellate Brief ("Appellate Brief") was filed with the Regional Hearing Clerk on October 23, 2006. This Response Brief is accompanied by a Supplemental Affidavit of Mr. Everett H. Spencer (Attachment A-1), a Declaration of Mr. Kenneth L. AuBuchon (Attachment B-1), a Declaration of Ms. Rashida M. Shivers (Attachment C-1); and an Affidavit of Ms. Annette Evans Smith (Attachment D-1).

## I. FACTUAL AND PROCEDURAL BACKGROUND

The subject administrative enforcement action was initiated and has been prosecuted in accordance with Section 309(g) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(g), and the Consolidated Rules of Practice, codified at 40 C.F.R. Part 22. The findings of fact and conclusions of law as set forth in the Amended Complaint, Motion for Default Order, Initial Decision, and Amended Initial Decision after Remand are hereby adopted and incorporated by reference.

On October 15, 2003, EPA Inspectors conducted a routine Storm Water Compliance Evaluation Inspection at the site of Respondent's Chase Bank construction project, located at 10611 Broadway (FM 518), Pearland, Brazoria County, Texas 77584 ("construction site"). The construction site was between 1.0 and 1.3 acres, involved earth-disturbing activities of at least one acre, and was also being developed as part of a commercial/retail shopping center complex. (Inspection Report; Attachment B-1, Declaration of Kenneth AuBuchon, ¶ 8; Attachment C-1, Declaration of Rashida Shivers, ¶ 9) Phase II of the Storm Water Regulations (which were in effect before and at the time of Respondent's construction activities[1]) required Respondent to seek permit coverage under the Texas Pollutant Discharge Elimination System ("TPDES") General Permit for Storm Water Discharges from Construction Sites (the "General Permit") at least ninety (90) days before commencing construction by (1) either submitting a Notice of Intent to be covered under the General Permit or posting a construction site notice, (2) developing and implementing a storm water pollution prevention plan ("SWPPP") prior to commencing construction activities, and (3) adhering to the terms and conditions of the General Permit. (Amended Complaint ¶ 11; 40 C.F.R. §§ 122.21(c), 122.26(c)(1)(ii), 122.26(e)(8)) At no time relevant to the regulated activities at the construction site was Respondent in compliance with the Act and its implementing regulations or the General Permit.

On March 31, 2004, EPA issued an Administrative Order pursuant to Section 309(a) of the Act requiring Respondent to apply for coverage under the General Permit and otherwise comply with the Act and its implementing regulations. The Administrative Order also extended to Respondent the opportunity to arrange a meeting with EPA to show cause why Respondent

1 See Amended Complaint ¶¶ 8-10, 14-15; 40 C.F.R. § 122.26(e)(8); 64 Fed. Reg. 68721-68851 (National Pollutant Discharge Elimination System--Regulations for Revision of the Water Pollution Control Program Addressing Storm

had not complied with the Act and its regulations and why EPA should not take further enforcement action against Respondent for the violations cited. On April 7, 2004, Complainant and Respondent engaged in pre-filing settlement discussions regarding the Complaint that was afterwards filed on September 21, 2004. (Complaint ¶ 17) Having agreed to a settlement in principle, on or about October 19, 2004, Complainant forwarded to Respondent a Consent Agreement and Final Order ("CAFO") reciting said settlement which included the payment of a civil penalty. (Attachment A-1, Supplemental Affidavit of Everett Spencer, ¶ 12) On October 20, 2004, Complainant received from Respondent a letter dated October 19, 2004 and addressed to "Attn: Mr. Everett H. Spencer 6EN-WT" which stated, *inter alia*, that the "project was under five [5] acres total land area"; that "the lack of a pollution control plan did not seem out of place"; and that Respondent "feels that the 'Administrative Complaint' is unwarranted and without merit." The letter was copied by Respondent to Chase Bank and the architect and engineer for Chase Bank. Respondent did not file the letter with the Regional Hearing Clerk; the letter did not comport with the requirements of an answer pursuant to 40 C.F.R. § 22.15; and the letter did not request a hearing or any other relief. (Initial Decision, at 3-4; Amended Initial Decision, at 3) Complainant submitted a copy of said letter as an attachment to a status report that Complainant filed with the Regional Hearing Clerk on October 28, 2004. A copy of the status report was served on Respondent on or about November 2, 2004. (Return receipt)

On November 4, 2004, Mr. Spencer, on behalf of Complainant, called and discussed with Respondent that Brazoria County and the EPA Inspector confirmed that Respondent's project was part of a retail shopping center plat and part of a larger common plan of development.

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Water Discharges) (Final Rule); TPDES General Permit No. TXR150000.

(Record of Communication of Everett Spencer; Attachment A-1, Supplemental Affidavit of Everett Spencer, ¶ 7)

On November 19, 2004, a Notice of Assignment and Initial Scheduling Order was issued ("Scheduling Order"). In the Scheduling Order, the Regional Judicial Officer ("RJO") *sua sponte* extended the time for Respondent to file an Answer to the Complaint from October 25, 2004 to December 20, 2004. The RJO also ordered the Parties to file a status report on the status of settlement negotiations on or before December 6, 2004, and each month thereafter on or before the 5th day of the month until otherwise ordered. The Parties filed a joint status report on December 3, 2004, which referenced two telephonic conferences between the Parties on November 22, 2004 and December 3, 2004; stated that Complainant remained open to continued settlement negotiations and remained willing to settle the matter on the terms of the draft CAFO; and stated that Respondent would file its answer to the Complaint and request for hearing consistent with 40 C.F.R. § 22.15 on or before December 20, 2004. Said joint status report was signed by both Parties. Mr. Bill Gaskey (as "Guy W. Gaskey")[2] signed the joint status report as President of Respondent. However, Respondent did not file an answer to the Complaint as required and agreed.

Complainant filed two additional status reports on January 4, 2005 and April 13, 2005, respectively, which were served on Respondent via certified mail, return receipt requested. The status reports discussed, *inter alia*, two failed attempts to contact Mr. Bill Gaskey by telephone on January 3, 2005 and January 4, 2005 and Complainant's intent to file a motion for default

2 At all times relevant to the subject action, including at present, the Texas Secretary of State records list "Guy W. Gaskey" (Bill Gaskey) as President and as the registered agent for service for Respondent. No other corporate official or registered agent is listed. Additionally, at the time of the Inspection, "Mr. Bill Gaskey" was represented to be President of Respondent to the EPA Inspectors. See Attachment C-1, Declaration of Rashida Shivers, ¶ 7.

judgment.

