

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

In the Matter of:

**Quality Engineers and Contractors
Corporation**
Suite 201, 206 Eleanor Roosevelt
Hato Rey, Puerto Rico 00918

and

Cidra Excavation, Inc.
P.O. Box 11218
Caparra Heights Station
San Juan, P.R. 00922

Serena Housing Development

Respondents.

NPDES PERMIT No. PRR10B942

DOCKET NO. CWA-02-2007-3411

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

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
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REGIONAL HEARING
CLERK

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

COME NOW Respondents in the captioned matter and respectfully state and pray as follows:

I. BACKGROUND

The instant matter has its origins in an Administrative Compliance Order (CWA-02-2007-3011) ("ACO"), dated January 11, 2007, filed by the Caribbean Environmental Protection Division, Region 2, of the U.S. Environmental Protection Agency ("EPA") against Respondent Quality Engineers and Contractors Corporation ("Quality") alleging, in essence, violations to Clean Water Act, Section 402 (p), 33 U.S.C. §§ 1251 et seq., 1342(p), regulatory enactments applicable to storm water management and discharges from construction sites, in this case a

residential housing development, known as Serena Housing Development (“Serena” or “Project”), located on an approximately 33 acre site in Pájaros Ward (the “Site”), Municipality of Bayamón, Puerto Rico. Alleged violations were presumably based on an inspection conducted by EPA on October 26, 2006. Quality, by request dated January 26, 2007, asked for summary dismissal of the ACO. EPA’s response to requested summary dismissal was the filing of the present case.

The instant matter commenced on or about June 7, 2007. Contrary to the ACO, whose sole respondent was Quality, the Complaint now includes Serena contractor, Cidra Excavation, Inc. (“Cidra”). The ACO, as well as the Complaint, aver that Project stormwaters discharge into a “tributary”, described in the ACO as an “intermittent unnamed creek”, of Escarcha Creek. In Answers to the Complaint filed by Respondents, both raised, among other affirmative defenses, that the “intermittent creek that receives stormwaters from the site...[as well as] La Escarcha Creek are not ‘waters of the United States’ and, thus, EPA lacks jurisdiction over Respondent activities at the site”. In a Status Report filed in June, 2008, Complainant informed of Respondents’ intention of challenging the jurisdictional basis of the captioned action.

EPA has now requested leave to withdraw (“Motion to Withdraw”) the Complaint based on the alleged identification of new and continuing violations, against one or more as yet not specified Respondents, for which Complainant avers further enforcement may entail “pursuing this matter as part of a civil action in Federal District Court pursuant top Section 309I(b) of the Clean Water Act, 33 U.S.C. § 1319(b).”

Respondent, for the reasons hereinbelow stated requests, that given the stage of instant proceedings, the Administrative Law Judge (“ALJ”) not grant EPA’s Motion to Withdraw and instead proceed to hear evidence as to CWA jurisdiction in light of Rapanos v. United States

Army Corps of Engineers, 547 U.S. 715 (2006), and, thereafter, rule upon the jurisdictional issue.

Granting the Motion to Withdraw exposes Respondents to continued, potentially spurious demands by EPA of CWA stormwater management compliance at the Project Site. Furthermore, permitting EPA to withdraw the Complaint, for stated reasons, will in all probability require that Respondents, following proper accounting practices, inform of the existence of a potential claim, in their financial statements, and establish an appropriate corresponding monetary reserve. All this, despite the fact that EPA may ultimately decide not to file a civil action in federal court once proper examination of the jurisdictional issue present in this case is conducted.

In sum, granting the Motion to Withdraw, 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.

The legal and factual basis of what would constitute Respondents' evidence at a hearing to address CWA jurisdiction in the present case follows.

II. BASIS OF RESPONDENTS' JURISDICTIONAL CHALLENGE

A. Legal Considerations

Respondents' jurisdictional challenge is grounded on the Clean Water Act jurisdictional tests set forth in Rapanos v. United States Army Corps of Engineers, 547 U.S. 715 (2006), ("Rapanos") and subsequent criteria or guidance jointly issued by the EPA" and the U.S Army Corps of Engineers, entitled *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*". See, EPA and Army Corps

of Engineers Guidance Regarding Clean Water Act Jurisdiction after Rapanos, 72 Fed. Reg. 31824-31825 (June 8, 2007) (“EPA/Corps Guidance”).

