

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2008 OCT -9 PM 3:24
REGIONAL HEARING
CLERK

IN THE MATTER OF:

Victor Morales
P.O. Box 8817
Caguas, Puerto Rico 00726

Victor Morales Lot Development
NPDES Permit Number **PRU202017**

Respondent.

Proceeding pursuant to Section 309(g) of
the Clean Water Act, 33 U.S.C. §1319(g)

**PROCEEDING TO ASSESS A CLASS I
CIVIL PENALTY**

DOCKET NO. CWA-02-2008-3357

**ADMINISTRATIVE COMPLAINT
FINDINGS OF VIOLATION, NOTICE OF PROPOSED
ASSESSMENT OF AN ADMINISTRATIVE PENALTY, AND
NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

I. STATUTORY AND REGULATORY AUTHORITIES

1. This Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of an Administrative Penalty, and Notice of Opportunity to Request a Hearing ("Complaint") is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 309(g)(2)(A) of the Clean Water Act ("Act" or "CWA"), 33 U.S.C. §1319(g)(2)(A). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 2, who in turn has delegated it to the Director, Caribbean Environmental Protection Division ("CEPD") of EPA, Region 2 ("Complainant").
2. Pursuant to Section 309(g)(2)(A) of the Act, and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("CROP"), 40 CFR Part 22 (2001), a copy of which is attached, Complainant hereby requests that the Regional Administrator assess a civil penalty against Culebra Resort Associates ("Respondent"), as a result of Complainant's determination that the Respondent is in violation of Sections 301 and 402 of the Act, 33 U.S.C. §1311 and §1342,

respectively, for the unlawful discharge of pollutants into navigable waters without authorization by a National Pollutant Discharge Elimination System ("NPDES) permit.

3. Section 301(a) of the Act, 33 U.S.C. §1311(a), provides in part that "except as in compliance with this Section and Sections . . . 402, and 404 of the Act, the discharge of any pollutant by any person shall be unlawful."
4. Section 308 of the Act, 33 U.S.C. §1318, provides, in relevant part, that the Administrator of EPA may require the owner or operator of any point source to, among other things: maintain such records; make such reports; install, use and monitor such equipment; sample such effluents; and provide such other information as may reasonably be required in order to carry out Section 402 of the Act, 33 U.S.C. §1342.
5. Section 402 of the Act, 33 U.S.C. §1342, authorizes the Administrator to issue a NPDES permit for the discharge of any pollutant, or combination of pollutants, subject to certain requirements of the Act and such conditions as the Administrator determines are necessary.
6. Section 402 (p) of the Act, 33 U.S.C. §1342(p), requires a permit with respect to a discharge of storm water associated with industrial activity.
7. The Administrator of EPA has promulgated regulations at 40 CFR §122.26(a)(1)(ii) and §122.26(b)(14), which require operators to obtain a NPDES permit for storm water discharges associated with industrial activity, including construction activity.
8. The regulations at 40 CFR §122.26(b)(14)(x) and 40 CFR §122.26(b)(15)(i) regulate storm water discharges associated with construction sites which include clearing, grading and excavation activities that result in the disturbance of one (1) or more acres of total land area.
9. The Act and its implementing regulations (and applicable NPDES permit in this case, if any), contain the following definitions:
 - a) "Navigable waters" means the waters of the United States and territorial seas, pursuant to Section 502(7) of the Act, 33 U.S.C. §1362(7). "Waters of the United States" means, but are not limited to, waters which are currently used or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide and including wetlands, rivers, streams (including intermittent streams) (40 CFR §122.2).
 - b) "Pollutant" means, but is not limited to, solid waste, dredged spoil, rock, sand, cellar dirt, sewage, sewage sludge, and industrial, municipal and

agricultural waste discharged into water, pursuant to Section 502(6) of the Act, 33 U.S.C. §1362(6).