On March 1, 2005, Complainant filed an Amended Complaint, amending the allegations in Paragraphs 10 and 13 of the initial Complaint to reflect that that the construction site was between one and five acres and was part of a larger common plan of development or sale, that the start date of the construction activities was in or about June 2003, and to add relevant information regarding Phase II of the Storm Water Regulations. The Amended Complaint was sent to Respondent via certified mail, return receipt requested, on March 1, 2005; however, Complainant did not receive the return receipt card. Thus Complainant sent two additional copies of the Amended Complaint to Respondent via Federal Express and by certified mail, return receipt requested. Respondent was served with the Amended Complaint by Federal Express on April 6, 2005 and via certified mail, return receipt requested, on April 4, 2005. Respondent failed to file an Answer to the Amended Complaint, as required in 40 C.F.R. §§ 22.14(c) and 22.15.

In accordance with the procedures set forth in the Consolidated Rules of Practice, Complainant filed a Motion for Default Order on July 1, 2005. Respondent was properly served with the Motion but failed to respond to it. (Initial Decision, at 7; Amended Initial Decision, at 4) The Initial Decision and Default Order was issued on February 6, 2006, finding, *inter alia*, that at the relevant times, the construction site was a point source of pollutants with its storm water discharges to waters of the United States; Respondent, as the owner or operator of the construction site, was required but failed to obtain coverage under the General Permit and failed to develop and implement a SWPPP; each day that Respondent engaged in the construction activities and operated the facility without a TPDES permit is a violation of the Section 301 of

the Act; and Complainant's proposed penalty of $10,155.00 is consistent with Section 309(g) of the Act and the record and shall be assessed against Respondent.

On March 21, 2006, the Environmental Appeals Board ("EAB" or "Board"), having elected *sua sponte* to review the Initial Decision, affirmed that the default judgment is appropriate in this matter but remanded the matter to the RJO for clarification on the penalty assessment. On September 18, 2006, an Amended Initial Decision after Remand was issued assessing against Respondent Complainant's proposed penalty of $10,155.00, providing further explanation and analysis for adopting the proposed penalty without adjustment, and affirming the first Initial Decision. On October 23, 2006, Complainant received a copy of the Appellate Brief. Pursuant to 40 C.F.R. § 22.7(c), because service was effected by first class mail, Complainant is entitled to five (5) additional days for filing its Response Brief[3].

In the Appellate Brief, Respondent (1) moved to set aside the Default Order; (2) requested that the EAB elect, *sua sponte*, to review the Initial Decision; (3) requested all such full and complete hearings available; and (4) requested that the subject Complaint be dismissed or that, to the extent appropriate, the penalty be fully abated. Complainant makes the following statements in objection to the granting of the relief sought in the Appellate Brief.

## II. THE ONLY ISSUE BEFORE THE BOARD IS PENALTY AND THE BOARD SHOULD DECLINE TO REVIEW ITS PRIOR AFFIRMATION OF THE DEFAULT JUDGMENT AS TO LIABILITY

In the Board's Order Electing to Review Sua Sponte and Remanding to Regional Judicial Officer, the Board wrote, "Because Gaskey failed to file a timely answer to the complaint, we

3 Calculating from the postmark date of October 17, 2006 which appears on mailing envelope of the Appellate Brief, Complainant has until Monday, November 13, 2006 to file its Response Brief, in accordance with 40 C.F.R. §§

agree with the RJO that a default judgment is appropriate in this matter; nonetheless, we grant review and remand this matter to the RJO for clarification on the penalty assessment." The Board's Order reiterates that the penalty portion of the Default Order is remanded. Under these circumstances, the only issue the Board should consider in the instant appeal is whether the RJO erred in ordering the penalty as proposed in the Motion for Default Order. Complainant agrees with the penalty as ordered and analyzed in the Amended Initial Decision and believes that the penalty as ordered should be upheld.

Further, no good cause exists for Respondent's failure to file an answer to the Complaint and Amended Complaint and failure to respond to the Motion for Default Order. Respondent's Appellate Brief purports to file an answer and request a hearing nearly two years after the Complaint was filed. Regarding untimely filings, the Board has stated that "filing requirements ... are not merely procedural niceties. Rather, they serve an important role in helping to bring repose and certainty to the administrative enforcement process. Further, they ensure that the Board's resources are reserved for those cases involving both important issues and serious and attentive litigants." (emphasis omitted) *In re Tri-County Builders Supply*, Docket No. CWA-9-2000-0008 (EAB, Order Denying Motion for Reconsideration, May 24, 2004, at 3). Respondent has provided no valid excuse for its untimeliness and has not demonstrated in its Appellate Brief a "strong probability" that litigating its arguments in defense would produce an outcome different from that secured by the Default Order.[4] Moreover, no procedural unfairness will result from entering a default judgment against Respondent.[5]

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22.7(a), (c).

4 *See* In re Pyramid Chemical Co., 11 E.A.D. 657 (EAB 2004); In re Jiffy Builders, Inc., 8 E.A.D. 315 (EAB 1999).

## III. THE FACTS AS TO LIABILITY ARE UNDISPUTED AND RESPONDENT HAS WAIVED ITS RIGHT TO CONTEST ALL FACTS ALLEGED IN THE COMPLAINT AND AMENDED COMPLAINT

As stated supra, Complainant believes that the only issue before the Board in this matter is the issue of penalty. The arguments made hereinafter are being offered primarily to support the appropriateness of the penalty as ordered in the Amended Initial Decision.

Section 22.15(a) of 40 C.F.R. provides:

> Where respondent: Contests any material fact upon which the complaint is based; contends that the proposed penalty, compliance or corrective action order, or Permit Action, as the case may be, is inappropriate; or contends that it is entitled to judgment as a matter of law, it shall file an original and one copy of a written answer to the complaint with the Regional Hearing Clerk and shall serve copies of the answer on all other parties. Any such answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint.