As is well known, the discharge of pollutants into “navigable waters” of the United States is prohibited unless in compliance with a permit issued by the EPA”, under Section 402 of the Clean Water Act (“CWA”), 33 U.S.C. §§1251 et seq. §1342. CWA Section 502 (7), 33 U.S.C. §1362 (7), defines the term “navigable waters” as meaning “the waters of the United States, including the territorial seas”. EPA regulations, appearing at 40 C.F.R. §230.3, (s),¹ define the “term waters of the United States” as:

- (1) All waters which are currently used, or were used in the past, 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;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.
- (8)...

(Emphasis added)

EPA regulations define the term “adjacent” as meaning “bordering, contiguous, or neighboring.” They, furthermore, provide that “[w]etlands separated from other waters of the

¹ Similar U.S. Army Corps of Engineers Regulations appear at 33 C.F.R. § 328.

United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent wetlands”. 40 C.F.R. 230.3 (b).²

As a result of the 2006 Rapanos decision, the Corps and the EPA have established additional criteria, albeit in the form of as yet temporary guidance,³ further attempting to clarify the meaning of “waters of the United States”, on this occasion, within the parameters established by the different opinions issued by the divided Court.⁴

Pursuant to issued Guidance, “EPA and the Corps will continue to assert jurisdiction over [a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide” or, in other words, over those waters of the United States, as defined in 40 C.F.R. §230.3(s) supra.⁵ These waters are referred to in the Guidance as “traditional navigable waters” (“TNW’s”). Furthermore, issued Guidance affirms that EPA and the Corps “will also continue to assert jurisdiction over wetlands ‘adjacent’ to traditional navigable waters as defined in the agencies’ regulations.”⁶

B. Factual Considerations

1. Absence of Traditional Navigable Waters at the Site

Respondent has retained the services of Gregg Morris & Associates (“Morris”), a firm specialized in environmental engineering and hydrology to identify the surface water bodies

² Similar Corps’ regulations appear at 33 C.F.R. §328.3(c).

³ EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after Rapanos, 72 Fed. Reg. 31824-31825 (June 8, 2007) and 72 Fed. Reg. 67304 (Nov. 28, 2007). See, <http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html>, (last visited August 1, 2008).

⁴ The justices issued five separate opinions in Rapanos (one plurality opinion, two concurring opinions and two dissenting opinions), with no single opinion commanding a majority of the Court.

⁵ EPA and Corps, Clean Water Act Jurisdiction Following the U.S. Supreme Courts Decision in Rapanos v. United States & Carabell v. United States, June 5, 2007, <http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html>, at p. 5 (last visited August 1, 2008), hereinafter referred to as the “Guidance”.

⁶ Id.

described in paragraphs 23 and 24 of the Complaint (“La Escarcha Creek” and tributaries) as well as aquatic resources adjacent and/or proximate and downstream to the Site where Respondent construction activities, are conducted. The study area is described in attached **Figures 2 and 4**. Respondent Consultants were present during the EPA inspection conducted on July 2, 2008, described in paragraph 4 of the Motion to Withdraw. Respondent informed EPA inspectors of its understanding that stormwaters were not discharging into waters of the United States.

As a result of the examination of surface hydrology and surrounding aquatic resources, Respondents understand that Project stormwaters discharge at two points. First, to a wetland adjacent to a non-navigable tributary or small wash characterized by low volume flow; and, second, to the prior mentioned non-navigable tributary or small wash upstream to the wetland, into which said non-navigable tributary or small wash flows. See, attached **Figure 1**. This non-navigable tributary or small wash is, upon information and belief, the “intermittent, unnamed creek”, tributary of Escarcha Creek described by EPA in both the ACO and the Complaint. These waters are not currently used, nor where they, upon information and belief, used in the past, or are they susceptible to use, in interstate or foreign commerce. These waters are not subject to the ebb and flow of the tide.