- c) "Point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged, ..." pursuant to Section 502(14) of the Act, 33 U.S.C. §1362(14).
- d) "Discharge of a pollutant" means any addition of any pollutant to navigable waters from any point source, pursuant to Section 502(12) of the Act, 33 U.S.C. §1362(12).
- e) "Person" means, but is not limited to, an individual, corporation, partnership or association, pursuant to Section 502(5) of the Act, 33 U.S.C. §1362(5).
- f) "Operator," for the purpose of the NPDES storm water general permit for construction activities and in the context of storm water associated with construction activity, is defined at Appendix A of the CGP to mean any party associated with a construction project that meets either of the following two (2) criteria:
 - i. The party has operational control over construction plans and specifications including the ability to make modifications to those plans and specifications; or
 - ii. The party has day-to-day operational control of those activities at a project which are necessary to ensure compliance with a storm water pollution prevention plan for the site or other permit conditions. See Appendix A of the CGP.
- g) The term "construction activity" means construction activities including clearing, grading and excavating that result in land disturbance of equal to or greater than 1 acre. See 40 CFR §122.26(b)(14)(x).
- h) The term "owner" or "operator" means the owner or operator of any "facility" or "activity" subject to regulation under the NPDES program. See 40 CFR §122.2.
- i) The term "facility" or "activity" means any NPDES "point source" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program. See 40 CFR §122.2.

10. EPA issued the "NPDES General Permit for Discharges from large and Small Construction Activities", Permit No. PRR100000 on July 1, 2003 ("CGP"). This permit was published in the Federal Register (68 FR 39087). It became effective on July 1, 2003 and it expired on July 1, 2008. The new permit entered into effect on September 29, 2008.

II. JURISDICTIONAL FINDINGS

11. Victor Morales (herein "VM or Respondent"), is a person within the meaning of Section 502(5) of the Act, 33 U.S.C. §1362(5).
12. VM is the owner and operator of a project known as "Victor Morales Lot Development" (the "Project"). The Project is located on a site of approximately 6.0 acres.
13. Earth movement activities at the Project involve clearing, grading and excavation on approximately 1.67 acres of land.
14. The Project consists of the construction of multiple lots for housing units.
15. The Project is located at State Road # 251, Interior, Flamenco Ward, Culebra, Puerto Rico.
16. The Project is a "construction activity" as defined in 40 CFR §122.26(b)(15).
17. The Project is and was, at all relevant times a point source as defined in 40 CFR §122.2.
18. The Respondent is required to apply for and obtain NPDES permit coverage for the storm water discharges from the Project pursuant to 40 CFR §122.26(b)(15).
19. EPA issued on July 1, 2003 (68 FR 39087), the "NPDES General Permit for Discharges from Large and Small Construction Activities" (the "construction permit"). The construction permit became effective on July 1, 2003 and expired at midnight, July 1, 2008.
20. Part 2.3.A of the construction permit establishes application deadlines for operators of new construction projects. Such operators are required to file a complete and accurate Notice of Intent ("NOI") form prior to commencement of construction activities.
21. A review of the EPA National Storm Water Processing Center database at "<http://www.epa.gov/npdes/stormwater>," and EPA files, on September 25, 2008 revealed that , VM filed a late NOI on May 1, 2008 and obtained permit coverage for its construction activities at the project on May 8, 2008. The permit number assigned to VM is **PRR10BH00**.

III. FINDINGS OF VIOLATION

22. Complainant re-alleges Paragraphs 11 – 21 above.
23. On December 19, 2007, a representative of EPA Region 2 conducted a Compliance Evaluation Inspection (“CEI”) at the site.
24. The findings of the CEI are included in the NPDES Water Compliance Inspection Report dated March 12, 2008, and include among others the following:
 - a. Respondent had not filed an individual application or NOI for the development;
 - b. Respondent is in violation of Section 308(a) of the Act, 33 U.S.C. §1318(a), by its failure to comply with the application requirements for a NPDES storm water permit.;
 - c. Respondent has not developed, nor implemented a Pollution Prevention Plan for the Control of Erosion at the site and the Sedimentation of a ditch which discharges into the Atlantic Ocean, which is a water of the United States within the meaning of Section 502(7) of the Act, 33 U.S.C. §1362(7).
25. On April 1, 2008, an Administrative Order (CWA-02-2008-3141) (“AO”) was issued against Respondent VM under Sections 308 and 309 of the CWA.
26. The AO required Respondent to remedy certain violations based on findings made during the December 19, 2007, EPA inspection.
27. Respondent replied to the AO on April 22, 2008.
28. Therefore, based on the above findings, EPA hereby finds that Respondent violated Sections 301 and 402 of the Act, 33 U.S.C. §1311 and 33 U.S.C. §1342, respectively, by discharging pollutants into a ditch which discharges into the Atlantic Ocean, through storm water runoff associated with construction activities, without a NPDES storm water permit required pursuant to Section 402 of the Act.

