

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2**

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. II  
2008 AUG 26 PM 1:33  
REGIONAL HEARING  
CLERK

IN THE MATTER OF:

**QUALITY ENGINEERS AND  
CONTRACTORS, INC.**  
Suite 201,  
206 Eleanor Roosevelt  
Hato Rey, Puerto Rico 00918

**DOCKET NUMBER CWA-02-2007-3411**

and

**CIDRA EXCAVATION, INC.**  
P.O. Box 11218  
Caparra Heights Station  
San Juan, P.R. 00922

Proceeding Pursuant to Section  
309(g) of the Clean Water Act, 33 U.S.C.  
§1319(g), to Assess Class II Civil Penalty

**SERENA HOUSING DEVELOPMENT**

**RESPONDENTS.**

**NPDES PERMIT PRR10B942**

**REPLY TO RESPONDENTS' MOTION OPPOSING REQUEST FOR LEAVE TO  
WITHDRAW COMPLAINT WITHOUT PREJUDICE AND REQUESTING DISMISSAL  
OF COMPLAINT OR RAPANOS EVIDENTIARY HEARING ON CWA JURISDICTION**

1. On August 14, 2008, Complainant, Environmental Protection Agency, Region 2, Caribbean Environmental Protection Division ("CEPD") received copy of Respondents' motion entitled "Motion Opposing Request for Leave to Withdraw Complaint Without Prejudice and Requesting Dismissal of Complaint or Rapanos Evidentiary Hearing on CWA Jurisdiction" (hereinafter "Respondents' Motion").
2. In essence, Respondents' Motion vaguely alleges that the Honorable Court should deny Complainant's motion to withdraw the case and make a jurisdictional

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determination based on Rapanos v. United States Army Corps of Engineers, 547 U.S. 715 (2006).

3. Complainant's decision to move to withdraw the complaint is an exercise of its enforcement discretion. Complainant's decided to move in this direction after Respondents' non-compliance with previous orders issued by EPA. In addition, there are other matters related to factual issues that Complainant needs to clarify with Respondents and third parties before continuing any enforcement action in order to avoid unnecessary expenditures and delays that would entail if this process is continued before the Honorable Court.
4. Respondents irrelevant allegations that "...absent a determination of CWA jurisdiction, exposes Respondents to unnecessary expense and financial harm in a matter grounded on an inspection first conducted in 2006 that will quite possibly drag on unresolved, unless the jurisdictional grounds of the Complaint are adjudicated" are at best convenient only to Respondents. Further, Respondents fail to aver and ignore the fact that as of the July 2, 2008, when an Enforcement Case Support Inspection (ECSI) was conducted, Respondents were still in violation of their NPDES permit by failing to implement an adequate storm water pollution prevention plan.
5. Regarding the Rapanos jurisdictional challenge that Respondents pretend to assert, EPA conducted two Compliance Evaluation Inspections at the Site on October 26, 2006 and February 2, 2007, among other administrative processes that culminated with the issuance of the Complaint. In addition, on June 27, 2008, EPA began and ended the first portion of the ECSI of the Project. The second and final portion of

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the ECSI was conducted on July 2, 2008. The second portion of the ECSI included a walkthrough with Respondents' and Greg Morris representatives, Respondent's Counsel and EPA representatives. The inspections and the above mentioned walkthrough included the visual inspection of some of the areas that Respondents now allege are not under EPA's jurisdiction, because "no significant nexus exists between wetlands and the non-navigable tributary..." Please refer to Exhibit 1, which includes photos of the bodies of water observed during the ECSI.

6. Respondents' shortsighted allegations in support of its Jurisdictional challenge are unfounded and based on incomplete evidence. For example, Respondents aver as part of its factual considerations that it retained the services of a technical consultant and includes various descriptive and allegedly conclusive figures, prepared by their consultant, in support of its conclusion that the "Serena Site storm waters discharge are not 'waters of the United States.'" (See Exhibit 2). Notwithstanding the above, the figures provided clearly identify that: a) the project discharges into an area abutting a wetland; b) that the wetland is connected to a body of water; and c) that the body of water eventually reaches navigable water of the United States. In summary, Respondents' exhibits identify the significant nexus between the wetlands and waters of the United States.
  