Pursuant to 40 C.F.R. § 22.15(d), "[f]ailure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation." Further, 40 C.F.R. § 22.15(c) provides that "[a] hearing upon the issues raised by the complaint and answer may be held if requested by respondent in its answer." Section 22.15(c) also gives the Presiding Officer the discretion to hold a hearing if issues appropriate for adjudication are raised in the answer. In the subject action, Respondent never filed an answer to the Complaint and further failed to file an answer to the Amended Complaint. (Amended Initial Decision, pages 3-4) Respondent's failure to file an answer to the Complaint or to the Amended Complaint constitutes admission of all material factual allegations in the Complaint and Amended Complaint. Moreover, no hearing was proper since Respondent did not file an answer and did

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5 Id.

not raise any issues appropriate for adjudication in an answer.

Respondent was clearly made aware of its obligation to file an answer and request a hearing, and the procedures for doing so, in order to preserve the right to a hearing or to pursue other relief. A copy of the requirements for filing an answer as set forth at 40 C.F.R. § 22.15 accompanied the Complaint and Amended Complaint.[6] (Complaint ¶ 26; Amended Complaint ¶ 25) Further, Paragraph 28 of the Complaint clearly and expressly set forth that "Respondent must send the Answer to this Complaint, including any request for hearing, and all other pleadings to:

> Regional Hearing Clerk (6RC-D)
> U.S. EPA Region 6
> 1445 Ross Avenue, Suite 1200
> Dallas, TX 75202-2733"

and requested Complainant to send a copy of its answer to Ms. Yerusha Beaver, the EPA attorney assigned to this case, and provided her mail code and mailing address. Paragraph 27 of the Complaint also stated:

> IF RESPONDENT DOES NOT FILE AN ANSWER TO THIS COMPLAINT WITHIN THIRTY (30) DAYS AFTER SERVICE OF THIS COMPLAINT, A DEFAULT ORDER MAY BE ISSUED AGAINST RESPONDENT PURSUANT TO 40 C.F.R. § 22.17. A Default Order, if issued, would constitute a finding of liability, and could make the full amount of the penalty proposed in this Complaint due and payable by the Respondent without further proceedings sixty (60) days after a final order issued upon default.

(emphasis in original). The cover letter to the Complaint invited Respondent to confer informally with the EPA concerning the alleged violations and the amount of the proposed penalty whether or not Respondent requested a hearing. The cover letter cautioned that "[a]

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6 A copy of the Federal Register Notice of the Final Rule setting forth the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (40 C.F.R. Part 22) accompanied both the Complaint and the Amended Complaint. See Attachment D-1, Affidavit of Annette Evans Smith, ¶¶ 7-8.

request for an informal conference does not extend the thirty (30) days by which you must request or waive a hearing on the proposed penalty assessment; the two procedures can be pursued simultaneously."[7] Moreover, as noted supra, Respondent agreed in writing in the joint status report (filed December 3, 2004) to file an answer to the Complaint and request for hearing consistent with 40 C.F.R. § 22.15 on or before December 20, 2004.

In light of Respondent's failure to file an answer to the Complaint and Amended Complaint, and in accordance with the requirement to diligently prosecute a matter[8], Complainant filed the Motion for Default Order. Section 22.17(a) of 40 C.F.R. provides:

> A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.

Respondent's failure to file a timely answer to the Complaint and Amended Complaint constitutes an admission of all facts alleged therein and a waiver of Respondent's right to contest such factual allegations. Further, Respondent did not file, or otherwise submit, a response to the Motion for Default Order. (Initial Decision, at 7) Respondent's attempt to now answer the Complaint and request a hearing to contest all material allegations contained in the Complaint in its Appellate Brief is untimely and improper under the Consolidated Rules.

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7 The referenced information underscoring Respondent's right to file an answer and request a hearing was reiterated in the Amended Complaint, with appropriate changes regarding the shortened twenty-day deadline to answer.

8 *See* In the Matter of Colonial Heritage Corporation, RCRA NO. VI-801-H (RJO Malone, Order And Reasons Dismissing Complaint, Feb. 18, 2000, at 3-4) ("In any event, under the Administrative Procedure Act (APA), 5 U.S.C. § 555(b), federal agencies, including EPA, are required to proceed with reasonable dispatch during all administrative actions."); In the Matter of Village of Noble, SDWA Docket No. C9101 (RJO Malone, Order And Reasons Dismissing Complaint With Prejudice, July 13, 1999, at 3) ("In accordance with the Administrative Procedure Act (APA), 5 U.S.C. § 555(b), federal agencies are required to proceed with reasonable dispatch during

## IV. RESPONDENT MISTAKENLY AVERS THAT ITS CONSTRUCTION SITE DID NOT REQUIRE PERMIT COVERAGE AND A SWPPP

Section 122.21(a) of 40 C.F.R. requires "[a]ny person who discharges or proposes to discharge pollutants" into waters of the United States to apply for a NPDES permit." Section 122.21(c)(1) of 40 C.F.R. requires such facilities described under 40 C.F.R. § 122.26(b)(14)(x) or § 122.26(b)(15)(i) to submit permit applications at least 90 days before the date on which construction is to commence. Section 122.26(b)(14)(x) facilities are described as follows:

> Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

Section 122.26(b)(15)(i) facilities are described as follows:

> Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres.

Respondent's construction site falls within both categories of facilities. As a subject facility, Respondent was "required to apply for an individual permit or seek coverage under a promulgated storm water general permit." 40 C.F.R. §§ 122.26(c)(1), 122.21(a)(1).

As Mr. Spencer discusses in paragraph 6 of his supplemental affidavit, the intent of the General Permit is to prevent/minimize the escape of pollutants (total suspended solids ("TSS") and other pollutants common to a construction site) from an earth-disturbed construction site of one acre or more, or less than one acre if part of a larger common plan of development or sale

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all administrative proceedings.").

that ultimately disturbed one acre or more.[9] Because Respondent's construction site involved earth-disturbing activities on one acre or more[10] of total land area (Inspection Report), permit coverage and a storm water pollution prevention plan ("SWPPP")[11] were needed and required under the TPDES program. The construction site was also part of a commercial/retail shopping center complex that cumulatively disturbed more than twenty-eight (28) acres; therefore, even if the total disturbed area of Respondent's construction site was less than one acre, Respondent was nevertheless obligated to comply with the aforementioned requirements because this construction activity was part of a larger common plan of development that ultimately disturbed more than an acre.[12] (Attachment A-1, Supplemental Affidavit of Everett Spencer, ¶ 7) Mr. Spencer confirmed

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9 The Preamble to the NPDES Storm Water Discharges Final Rule provides:

> EPA believes that implementation of Best Management Practices (BMP) controls at small construction sites will also result in a significant reduction in pollutant discharges and an improvement in surface water quality. EPA believes this rule will result in monetized financial, recreational and health benefits, as well as benefits that EPA has been unable to monetize. Expected benefits include reduced scouring and erosion of streambeds, improved aesthetic quality of waters, reduced eutrophication of aquatic systems, benefit to wildlife and endangered and threatened species, tourism benefits, biodiversity benefits and reduced costs for siting reservoirs.

