



March 21, 2013

Via U.S. Mail & Electronic Mail
Matthew.P.Kelley@usace.army.mil

Mr. Matthew Kelley
Redding Regulatory Office
U.S. Army Corps of Engineers
310 Hemsted Dr., Ste. 310
Redding, CA 96002

RE: SPK-2013-00015

Mr. Kelley:

By virtue of this letter, please be advised that I represent Mr. John Duarte and Duarte Nursery, Inc. on this matter. Henceforth, please direct any future correspondence on this matter to me at Lucas Law, P.O. Box 696, Hilmar, CA 95324. My e-mail address is rlucas@ralucaslaw.com.

By virtue of a letter dated February 25, 2013 ("Communication"), your agency accused my client, without any proof or documentation, of undertaking "unauthorized work in waters of the United States." This allegation is completely without merit, and, on behalf of my client, I insist you immediately provide any and all documentation which you utilized in order to make this false allegation of wrongdoing. I further demand that you describe, with exact specificity, the precise location where the alleged "unauthorized work" occurred, including GPS coordinates and a complete legal description. This information is necessary in order for me to even begin to understand any aspects of your Communication.

The Communication references "available information" as being the basis for your incorrect assertions of misconduct under the Clean Water Act. Please provide, within 10 working days, all "available information" you and your agency used in this matter.¹ In addition to providing the "available information" utilized to make your determination that my client violated the Clean Water Act², also provide all agency policies, regulations, memorandums, communications, and/or guidance documents utilized to ascertain the presence or absence of seasonal wetlands, vernal pools, vernal swales, and intermittent and ephemeral drainages which are waters of the United States within 10 working days.

¹ This deadline corresponds to the allotted time for an agency to respond to a Freedom of Information Act ("FOIA") request. (5 U.S.C. §§ 552, *et seq.*)

² Nothing contained in this correspondence is a concession that your agency is correct in any of its assertions as communicated in the Letter.

P.O. BOX 696 • HILMAR, CA 95324 • FACSIMILE: 209-656-7844

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Although couched as a letter, the Communication states my client is “hereby directed to cease and desist all work in waters of the United States until this violation is resolved.” Please advise me immediately if the Communication is a letter or an enforcement action. Be advised that a wheat crop is currently planted on property owned by Duarte in Tehama County. The minimal expense, not taking into account time, for putting in this crop is approximately \$50,000.00. Your Communication, and specifically your direction to “cease and desist” threaten to completely destroy the wheat crop, costing my client not only the roughly \$50,000.00 in costs already incurred but also the lost revenues that would result from harvesting and selling the crop. Presently, routine farming practices need to be undertaken in order to properly care for this wheat crop. However, solely as a result of your Communication, my client is unclear if proceeding with the routine care and best management practices employed by wheat farmers will result in any liability or enforcement action. This uncertainty and my client’s subsequent unwillingness to act in light of the uncertainty threatens the viability of the wheat crop. Who will pay for my client’s expenses and lost revenues as a result of your Communication? Is it presently your position, as stated in the Communication, that my client undertaking routine farming practices in order to simply care for his \$50,000.00 investment in a wheat crop may result in his facing “fines, penalties, and imprisonment?”

Your position in this Communication is even more bewildering considering my client’s property in Tehama County has a history of farming. In 1977, Congress passed amendments to the Clean Water Act to eliminate unequivocally most applications of the section 404 permit program to farming. Congress “emphatically did not want the law to impede these bucolic pursuits.”³ The lengthy legislative history vigorously and repetitiously explains that Section 404 was amended in 1977 to allow, *without a permit*, normal farming and ranching activities such as plowing, seeding, cultivating, and harvesting for the production of food and fiber.⁴ Senator Muskie, in presenting the conference report to the Senate, could not have made this point any more cogently stating:

The conferees have adopted the Senate’s explicit approach for clarifying that plowing, seeding, cultivating, harvesting . . . were not intended to require section 404 permits. Such exemptions were provided by the Corps of Engineers’ regulations under the current law.⁵

Senator Wallop explained that section 404 as amended would relieve agriculture “of irrelevant or unnecessary burdens,” referring to a farmer not having to obtain a 404 permit to plow his fields.⁶

³ *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399, 1405 (D.C. Cir. 1998)

⁴ 33 U.S.C. § 1344(f)(1)(A).

⁵ 3 1977 Leg. History at 348.

⁶ 3 1977 Leg. History at 530, 533.

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In light of these facts, your Communication is, at best, baffling. The fact that this Communication was used to “solicit[] the views of the appropriate Federal, State, and local agencies, which may also have jurisdiction regarding this unauthorized activity” makes it appear the Communication in nothing more than an attempted “strong-arming of regulated parties into ‘voluntary compliance’” without any due process. The Supreme Court recently weighed in these types of tactics when enforcing the Clean Water Act, and in a unanimous decision, placed a much needed check to your agency’s strong-arm tactics in the form of judicial review under the Administrative Procedures Act.⁷

Lastly, without any administrative proceeding or hearing, without any evidence whatsoever, without any basis in law, you have labeled my client a violator of the Clean Water Act, ordered him to cease and desist, threatened him with penalties and slandered his name and character. My client has to work with all of the agencies that received a copy of your baseless and harmful allegations against him. The sharing of this Communication, without any evidence or administrative process to protect my client’s rights and defend his lawful actions, results in the possible harm to his business and his reputation and a clear violation of his constitutional right to due process. It also violates California Civil Code §§ 44 and 46, *et seq.* Immediately retract this Communication and make all agencies who received it aware that there has been no proceeding or official finding regarding my client in this context.

I further demand to know all available administrative remedies and proceedings are available to my client at this time. Once I am in receipt of the documents and materials requested in this letter and have been give adequate time to review the materials, we will participate in your “evaluation” of this situation.

Sincerely,


RONDA AZEVEDO LUCAS
Attorney at Law

cc: Mr. John Duarte

⁷ *Sackett v. EPA*, 566 U.S. ____ (2012) (slip opinion).