The nearest presumably TNW downstream from prior mentioned wetland, De La Plata River, is over 4,000 meters from the Project Site. See, **Figures 2 & 3**. None of the bodies of water, downstream from the Site, between the Project and De La Plata River, namely, Escarcha Creek (Quebrada Escarcha) and Río Bucarabones, are TNW since they do not satisfy the herein relevant criteria of 40 C.F.R. §230.3(s), namely, past or present use or susceptibility for use in interstate or foreign commerce, or showing of tidal influence.

2. No Significant Nexus

Finally, the Guidance asserts that “[t]he agencies will assert jurisdiction over ... (1) non-navigable tributaries that are not relatively permanent, (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e.g., separated from it by uplands, a berm, dike or similar feature)”, if “they have a significant nexus with traditional navigable waters.”⁷ In determining whether a significant nexus exists, the Guidance states that the Corps “will assess the flow characteristics and functions of the tributary itself, together with the functions performed by any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with traditional navigable waters.”⁸

Based on the identification and evaluation of aquatic resources within the study area, Respondents have concluded that no significant nexus exists between wetlands and the non-navigable tributary or small wash - identified by Complainant as flowing into the Escarcha Creek - and TNWs. As a result, Respondent, furthermore, submits that, absent a significant nexus between wetlands and adjacent surface water, that receive Project stormwaters, and TNWs, said wetlands and surface waters are not “waters of the United States” pursuant to the CWA.

Wetland functions and values or, in general terms, the benefits provided to society include: fish and wildlife habitats, natural water quality improvement, flood storage, shoreline erosion protection and recreation and aesthetic appreciation.⁹ However, “[n]ot all wetlands perform all functions nor do they perform all functions equally well”.¹⁰ EPA acknowledges that

⁷ Guidance, at p. 7.

⁸ Id.

⁹ See, EPA; “Wetlands Functions and Values”, Watershed Academy Web at: <http://www.epa.gov/watertrain/wetlands/>, available on January 29, 2008. “Wetland functions include water quality improvement, floodwater storage, fish and wildlife habitat, aesthetics, and biological productivity.” See, _____, “Functions and Values of Wetlands”, EPA 843-F-01-002c (Sept. 2001) at p. 1.

¹⁰ Novitzki, Richard P, Smith, R. Daniel & Fretwell, Judy D.; “Restoration, Creation, and Recovery of Wetlands -

although benefits, on a large scale, may be evaluated, determining specific wetlands benefits is difficult because, again, variations amongst wetlands are significant, and not all wetlands perform the same functions equally well.¹¹

EPA/Corps Guidance provides that:

After assessing the flow characteristics and functions of the tributary and its adjacent wetlands, the agencies will evaluate whether the tributary and its adjacent wetlands are likely to have an effect that is more than speculative or insubstantial to the chemical, physical, and biological integrity of a traditional navigable water. As the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with traditional navigable water.¹² (Emphasis added)

Wetlands where Project storm waters directly or indirectly discharge, comprise, approximately, 1,800 sq.mts., within a significantly larger, drainage area. See, **Figure 4**. Because of wetland's size, location and type Respondents submit that a significant nexus does not exist between them and the most proximate, downstream traditional navigable body of water – Río de La Plata or the Atlantic Ocean.

One of the most commonly used wetlands classification systems, developed by Cowardin,¹³ classifies wetlands within five (5) general categories, namely: Marine, Estuarine, Riverine, Lacustrine and Palustrine. Subject Wetlands are clearly neither marine nor estuarine. Respondent Consultants classify Project Site wetlands as palustrine. Given their type, size and location subject wetlands do not serve as fish and wildlife habitats, do not contribute to shoreline

Wetland Functions, Values, and Assessment, 1997; U.S. Geological Survey Water Supply Paper 2425, ("Novitzki"), at p. 2.