10 See Attachment B-1, Declaration of Kenneth AuBuchon, ¶¶ 8-9; Attachment C-1, Declaration of Rashida Shivers, ¶ 9. See also Appellate Brief Part I, page 2 ("The survey shows 1.1810 acres."); and Part II.B, page 2 ("...actually the Tract was right at one (1) acre, more or less.").

11 The SWPPP details the best management practices ("BMPs") that will be employed on the site to minimize the escape of pollutants to waters of the United States, among other things. (Attachment A-1, Supplemental Affidavit of Everett Spencer, ¶ 8)

12 The following excerpt is an example of public EPA guidance on this issue that was available to Respondent before and after commencing the subject activities:

> Storm Water - Common Plan of Development or Sale
>
> N.B.: The following information was written prior to Phase 2 storm water regulations, which became effective on March 10, 2003. The information is accurate except that the 5 acre threshold has been reduced to 1 acre.
>
> 40 CFR 122.26(b)(14)(x) requires operators of construction or demolition projects disturbing 5 or more acres of earth, or less than 5 acres if part of a "larger common plan of development or sale" that cumulatively disturbs 5 or more acres to obtain an NPDES permit. Many people inquire as to what constitutes a common plan of development or sale and is there ever a time when this plan ends. A common plan of development or sale comes into being upon the time when there is documentation showing plans to disturb earth [regardless] of how many phases or how long it will take. Common documents used in EPA investigations to confirm such a plan include plats, blue prints, marketing plans, and contracts.
>
> REMINDER: The same "common plan of development or sale" approach will be used for Phase II when permits for construction projects disturbing 1-5 acres start needing permits March 10, 2003. You will then need to look at the remainder from a "common plan" to see if 1 or more acres would

with Brazoria County that Respondent's construction site was part of the larger shopping complex. (Id.)

In its Appellate Brief, Respondent avers that it was told by Brazoria County that "no Permit was needed as the Project was covered by the TCEQGP[13] and to go away." (Appellate Brief, Part II, page 5, ¶ 5) It is correct that Respondent would not have been required to obtain an individual permit had Respondent obtained coverage under the General Permit. It is also correct that small construction activities as defined at 40 C.F.R. § 122.26(b)(15)(i) may be automatically authorized under the General Permit (i.e., not required to submit an NOI) provided they:

> (a) develop a [SWPPP] according to the provisions of this general permit, that covers either the entire site or all portions of the site for which the applicant is the operator, and implement that plan prior to commencing construction activities;
> (b) sign a completed construction site notice (Attachment 2 of this general permit);
> (c) post a signed copy of the construction site notice at the construction site in a location where it is readily available for viewing by the general public, local, state, and federal authorities, prior to commencing construction activities, and maintain the notice in that location until completion of the construction activity; and
> (d) provide a copy of the signed and certified construction site notice to the operator of any municipal separate storm sewer system receiving the discharge at least two days prior to commencement of construction activities.

(General Permit TXR150000, at 12-13 (Part II.D.2)) However, Respondent did not satisfy the requirements to be automatically authorized under the General Permit; neither did Respondent submit an NOI nor apply for an individual permit. Because Respondent failed to obtain coverage under the General Permit, Respondent's only permissible alternative would have been to apply for an individual permit, as prescribed in 40 C.F.R. § 122.26(c)(1).

Additionally in its Appellate Brief, Respondent argues that it was the responsibility of

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be disturbed.
See http://www.epa.gov/earth1r6/6en/w/sw/hottopcommon.htm.

13 This acronym references the General Permit, which is issued by the Texas Commission on Environmental Quality

Chase Bank to ascertain whether a permit was needed and to develop the SWPPP and provide said information to Respondent. Section 122.21(b) of 40 C.F.R. provides, however, that "[w]hen a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit" (emphasis added). As Mr. Spencer expounds in paragraph 10 of his supplemental affidavit, the TPDES program requires the operators at the site (defined as persons having either operational control over site plans and specifications or having operational control over day-to-day activities[14]) to develop and implement a SWPPP and obtain permit coverage. It is the responsibility of the operator(s)[15] at the site to make that determination. Respondent does not deny that it was the operator of the subject construction site. Respondent had control over day-to-day activities at the site and fit the definition of who should have permit coverage. (Inspection Report; Attachment B-1, Declaration of Kenneth AuBuchon, ¶ 9) Therefore, Respondent had a responsibility to determine that it needed permit coverage, develop and implement a SWPPP, and obtain permit coverage.

## V. THE PENALTY ASSESSED IN THE INITIAL DECISION AND THE INITIAL DECISION AFTER REMAND IS FAIR, APPROPRIATE, AND CONSISTENT WITH THE RECORD AND THE ACT

Section 22.17(a) of 40 C.F.R. provides, in pertinent part:

> The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

The relief proposed in the Complaint and Amended Complaint, namely the assessment of

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as an authorized State.

14 General Permit TXR150000, at 4 (Part I. Definitions).

15 According to the definition of "operator," it is possible for a land owner to also be an operator subject to these requirements where the land owner fits one of the prongs of the definition. However, this would not absolve any

a civil penalty in the amount of $10,155.00, is not clearly inconsistent with the record of the subject proceeding or the Act. Therefore, Complainant's proposed penalty was properly ordered in the Initial Decision and Amended Initial Decision and should be upheld by the EAB.