IV. CONCLUSIONS OF LAW

29. As set forth above, Respondent is liable for the violations of Sections 301(a) and 402 of the Act, 33 U.S.C. § 1311(a) and 33 U.S.C. §1342, as specified below:
 - a. **Claim 1 – Failure to apply for and obtain coverage under the NPDES permit.** Respondent did not submit an individual NPDES permit application as required by 40 C.F.R. § 122.21, nor did It file a complete and accurate NOI form prior to commencement of construction activities as required by Part 2 of the Construction Permit.

- b. **Claim 2 – Illegal discharges of a pollutant (storm water) into waters of the United States without NPDES permit coverage.** Respondent discharged pollutants from the Project into waters of the United States without NPDES permit coverage, in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

The EPA will notify the Commonwealth of Puerto Rico regarding this proposed action by mailing a copy of this Complaint and Notice and offering an opportunity for the Commonwealth to confer with EPA on the proposed penalty assessment.

V. NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY

Based on the foregoing Findings of Violation, and pursuant to the authority of Section 309(g) of the Act, 33 U.S.C. §1319(g), and the Debt Collection Improvement Act of 1996, EPA, Region 2 hereby proposes to issue a Final Order Assessing Administrative Penalties ("Final Order") to Respondent assessing a penalty of \$24,400.00. EPA determined the proposed penalty after taking into account the applicable factors identified at Section 309(g)(3) of the Act, 33 U.S.C. §1319(g)(3). EPA has taken into account the nature, circumstances, extent and gravity of the violations, and Respondent's prior history of violations, degree of culpability, economic benefit or savings accruing to Respondent by virtue of the violations, and Respondent ability to pay the proposed penalty.

Based on the Findings set forth above Respondent has been found to have violated the Act for at least one hundred twenty-seven (127) days for, the unlawful discharge of pollutants (storm water runoff associated with construction activities) into navigable waters, from the Project, and failure to timely apply for a National Pollutant Discharge Elimination System ("NPDES") storm water permit from November 27, 2007 (when Respondent began construction activities at the development) through April 1, 2008. Respondent also did not comply with the related NPDES storm water regulations (development and implementation of an appropriate Storm Water Pollution Prevention Plan; monitoring, sampling and reporting of its discharges, etc.) developed to ensure prevention and minimization of contamination of storm water by the facility's construction activities. EPA took into account Respondent's knowledge of the critical erosion condition at the development and the excessive sedimentation in the receiving waters as a result of Respondent's discharges of pollutants. The violations alleged in the complaint are serious and have potential effect on human health and the environment. Respondent obtained an economic benefit as a result of its noncompliance with the Act and the NPDES regulations. Respondent does not have a prior history of violations. Respondent is in violation of the Act for the unlawful discharge of pollutants (storm water runoff associated with construction activities) into navigable waters and failure to timely apply for a National Pollutant Discharge Elimination System ("NPDES") storm water permit. Respondent should have known of its obligations and complied with its NPDES permit pursuant to §309(g)(3) of the Act, 33 U.S.C. §1319(g)(3).

EPA may issue the final Order Assessing Administrative Penalties thirty (30) days after Respondent's receipt of this Notice, unless Respondent, within that time, files an answer to the complaint, and request a hearing on this Notice pursuant to the following section.

VI. PROCEDURES GOVERNING THIS ADMINISTRATIVE ACTION

The rules of procedure governing this civil administrative litigation have been set forth in the CROP, 40 CFR Part 22. A copy of these rules accompanies this Complaint.

A. Answering The Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written Answer to the Complaint, and such Answer must be filed within thirty (30) days after service of the Complaint. 40 CFR §22.15(a). The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866**

Respondent shall also serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. 40 CFR §22.15(a). Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which the Respondent has any knowledge. 40 CFR §22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in the Answer, the allegation is deemed denied. 40 CFR §22.15(b). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intend to place at issue in the proceeding), (3) the basis for opposing the proposed relief and (4) whether Respondent requests a Hearing. 40 CFR §22.15(b).