¹¹ See, supra, _____, "Functions and Values of Wetlands", see also, Thompson, Dale B., "Valuing the Environment: Courts' Struggles with Natural Resources Damages", 32 Env.Law 57, 89; Hatfield, Mokos & Hartman, "Development of Wetland Quality and Function Assessment Tools and Demonstration", Rutgers University & N.J. Dept. Env. Protection (June 2004)[evaluation for State of New Jersey of at least 6 wetlands quality and functions evaluation techniques] available on February 26, 2006 at: www.state.nj.us/dep/dsr/wetlands2/report.pdf.

¹² Guidance, at p. 10.

¹³ Cowardin, Lewis M., et al., "Classification of Wetlands and Deepwater Habitats of the United States", U.S. Dept. of the Interior, Fish & Wildlife Service (Wash., D.C. 1985).

erosion protection nor provide for recreation and aesthetic appreciation. Its limited expanse and distance from De La Plata River and the Atlantic Ocean severely constrain the system's contribution to natural water quality improvement. Finally, and again because of its limited expanse, Project Site wetlands contribute in a reduced manner to flood storage.¹⁴

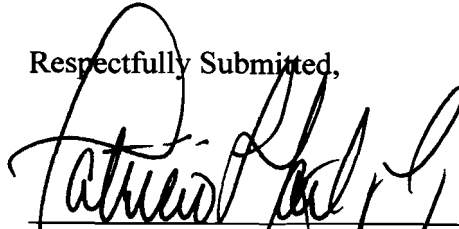
In view of the above, Respondents' submit that the flow characteristics and functions of the intermittent creek that receives Project storm waters, a non-navigable, non-relatively permanent tributary ("non-RPW"), together with the functions performed by wetlands adjacent to this creek, which also receive Project stormwaters, do not jointly or much less separately, have a significant nexus with TNWs, namely, for present purposes, the De La Plata River and the Atlantic Ocean.

In sum, pursuant to Rapanos and applicable EPA guidance, waters and wetlands where Serena Site storm waters discharge are not "waters of the United States" pursuant to the CWA and EPA, thus, lacks subject matter jurisdiction in the instant case.

WHEREFORE, Respondents respectively request that Complainant's Motion to Withdraw be Denied, that Complainant be required to reply to Respondents' Request for Dismissal for Lack of Jurisdiction and that, depending on the factual averments or documentary evidence submitted in support of Complainant's reply, an evidentiary hearing be held to characterize wetlands and waters proximate to the Serena Site and to determine the hydrological connections and/or significant nexus between these and traditional navigable waters.

¹⁴ This wetland function or value has, of course, no relationship with the significant nexus analysis of subject wetlands with the De la Plata River or the Atlantic Ocean which ultimately is the applicable consideration pursuant to the Guidance.

Respectfully Submitted,



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

CERTIFICATE OF SERVICE

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

Original and copy mail to
Federal Express:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region II
290 Broadway - 17th Floor
New York, New York 10007

Copy was notified to:

Ms. Silvia Carreño-Coll
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 2
Centro Europa Building, Suite 417
1492 Ponce de León Avenue
San Juan, PR 00907-1866
Tel. (787) 977-5818

DOCKET NO. CWA-02-2007-3411
Motion Opposing Request for Leave to Withdraw Complaint Without
Prejudice and Requesting Rapanos Evidentiary Hearing on CWA Jurisdiction

Copy was notified to:

Pedro J. Nieves-Miranda
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Dated: August, 2008