In its Appellate Brief, Respondent misconstrues the underlying value of developing and implementing a SWPPP that was used in calculating the economic benefit portion of the penalty. Section 309(d) of the Act, 33 U.S.C. § 1319(d), requires that EPA consider the economic benefit of noncompliance. The purpose of the economic benefit factor is to remove any economic advantage that the facility may have gained as a result of noncompliance. In Paragraphs 37-41 of the Mr. Spencer's initial affidavit (Attachment G to the Motion for Default Order), he explains his calculation of the economic benefit as follows:

> 37. I used the BEN model to calculate the economic benefit. Computing the economic benefit involves three parts as follows: 1) capital investments, 2) one-time, non-depreciable expenditure and 3) annually recurring costs.
>
> 38. Capital investments are those expenditures that are one-time depreciable costs which have been put off by the violator's failure to promptly comply with the regulations. By not spending the money initially to achieve compliance, the violator accrued an economic benefit.
>
> 39. One-time non-depreciable expenditures are the type of non-depreciable expenditures (such as the purchase of land) that the violator should have implemented but did not do so. The violator gained an economic benefit by not putting to use these type of non-depreciable expenditures.
>
> 40. Annual recurring costs are the type of expenditures which occur on a regular basis associated with environmental control measures. These type of expenses are equivalent to staffing, operating and maintenance, and record keeping costs.
>
> 41. In this matter, the BEN model I used calculated the economic benefit to be $155 because the Respondent failed to prepare and implement a Storm Water Pollution Prevention Plan. This expenditure falls under annually recurring costs. Because minimal pollution control equipment (or infrastructure constructed) would have been needed to implement the Best Management Practices, I entered only $2000 for capital investment. This would include such things as berms and structural controls to allow storm water to be filtered or settle

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other operator from the responsibility to comply with the requirements.

> pollutants prior to discharge. As for one-time nondepreciable expenditures, I estimated $0, as the cost of the BMPs is a capitol cost. For annual recurring costs, I estimated that Respondent would have to pay $2000 a year in employee expenses to implement the Best Management Practices and perform the record keeping. Since the project lasted less than a year the only real cost savings was the capital investment. Using the numbers I input, the BEN model calculated the economic benefit to be $155.00. This figure is based entirely on the cost savings associated with not spending the money to develop a SWPPP, install BMPs, and maintain them over the life of the project.

(emphasis added). Although Respondent argues that it was not required to develop and implement a SWPPP, Respondent does not contest the accuracy of the amount of the economic benefit as calculated.

Regarding the gravity portion of the proposed penalty, Mr. Spencer clarifies the reasonableness of his penalty calculation in his supplemental affidavit. He explains in paragraph 9 that, in accordance with standard Agency practices, the General Permit relies on the ½" of rainfall as a "benchmark" indicator that triggers an inspection of the construction site on the "once every two week or after a ½" rainfall" schedule prescribed in the permit. (General Permit, at 26-27 (Part III.F.8(a)) The ½"-rainfall-or-more indicator is significant in that a discharge of storm water from the construction site becomes imminent as the rainfall approaches the ½" mark. After the ½" mark is reached, the construction site has a high probability of discharging (depending on the BMPs employed). At the subject construction site, no BMPs were employed. (Attachment B-1, Declaration of Kenneth AuBuchon, ¶ 7) Since the relevant construction site had seventeen (17) rainfall events ranging from 0.55 inch to 4.65 inches during the time of construction without a permit (from June 2003 to October 2003[16]), it is an appropriate inference that the construction site discharged during and after said rainfall events. Additionally, eleven

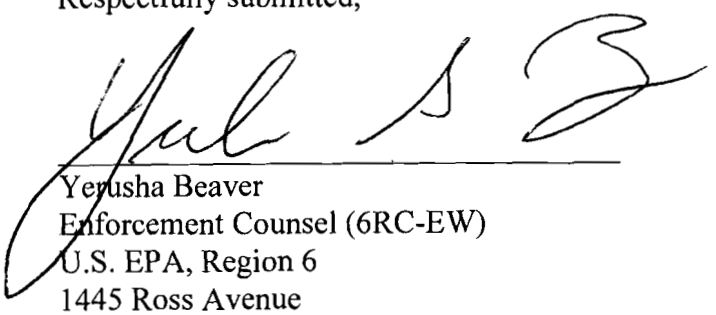
16 See Attachment C-1, Declaration of Rashida Shivers, ¶¶ 5, 8-9.

(11) of the rainfall events were above one inch, and at least one such event occurred each month from June 2003 to October 2003. Section 309(g) of the Act authorizes EPA to assess a penalty of up to $11,000 *per day* of violation. Thus the gravity portion of the penalty could have reflected an amount of up to $11,000 per day of violation multiplied by a minimum of seventeen days of violation. However, considering the statutory factors and the specific facts of this case, Complainant believed the gravity calculation of $2,000 multiplied by five months of violations to be appropriate and sufficient to accomplish the goals of the Act's penalty authority.

Regarding Respondent's statements of its inability to pay the prescribed penalty, at no time prior to the Initial Decision did Respondent declare an inability to pay the penalty or otherwise request that Complainant consider reducing the proposed penalty on such basis. (Attachment A-1, Supplemental Affidavit of Everett Spencer, ¶ 12) In view of the information available to Complainant and discussions with Respondent, Complainant had no reason to believe, or basis to conclude, that Respondent could not afford to pay the proposed penalty. Further, no financial documents or other supporting documentation have been provided by Respondent to justify penalty reduction. Had Respondent made a request for inability-to-pay considerations and provided the requisite documentation during any of the discussions prior to the filing of Complainant's Motion for Default Order, Complainant would have considered such and acted accordingly, as per standard Agency practice.

WHEREFORE, for the reasons set forth above, Complainant respectfully requests that the relief sought in the Appellate Brief be denied and the Amended Initial Decision after Remand be upheld.

Respectfully submitted,



Yerusha Beaver
Enforcement Counsel (6RC-EW)
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733
Tel.: (214) 665-6797

## CERTIFICATE OF SERVICE

I certify that the original of the foregoing Complainant's Brief in Response to Respondent's Appellate Brief was hand-delivered to and filed with the Regional Hearing Clerk, U.S. EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, and true and correct copies were sent on this the 9th day of November, 2006, to the addressees listed below in the manner indicated:

VIA HAND DELIVERY:

Regional Judicial Officer (6RC-D)
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, TX 75202

VIA U.S. MAIL, Certified Mail, Return Receipt Requested:

Mr. Bill Gaskey, President
Gaskey Construction Corporation
11422 Craighead Drive
Houston, TX 77025

Mr. Carl G. Mueller, Jr.
Counsel for Respondent
#3 River Hollow
Houston, TX 77027

VIA Federal Express Mail

Eurika Durr
Clerk of the Board
Environmental Appeals Board (MC-1103B)
U.S. Environmental Protection Agency
Suite 600
1341 G Street, N.W.
Washington, D.C. 20005

# Attachment A-1

## Supplemental Affidavit of Mr. Everett H. Spencer

| | | |
|---|---|---|
| IN THE MATTER OF: | § | |
| Gaskey Construction Corporation<br>a Texas corporation | § | |
| Respondent | § | DOCKET NO. CWA-06-2004-2335 |
| NPDES No.: TXU010332 | § | |

**SUPPLEMENTAL AFFIDAVIT OF EVERETT H. SPENCER**

I, EVERETT H. SPENCER, make the following statement truthfully from personal knowledge, under penalty of perjury, in accord with 28 U.S.C. § 1746.