Respondent's failure to affirmatively raise in its Answer facts that constitute or that might constitute the grounds of a defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a Hearing.

B. Opportunity To Request A Hearing

If requested by Respondent in its Answer, a Hearing upon the issues raised by the Complaint and Answer may be held. 40 CFR §22.15(c). If, however, Respondent does not request a Hearing, the Presiding Officer (as defined in 40 CFR §22.3) may hold a Hearing if the Answer raises issues appropriate for adjudication. 40 CFR §22.15(c).

Any Hearing in this proceeding will be held at a location determined in accordance with 40 CFR §22.21(d). A Hearing of this matter will be conducted in accordance with the applicable provisions of the Administrative Procedure Act, 5 U.S.C. §§551-59, and the procedures set forth in Subpart D of 40 CFR Part 22.

Should Respondent request a Hearing on this proposed penalty assessment, members of the public, to whom EPA is obligated to give notice of this proposed action, will have a right under Section 309(g)(4)(B) of the Act, 33 U.S.C. §1319(g)(4)(B), to be heard and to present evidence on the appropriateness of the penalty assessment. Should Respondent not request a Hearing, EPA will issue a Final Order, and only members of the public who submit timely comment on this proposal will have an additional thirty (30) days to petition EPA to set aside the Final Order and to hold a Hearing thereon. EPA will grant the petition and will hold a Hearing only if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order.

C. Failure To Answer

If Respondent fails in any Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 CFR §22.15(d). If Respondent fails to file a timely [*i.e.* in accordance with the 30-day period set forth in 40 CFR §22.15(a)] an Answer to the Complaint, Respondent may be found in default upon motion. 40 CFR §22.17(a). 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. 40 CFR §22.17(a). Following a default by Respondent for a failure to timely file an Answer to the Complaint, any order issued therefore shall be issued pursuant to 40 CFR §22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings thirty (30) days after the Default Order becomes final pursuant to 40 CFR §22.27(c). 40 CFR §22.17(d). If necessary, EPA may then seek to enforce such Final Order of Default against Respondent, and to collect the assessed penalty amount, in Federal court.

VII. INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal Hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 CFR §22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in this Complaint and Respondent may also provide whatever additional information is believed to be relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on

Respondent's ability to continue in business and/or (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant or to dismiss any or all of the charges, if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 CFR §22.18.

Any request for an informal conference or any questions that Respondent may have regarding this Complaint should be directed to:

Tere Rodriguez, Chief
Chief, Multimedia Permits and Compliance Branch
Caribbean Environmental Protection Division
U.S. Environmental Protection Agency, Region 2
Centro Europa Building – Suite 417
1492 Ponce de Leon Avenue
San Juan, Puerto Rico 00907
Telephone (787) 977-5864
Fax (787) 289-7982

The parties may engage in settlement discussions irrespective of whether Respondent has requested a Hearing. 40 CFR §22.18(b)(1). Respondent's requesting a formal Hearing does not prevent Respondent from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a Hearing as specified in 40 CFR §22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 CFR §22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written Consent Agreement. 40 CFR §22.18(b)(2). In accepting the Consent Agreement, Respondent waives any right to contest the allegations in the Complaint and waive any right to appeal the Final Order that is to accompany the Consent Agreement. 40 CFR §22.18(b)(2). In order to conclude the proceeding, a Final Order ratifying the parties' agreement to settle will be executed. 40 CFR §22.18(b)(3).

Entering into a settlement through the signing of such Consent Agreement and complying with the terms and conditions set forth in such Consent Agreement and Final

Order terminates this administrative litigation and these civil proceedings against Respondent (note that a new enforcement action may be initiated based on continued non-compliance). Entering into a settlement agreement does not extinguish, waive, satisfy or otherwise affect Respondent's obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

VIII. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

Instead of filing an Answer, Respondent may choose to pay the total amount of the proposed penalty (\$24,400.00) within 30 days after receipt of the Complaint, provided that Respondent files with the Regional Hearing Clerk, Region 2 (at the address noted above), a copy of the check or other instrument of payment. 40 CFR §22.18(a). A copy of the check or other instrument of payment should be provided to the EPA Attorney identified in Section IX below. Payment of the penalty assessed should be made by sending a cashier's or certified check payable to the "Treasurer, United States of America", in the full amount of the penalty assessed in this complaint to the following addressee:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