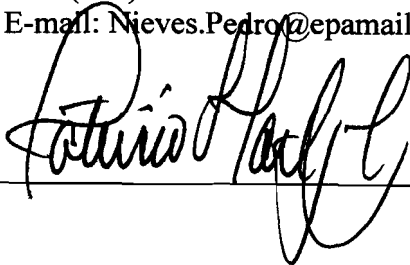




Figure 1. Resources Adjacent to Study Site

SERENA
BAYAMON, PUERTO RICO

NOTE: All areas are approximate



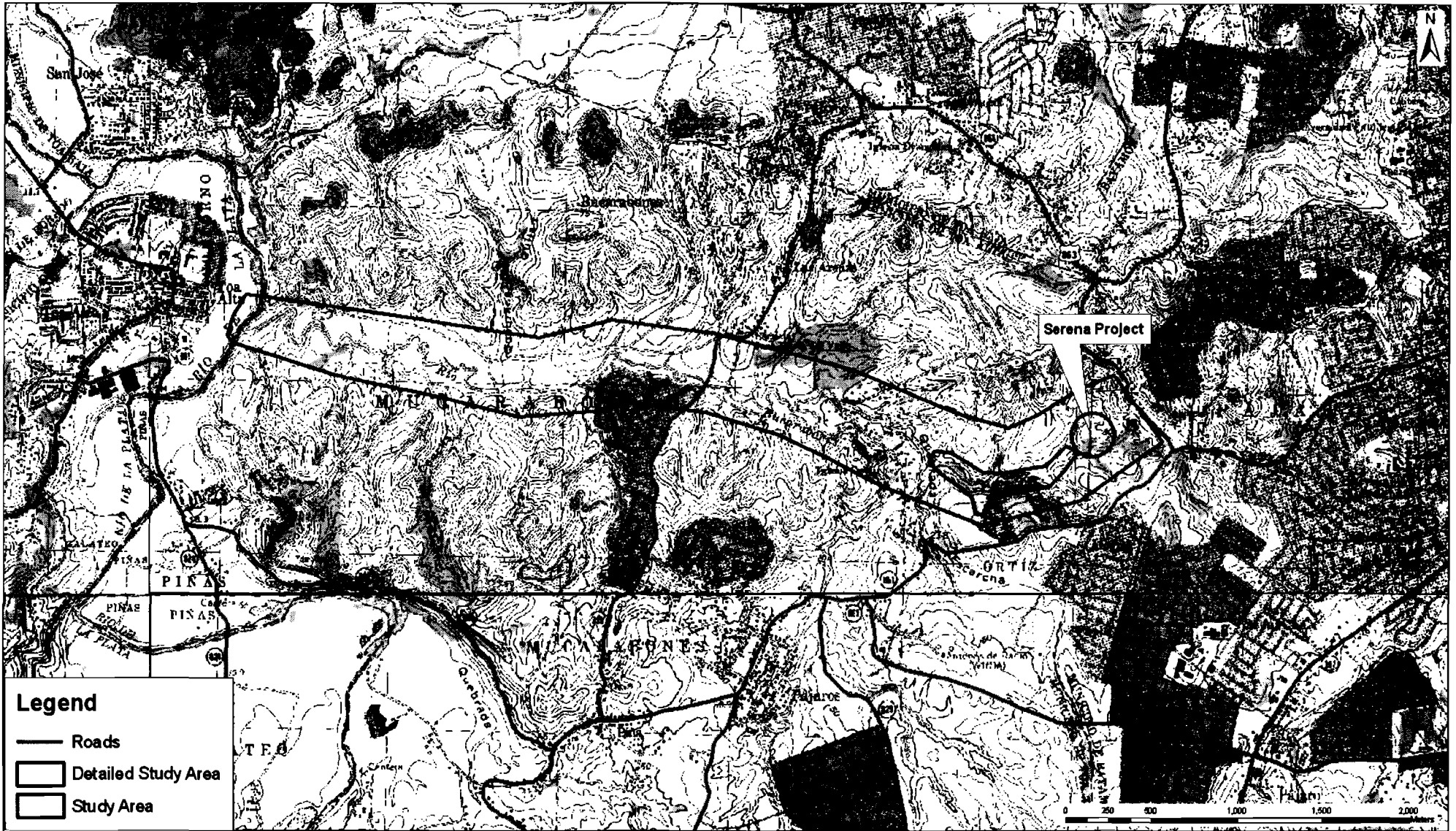


Figure 2. Project Location over USGS Quadrangle showing Study Area (1:20,000)