## I. GENERAL BACKGROUND

1. I make this statement in my capacity as an Enforcement Officer employed in the Water Enforcement Branch of the Compliance Assurance and Enforcement Division of the United States Environmental Protection Agency, Region 6 (EPA).

2. In January 1986, I began work as an Enforcement Officer in the National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act for the Enforcement Branch of the Water Management Division, EPA, Region 6. EPA Region 6 reorganized in 1995 and the branch and division changed names to the Water Enforcement Branch of the Compliance Assurance and Enforcement Division. As such, I am responsible for NPDES investigations in Texas and New Mexico, primarily investigating discharges of pollutants to Waters of the U.S. from wastewater treatment plants. In 2002, I was assigned as the NPDES Storm Water Regional Enforcement Coordinator to assure compliance with the Storm Water program. These duties require that I maintain regular contact with the various state agencies; conduct outreach to the general public and regulated communities on storm water

issues; and train federal, state and local storm water investigators. Furthermore, my duties include investigating and enforcing, on behalf of the Agency, violations of the Clean Water Act's NPDES storm water requirements.

3. I am the EPA, Region 6 Enforcement Officer assigned to review information related to Clean Water Act regulatory compliance at Gaskey Construction Corporation (Respondent). In my capacity as an Enforcement Officer for EPA, I am familiar with the Clean Water Act's (CWA or "the Act") NPDES program.

4. I was awarded a Bachelor of Science in Geology from Louisiana State University in Baton Rouge in 1980. The major section of study for my degree plan was physical geology dealing with natural erosional processes.

5. As the Enforcement Officer for the matter against Respondent, I reviewed Respondent's file and calculated the penalty based on a consideration of the required statutory factors in Section 309(d) of the Act, 33 U.S.C. § 1319.

## II. CLARIFICATION OF NATURE OF VIOLATIONS

6. The intent of the TPDES Storm Water Construction General Permit is to prevent/minimize the escape of pollutants (total suspended solids (TSS) and other pollutants common to a construction site) from an earth disturbed construction site of one acre or more, or less than one acre if part of a larger common plan of development or sale. The Gaskey Construction site was in fact one acre or more and part of a larger common plan of development, therefore a storm water pollution prevention plan (SWPPP) and permit coverage was needed and required by the TPDES program.

7. On or about November 1, 2004, I called and spoke with the Brazoria County Clerk and confirmed that the area around the Gaskey site was zoned commercial development. Further, I learned that the area around the Gaskey site was being developed as a commercial/retail shopping center that ultimately disturbed more than twenty-eight (28) acres of total land area.

8. The SWPPP is developed before the permit coverage is applied for (filing a Notice of Intent (NOI) or posting a construction site notice). The SWPPP details the best management practices (BMPs) that will be employed on the site to minimize the escape of pollutants to a waters of the US, among other things. The SWPPP also details the sequence of events on the site that the BMPs are employed for proper installation and maximum efficiency.

9. The permit relies on the ½" of rainfall as a "benchmark" indicator that triggers an inspection of the site on the "once every two week or after a ½" rainfall" schedule prescribed in the permit. The ½" rainfall or more indicator is significant in that a discharge of stormwater from the site becomes imminent as the rainfall approaches the ½" mark. After the ½" mark is reached the site has a high probability of discharging (depending on the BMPS employed). Since the Gaskey site had seventeen (17) rainfall events ranging from 0.55 inch to 4.65 inches during the time of construction (from June 2003 to October 2003) it is an appropriate presumption that the site discharged during and after these events. Also, eleven (11) of the rainfall events were above one inch, with at least one event occurring in each of the five months.

10. The TPDES program requires that the operators at the site having either operational control over site plans and specifications or having operational control over day-to-day activities develop and implement a SWPPP and obtain permit coverage. It is the responsibility of the operator(s) at the site to make that determination. Gaskey had control over day to day activities

at the site and fit the definition of who should have permit coverage. Therefore Gaskey had a responsibility to determine that it needed permit coverage, develop and implement a SWPPP, and obtain permit coverage.

## III. CLARIFICATION OF PENALTY ASSESSMENT

11. Under Section 309(g)(2) of the Act, the statutory maximum for the Respondent's Class I violations is $27,500. For this case, I calculated a penalty of $10,155 for five counts of violations which consists of five months of failure to have TPDES permit coverage. This penalty includes: $155 in economic benefit and $10,000 for the gravity of the violations. The five months was the duration of the project, June 2003 to October 2003. Instead of using the length of duration of noncompliance to calculate the fine amount, each discharge without a permit could have been used in the fine calculation. Each of the seventeen events would have been counted in the gravity part of the calculation and at a minimum would have resulted in seventeen calculations of $2000 or more. As an example of the consideration of harm to the environment, on October 9, 2003, the historical rainfall data shows an event of 4.65 inches. This amount of rainfall on an earth disturbed site with no BMPs to detain the water is capable of carrying off tons of TSS and other pollutants to the nearby receiving waters of the United States. This violation, and others like it, would have carried a penalty of $2000.00 to $11,000.00 per violation as per the 1995 CWA Penalty Policy. The Penalty Policy gives the enforcement officer the discretion to use the duration of noncompliance to calculate a penalty rather than the per violation calculation in appropriate circumstances. It allows for penalties that are reasonable and affordable by the Respondent.

12. In my conversations with Gaskey Construction, there was never a mention of a financial inability to pay the administrative penalty. The conversations centered around whether the construction site was part of a larger common plan of development and the need for permit coverage due to the size (greater than one acre) of the site. An inability to pay the penalty was never discussed in the conversations, nor was it part of the correspondence from the company. Thus in consideration of the economic impact of the proposed penalty on Respondent, I had nothing to indicate, and no reason to believe, that Respondent could not afford the proposed penalty. In fact, Mr. Gaskey and I agreed on a settlement amount that discounted the proposed penalty only by a small percentage as an expedited settlement consideration, and a Consent Agreement Final Order complaint was mailed to him to sign on October 19, 2004. Had he requested ability-to-pay considerations, I would have requested the pertinent financial documents and processed and considered the information in accordance with our standard procedures.