7. Based on the available information, EPA made a technical and jurisdictional determination, which is summarized as follows: a) the Unnamed creek is a tributary of the Escarcha Creek; b) the Escarcha Creek and its tributaries are "waters of the United States" pursuant to Section 502(7) of the Clean Water Act, 33 U.S.C. § 1362, and 40 C.F.R. § 122.2; and c) the Escarcha Creek has an hydrological connection to the De La Plata River.

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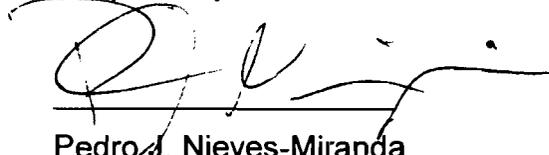
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8. In addition to the aforementioned, respondent Quality Engineers and Contractors, Inc. submitted a Notice of Intent ("NOI") form and prepared a Storm Water Pollution Prevention Plan ("SWPPP") for the Project, dated November 30, 2005, where it acknowledged that the Project would have discharges into waters of the United States. (See Exhibits 3 and 4, respectively). This by itself is an admission of jurisdiction.

WHEREFORE, Complainant further requests the Honorable Court to deny Respondents' Motion, rule in favor of Complainant's motion to withdraw complaint without prejudice and order any other remedy or relief under law it may deem necessary.

IN SAN JUAN, PUERTO RICO THIS 25<sup>TH</sup> OF AUGUST OF 2008.

Respectfully Submitted,



Pedro J. Nieves-Miranda  
US Environmental Protection Agency  
Region 2, ORC-Caribbean Team  
Centro Europa Building, 407  
1492 Ponce de León  
San Juan, PR 00907  
Tel. 787-977-5822  
Fax. 787-729-7748  
[Nieves.Pedro@epamail.epa.gov](mailto:Nieves.Pedro@epamail.epa.gov)

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**CERTIFICATE OF SERVICE**

I certify that the foregoing "Reply to Respondents' Motion Opposing Request for Leave to Withdraw Complaint Without Prejudice and Requesting Dismissal of Complaint or Rapanos Evidentiary Hearing on CWA Jurisdiction" was sent to the following persons, in the manner specified, on the date below:

Copy by Overnight and  
Facsimile:

Barbara A. Gunning  
Administrative Law Judge  
Office of Administrative Law Judges  
1099 14<sup>th</sup> Street, N.W. , Suite 350, Franklin  
Court, Washington, D.C. 20005  
(202) 565-0044

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Motion to Withdraw Complaint

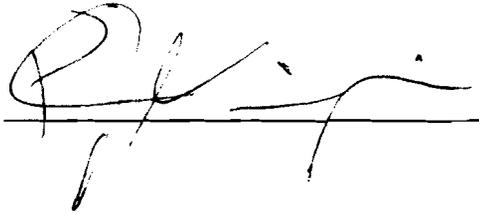
Original and Copy for  
Filing by Fed Ex:

Karen Maples  
Regional Hearing Clerk  
U.S. Environmental Protection Agency  
Region II  
290 Broadway – 16<sup>th</sup> Floor  
New York, NY 10007-1866

Copy by Fax

Mr. Patricio Martínez-Lorenzo  
Attorney at Law  
Martínez-Lorenzo Law Offices  
Union Plaza Building – Suite 1200  
416 Ponce de León Ave.  
Hato Rey, PR 00918-3424  
(787) 641-5007

Dated: August 25, 2008



A handwritten signature in black ink, appearing to read 'Patricio Martínez-Lorenzo', is written over a horizontal line. The signature is stylized and cursive.