SERENA
BAYAMON, PUERTO RICO

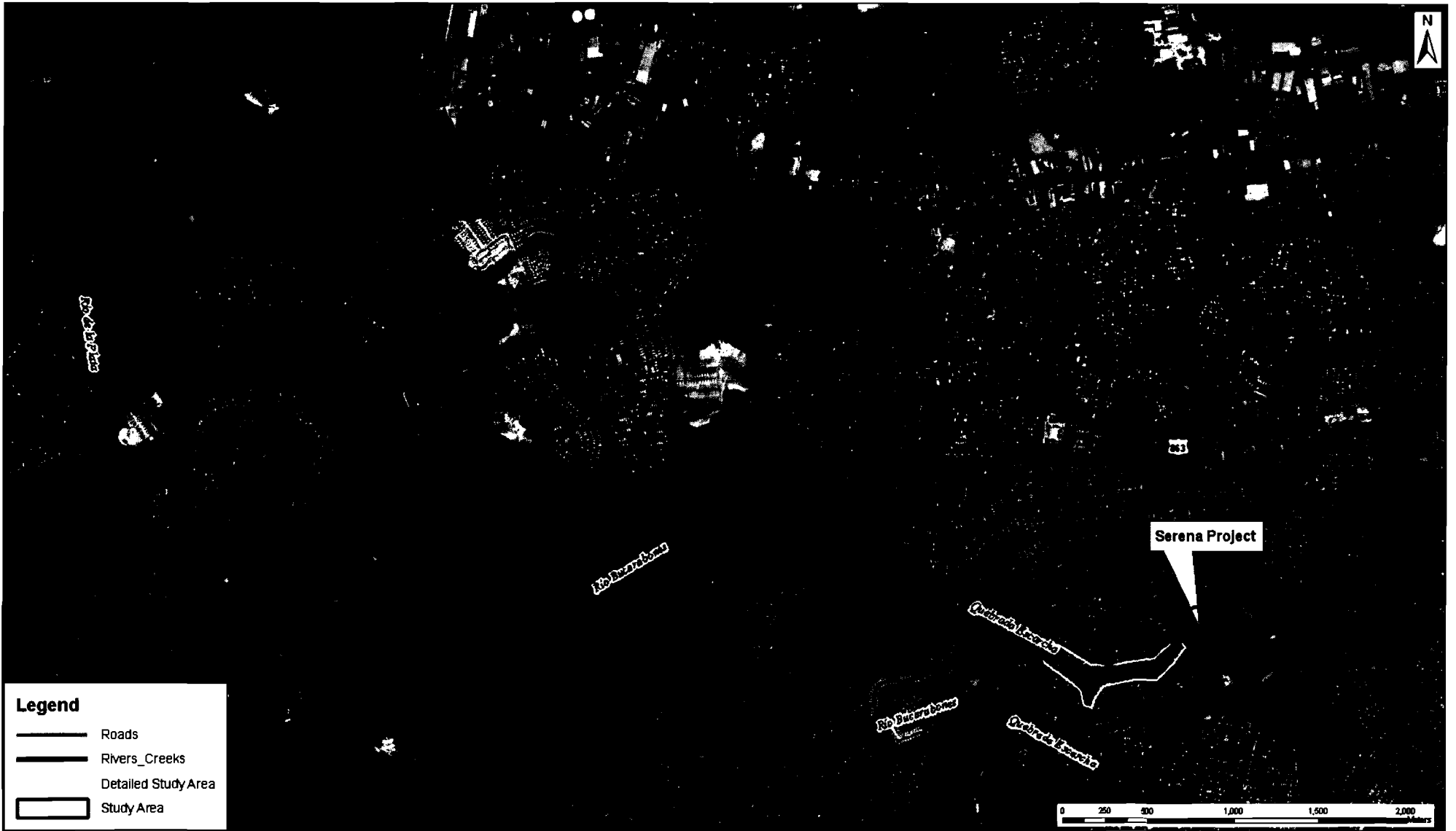


Figure 3. Water Bodies showing Study Area

SERENA
BAYAMON, PUERTO RICO