FURTHER AFFIANT SAYETH NOT.

Everett H. Spencer,
Affiant.

Subscribed and sworn to before me, the undersigned Notary Public,

this 31 day of October, 2006.

SHAWN M. MONTAGUE
Notary Public, State of Texas
My Comm. Expires
Feb 11, 2009

Notary Public

My commission expires: Feb 11, 2009

# Attachment B-1

## Declaration of Mr. Kenneth L. AuBuchon

| | | |
|---|---|---|
| IN THE MATTER OF: | § | |
| Gaskey Construction Corporation a Texas corporation | § | |
| Respondent | § | DOCKET NO. CWA-06-2004-2335 |
| NPDES No.: TXU010332 | § | |

**DECLARATION OF KENNETH L. AUBUCHON**

I, KENNETH L. AUBUCHON, state truthfully from personal knowledge, under penalty of perjury, in accord with 28 U.S.C. § 1746, the following:

1. I make this statement in my capacity as an Inspector employed in the Surveillance Section of the Air / Toxics & Inspection Coordination Branch of the Compliance Assurance and Enforcement Division of the United States Environmental Protection Agency, Region 6 (EPA).

2. In March 1998, I began work as an Inspector in the National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act for the Surveillance Section of the Air / Toxics & Inspection Coordination Branch of the Compliance Assurance and Enforcement Division, EPA, Region 6. I am responsible for conducting compliance evaluation inspections at facilities and sites that are subject to various (State and Federal) environmental statutes as directed. I am also responsible for conducting outreach to the general public and regulated communities on various environmental statutes. Additionally, my responsibilities include the training of federal, state, and local inspectors.

3. I was awarded a Bachelor of Science in Civil Engineering from the University of Houston, Magna Cum Laude, in 1996. The major area of study for my degree plan was structural design of

wastewater treatment units and offshore structures. I was awarded a Masters of Science in Environmental Engineering from the University of Houston in 1998, with a major concentration of study on municipal plant design and operations. My thesis was entitled, "Optimization of the Use of Polyelectrolytes for Dewatering of Municipal Biosolids."

4. On October 15, 2003, I was the lead EPA inspector conducting storm water compliance evaluation inspections in the Counties of Brazoria and Fort Bend, Texas. The inspections were to determine compliance of construction sites located in the area with the approved Texas Pollutant Discharge Elimination System (TPDES) program.

5. I was one of the two EPA, Region 6 Inspectors who conducted the onsite compliance evaluation inspection at the Gaskey Construction Corporation (Respondent) construction site located at 10611 Broadway (FM 518) in Pearland, Texas.

6. The inspection was in accordance with Section 308(a) of the Act, 33 U.S.C. § 1318. I presented my inspector credentials to show proof of the authority to enter and inspect the site to Mr. Brad MacDonald, who presented himself as the site superintendent for the Respondent.

7. At the time of the inspection, Mr. MacDonald was asked questions related to the site's activities and coverage under the TPDES General Permit Numbered TXR150000 (General Permit). To the best of my recollection, Mr. MacDonald did not have a clear understanding of the General Permit requirements. Mr. MacDonald did not present a Notice of Intent (NOI) from the Respondent or say that the site was covered by a TPDES permit. Additionally, there were no Best Management Practices (BMPs) in place at the site.

8. The TPDES program requires that the operators of construction activities that disturb an acre or more, or less than one acre if part of a larger common plan of development or sale that ultimately disturbed one acre or more, obtain permit coverage under the General Permit. The TPDES program also requires that operators at the site having either operational control over site plans and specifications or having operational control over day-to-day activities develop and implement a SWPPP and obtain permit coverage. It is the responsibility of the operator(s) at the site to make that determination. During the inspection on October 15, 2003, Mr. MacDonald was not sure of the total disturbed acreage under construction but gave an estimate of 1.0 to 1.3 acres.

9. I observed the construction of other related construction activities adjoining the Gaskey site forming a retail complex called "The Crossing." The Gaskey site was part of this retail complex which disturbed more than one acre of total land area. To the best of my recollection, Mr. MacDonald represented that Gaskey Construction had control over day-to-day activities at the site.

10. To the best of my recollection, since Mr. MacDonald did not provide a NOI or a SWPPP for the site, he was asked to provide information pertaining to the site and ownership of the company that he worked for that is normally documented in the NOI and SWPPP.

Executed on: 11/09/2006

Kenneth L. AuBuchon

# Attachment C-1

## Declaration of Ms. Rashida M. Shivers

| | | |
|---|---|---|
| IN THE MATTER OF: | § | |
| Gaskey Construction Corporation<br>a Texas corporation | § | |
| Respondent | § | DOCKET NO. CWA-06-2004-2335 |
| NPDES No.: TXU010332 | § | |

DECLARATION OF RASHIDA M. SHIVERS

I, RASHIDA M. SHIVERS, state truthfully from personal knowledge, under penalty of perjury, in accord with 28 U.S.C. § 1746, the following:

1. I make this statement in my capacity as an Inspector employed with the Surveillance Section of the Air/Toxics and Inspection Coordination Branch in the Compliance Assurance and Enforcement Division of the United States Environmental Protection Agency, Region 6 (EPA).

2. In September 2003, I began work as a Storm Water Construction Inspector in the National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act for the Surveillance Section of the Air/Toxics and Inspection Coordination Branch in the Compliance Assurance and Enforcement Division under the Environmental Protection Agency Intern Program (EIP). As such, I was responsible for conducting NPDES storm water construction compliance inspections in Texas, primarily inspecting discharges of pollutants to Waters of the U.S. from residential and commercial construction projects. In September 2005, I completed the EIP and am currently responsible for conducting inspections that pertain to all NPDES Program categories.

3. I earned a Bachelor of Science (B.S.) and a Master of Science (M.S.) Degree in Biology from Fayetteville State University in Fayetteville, NC in 2000 and 2003, respectively.

The major area of study for both my B.S. and M.S. degrees involved general biology.