Pursuant to 40 CFR §22.18(a)(3), if Respondent elects to pay the full amount of the penalty proposed in the Complaint within thirty (30) days of receiving the Complaint, then, upon EPA's receipt of such payment, the Regional Administrator of EPA, Region 2 (or, if designated, the Regional Judicial Officer), shall issue a Final Order in accordance with 40 CFR §22.18(a)(3). In accordance with 40 CFR §22.45(c)(3), no Final Order shall issue until at least ten (10) days after the close of the comment period on this Complaint. Issuance of a Final Order terminates this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint (note that a new enforcement action may be initiated based on continued non-compliance). Further, pursuant to 40 CFR §22.18(a)(3), the making of such payment by Respondent shall constitute a waiver of Respondent's right both to contest the allegations made in the Complaint and to appeal said Final Order to Federal court. Such payment does not extinguish, waive, satisfy or otherwise affect Respondent's obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

IX. FILING OF DOCUMENTS

The Answer and any Hearing Request and all subsequent documents filed in this action should be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
290 Broadway, 16th Floor
New York, New York 10007-1866

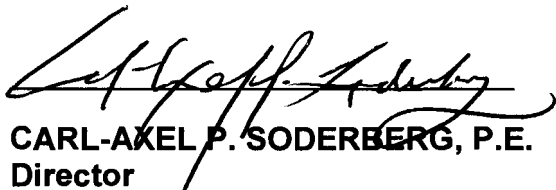
A copy of the Answer, any Hearing Request and all subsequent documents filed in this action shall be sent to:

Pedro J. Nieves-Miranda, Esq.
Assistant Regional Counsel
Office of Regional Counsel
Caribbean Environmental Protection Division
U.S. Environmental Protection Agency, Region 2
Centro Europa Building – Suite 417
1492 Ponce de Leon Avenue
San Juan, Puerto Rico 00907
Telephone (787) 977-5822
Fax (787) 729-7748

X. GENERAL PROVISIONS

1. Respondent has a right to be represented by an attorney at any stage of these proceedings.
2. This Complaint does not constitute a waiver, suspension or modification of the requirements of the Act, regulations promulgated there under, or any applicable permit.
3. Neither assessment nor payment of an administrative civil penalty pursuant to Section 309(g) of the Act will affect Respondent's continuing obligation to comply with the Act, and with any separate Compliance Order issued under Section 309(a) of the Act, 33 U.S.C. §1319(a), for the violations alleged herein.

ISSUED THIS 30th DAY OF SEPTEMBER, 2008.



CARL-AXEL P. SODERBERG, P.E.

Director

Caribbean Environmental Protection Division

United States Environmental Protection Agency - Region 2

1492 Ponce de León Ave., Suite 417

San Juan, Puerto Rico 00907-4127

To: **Victor Morales**
P.O. Box 8817
Caguas, Puerto Rico 00726

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF:

Victor Morales
P.O. Box 8817
Caguas, Puerto Rico 00726

NPDES Permit Number **PRU202017**

Victor Morales Lot Development

Proceeding pursuant to Section 309(g) of
the Clean Water Act, 33 U.S.C. §1319(g)

**PROCEEDING TO ASSESS A
CLASS I CIVIL PENALTY**

**DOCKET NO.
CWA-02-2008-3357**

I certify that on October 6, 2008, I served the foregoing fully
executed Administrative Complaint, Findings of Violation, Notice of Proposed
Assessment of an Administrative Penalty, and Notice of Opportunity to Request a
Hearing, bearing the above referenced docket number, on the persons listed
below, in the following manner:

Original and One Copy
By Overnight:

Karen Maples
Office of Regional Hearing Clerk
U.S. Environmental Protection Agency –
Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

Copy by Certified Mail
Return Receipt Requested:

Victor Morales
P.O. Box 8817
Caguas, Puerto Rico 00726

Copy by Certified Mail
Return Receipt Requested:

Wanda García
Director
Water Quality Area
PR Environmental Quality Board
P. O. Box 11488
San Juan, PR 00910