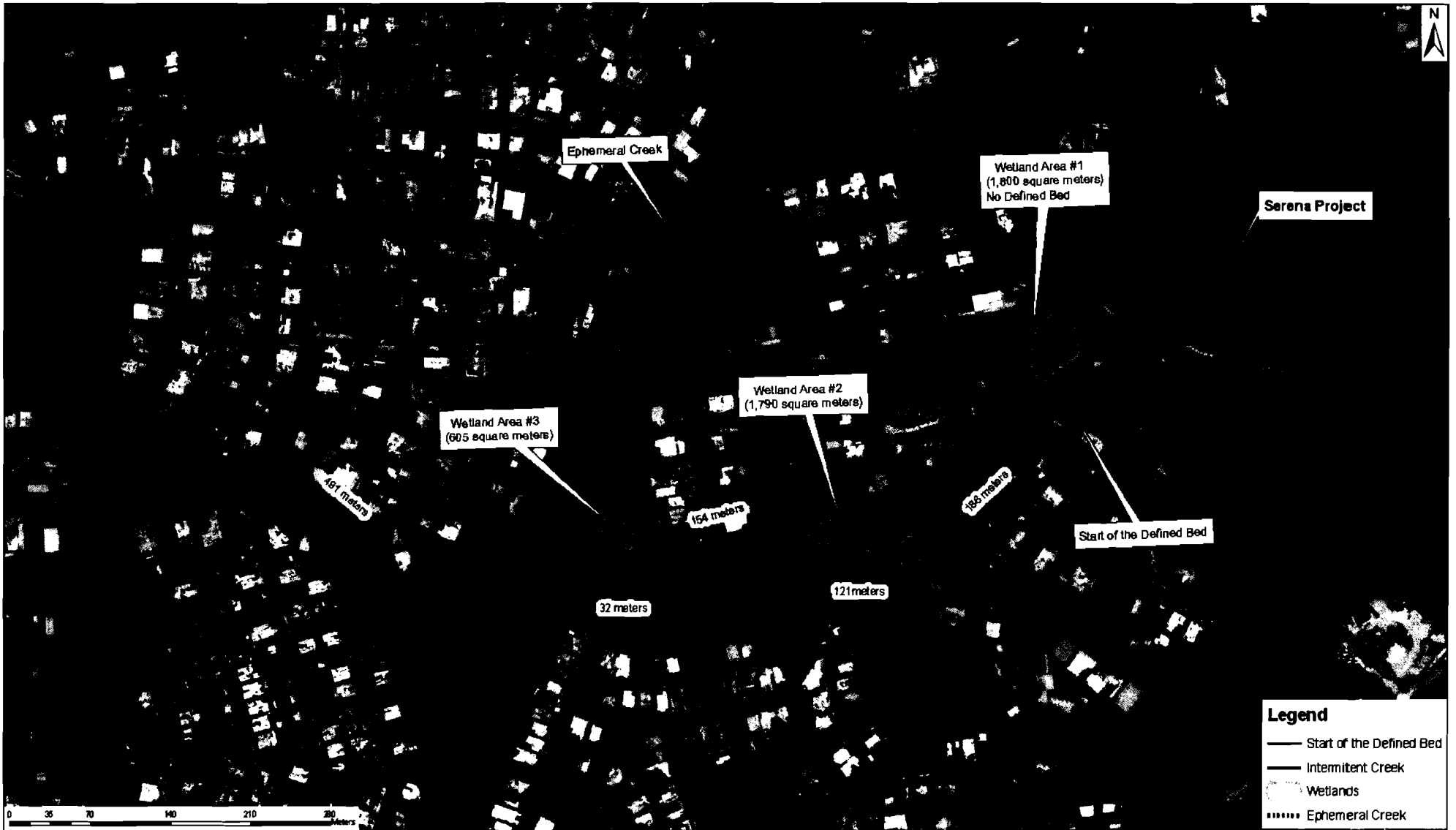


Figure 4. Hydrological Resources in Detailed Study Area

SERENA
BAYAMON, PUERTO RICO

NOTE: All areas and length are approximate