4. I was one of two EPA, Region 6 Inspectors who inspected the Gaskey Construction Corporation Chase Bank construction site located at 10611 Broadway (FM 518), Pearland, Brazoria County, Texas 77584

5. On October 15, 2003, I accompanied Mr. Kenneth AuBuchon, lead Inspector, on a routine Storm Water Compliance Evaluation Inspection of the Gaskey site as part of on-the-job field training (OJT) requirements for new Compliance Inspectors/Field Investigators, per EPA Order 3500.1.

6. Mr. Aubuchon and I arrived at the site at or around 1:35 pm on October 15, 2003. We presented our EPA credentials in accordance with Section 308(a) of the Act, 33 U.S.C. § 1318 and explained the purpose of the EPA inspection. We met with Mr. Brad MacDonald, who represented himself as the site superintendent. Mr. MacDonald also informed us that Gaskey was the General Contractor and Operator for the Chase Bank construction project.

7. During the inspection, Mr. MacDonald provided us with his personal business card from which we obtained general contact information for Gaskey Construction Corporation. Additionally, Mr. Aubuchon asked Mr. MacDonald who the cognizant official was for the Gaskey Construction Corporation as well as the Owner of the Chase Bank project. In turn, Mr. MacDonald informed both Mr. Aubuchon and me that the President of Gaskey Construction Corporation was Bill Gaskey (who was not present during the inspection). However, Mr. MacDonald was uncertain of the Owner of the Chase Bank project at the time of the inspection.

8. Mr. Aubuchon and I asked site-specific questions relating to the Chase Bank construction project including questions regarding the total disturbed land area; the beginning date and projected end date for the construction activities; whether or not the construction site

had storm water permit coverage under the Texas Pollutant Discharge Elimination System (TPDES) General Permit Number TXR150000; and if there was a Storm Water Pollution Prevention Plan (SWPPP) for the site.

9. According to Mr. MacDonald, he was uncertain of the total disturbed acreage of the site, however he estimated the disturbed land area to be between 1.00 and 1.35 acres. He approximated the construction commencement date to be June 2003. I do not recollect whether a projected end date was communicated. Mr. MacDonald also stated that Gaskey had not obtained coverage under the General Permit, nor developed or implemented a SWPPP for the site

10. At or around 1:40 pm, an exit interview was conducted with Mr. MacDonald. During the exit interview, Mr. MacDonald expressed his unfamiliarity with the requirements of the TPDES General Permit. As I recall, Mr. Aubuchon explained the general requirements of the storm water TPDES General Permit, including the definition of an Operator, the purpose of an Notice of Intent (NOI), the preparation and implementation of a SWPPP, and the installation of BMPs on the construction site.

11. I have read the affidavit of Mr. Kenneth AuBuchon, and I concur with his statements that provide additional details regarding our activities during the Inspection, namely paragraphs 4-10.

Executed on: November 9, 2006

Rashida M. Shivers

# Attachment D-1

## Affidavit of Ms. Annette Evans Smith

| | | |
|---|---|---|
| IN THE MATTER OF: | § | |
| Gaskey Construction Corporation<br>a Texas corporation | § | |
| Respondent | § | DOCKET NO. CWA-06-2004-2335 |
| NPDES No.: TXU010332 | § | |

**AFFIDAVIT OF ANNETTE EVANS SMITH**

I, ANNETTE EVANS SMITH, make the following statement truthfully from personal knowledge, under penalty of perjury, in accord with 28 U.S.C. § 1746.

1. I make this statement in my capacity as a Project Officer employed in the Office of Planning and Coordination, Compliance Assurance and Enforcement Division of the United States Environmental Protection Agency, Region 6 (EPA).

2. In 1983, I was awarded a Bachelor of Business Administration in General Business from Mississippi State University. In 1992, I received a Paralegal Certificate after completion of an Associate of Science Degree from El Centro Community College.

3. In January 1988, I began working as a Paralegal Specialist in the Air and Toxic Branch of the Office of Regional Counsel, EPA, Region 6. As such, I was responsible for tracking, filing, and effectuating service of all legal pleadings. In 1994, I was reassigned to the Water Branch of the Office of Regional Counsel where I performed similar duties. In 2005, I transitioned to my current position a Project Officer in the Office of Planning and Coordination.

4. I was the EPA, Region 6 Paralegal assigned to file and serve pleadings in the matter involving Gaskey Construction Corporation (Respondent). In my capacity as the Paralegal for

Water Legal Enforcement Branch, I was familiar with and experienced in the standard operating procedures for filing and serving pleadings under the Clean Water Act.

5. Consistent with the standard operating procedures, I would file the pleadings with the Regional Hearing Clerk. I would send a file-stamped copy of the pleadings to the respondents via certified mail, return receipt requested. After receiving the returned receipt, I would file it with the Regional Hearing Clerk to demonstrate that service was effectuated. I would always serve each complaint with an information sheet regarding the Small Business Regulatory Enforcement Fairness Act (SBREFA information sheet), a "Notice of Registrants Duty to Disclose" relating to the disclosure of environmental legal proceedings to the Securities and Exchange Commission (SEC Notice), and a copy of the Federal Register Notice setting forth the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (40 C.F.R. Part 22) (Consolidated Rules).

6. As the Paralegal for the Water Legal Enforcement Branch, I filed the Complaint and the Amended Complaint in the matter against Gaskey Construction Corporation in accordance with the standard operating procedures.

7. On September 21, 2004, I filed the Complaint with the Regional Hearing Clerk and sent a file-stamped copy to Respondent via certified mail, return receipt requested. I included with the complaint a copy of the SBREFA information sheet, the SEC Notice, and the Consolidated Rules. I filed the return receipt, demonstrating that service was effectuated on September 24, 2004, with the Regional Hearing Clerk.

8. On March 1, 2005, I filed the Amended Complaint with the Regional Hearing Clerk and sent a file-stamped copy to Respondent via certified mail, return receipt requested. I included

with the amended complaint a copy of the SBREFA information sheet, the SEC Notice, the Consolidated Rules, and a copy of the initial Complaint. I filed the return receipt, demonstrating that service was effectuated on April 4, 2005, with the Regional Hearing Clerk.

FURTHER AFFIANT SAYETH NOT.

Annette Evans Smith,
Affiant.

Subscribed and sworn to before me, the undersigned Notary Public,

this 9th day of November, 2006.

CHARLOTTE D. STANCE
MY COMMISSION EXPIRES
OCTOBER 19, 2008

Notary Public

My commission expires: 10/19/2008