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13
14 UNITED STATES DISTRICT COURT
15 FOR THE EASTERN DISTRICT OF CALIFORNIA
16

17 DUARTE NURSERY, INC., et al.,
18 Plaintiffs,
19 v.
20 UNITED STATES ARMY CORPS OF ENGINEERS;
et al.,
21 Defendants.

No. 2:13-cv-2095-KJM-DAD
**PLAINTIFF DUARTE NURSERY
INC.'S MEMORANDUM OF
POINTS AND AUTHORITIES
IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT
OR PARTIAL SUMMARY
JUDGMENT ON ITS DUE
PROCESS CLAIMS**

22
23 UNITED STATES OF AMERICA,
24 Counterclaim-Plaintiff,
25 v.
26 DUARTE NURSERY, INC., et al.,
27 Counterclaim-Defendants.

Hearing Date: November 20, 2015
Time: 10:00 a.m.
Court Room: 3-15th Floor
Judge: Kimberly J. Mueller

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I

INTRODUCTION

Plaintiff Duarte Nursery, Inc., (Duarte or Duarte Nursery) is entitled to summary judgment on its First, Second, and Fifth Claims for Relief in the Second Amended Complaint, because defendant Army Corps (Corps) denied Duarte notice and a hearing before and after ordering Duarte to cease all work (the Cease and Desist Order or Order) in waters of the United States on Duarte’s farm (the Property), and the Corps regulations provide for no hearing. Duarte had constitutionally protected property interests in farming the Property, and in the wheat crop it had planted on the Property. The Cease and Desist Order deprived Duarte of its ability to farm the Property, and caused the loss of the wheat crop. The only communications between the Corps and Duarte fell far short of constitutionally required procedures for notice, access to information before the decision maker, a meaningful opportunity to rebut and present information, and a neutral decision maker. The Corps regulations for issuance of cease and desist orders provide no procedures that afford due process to persons suspected of or determined to have violated the Clean Water Act.

II

STATEMENT OF LAW

A. Duarte Nursery Is Entitled to Summary Judgment or Partial Summary Judgment on its Due Process Claim Against the Corps Because There Is No Factual Dispute That the Corps’ Cease and Desist Order Deprived Duarte Nursery of Property Without a Hearing

1. Summary Judgment or Partial Summary Judgment Are Appropriate Where There Are No Disputed Material Facts

A court must grant a motion for summary judgment in whole or in part, “if . . . there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). This is a “threshold inquiry” into whether a trial is necessary at all, that is, whether “any genuine factual issues . . . properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The moving party bears the initial burden of “informing the district court of the basis for its motion, and identifying those portions of the [record] which it believes

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1 demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S.
2 317, 323 (1986). The burden then shifts to the nonmoving party to “go beyond the pleadings” and
3 “designate specific facts” in the record to show a trial is necessary. *Id.*

4 **2. The Government May Not Deprive Any Person of**
5 **Property Without Reasonable Notice of the Alleged Cause**
6 **for Deprivation, and a Meaningful Opportunity to Be Heard**

7 “No person shall be . . . deprived of life, liberty, or property, without due process of law[.]”
8 U.S. Constitution, Amendment V. “Procedural due process imposes constraints on governmental
9 decisions which deprive individuals of liberty or property interests within the meaning of the Due
10 Process Clause of the Fifth or Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332
11 (1976). “When protected interests are implicated, the right to some kind of prior hearing is
12 paramount.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70, n7 (1972).

13 **a. The Plaintiff in a Procedural Due Process Claim**
14 **Must Prove (1) a Property Interest of Which (2) the**
15 **Government Deprived the Plaintiff (3) Without a Hearing**

16 The Fifth Amendment uses the term “property” in the “sense to denote the group of rights
17 inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of
18 it.” “The constitutional provision is addressed to every sort of interest the citizen may possess.”
19 *U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

20 “A protected property interest is present where an individual has a reasonable expectation
21 of entitlement deriving from existing rules or understandings that stem from an independent source
22 such as state law.” *Wedges/Ledges of California, Inc. v. City of Phoenix, Az.*, 24 F.3d 56, 62 (9th
23 Cir. 1994) (internal quotations omitted) (quoting *Roth*, 408 U.S. at 577). A real property owner
24 in California has a vested right to continue uses of the property that conform to the zoning in place
25 when the use started. *HFH, Ltd. v. Superior Court*, 15 Cal.3d 508, 516 (1975). Growing crops are
26 another property interest. *Gongdon v. G.M.H. Wagner & Sons*, 207 Cal. 373 (1929).

27 A federal agency order directing action adverse to the recipient’s property interests is a
28 deprivation within the ambit of the Due Process Clause, and the recipient is entitled to a hearing.
See, e.g., *Hodel v. Virginia Surface Mining and Reclamation Ass’n*, 452 U.S. 264, 299-300 (1981)
(whether a pre-deprivation hearing was constitutionally necessary for order directing cessation of

1 mining operations).

2 The court determines what procedures are due by looking at three factors: (1) the nature
3 of the private interest deprived by the government, (2) the risk of error inherent in the existing
4 procedures and ability of additional safeguards to reduce error, and (3) the government's interest
5 in cost control and administrative burden. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).
6 Regardless of "how much process is due," due process always requires certain elements.

7 **b. A Due Process Hearing Must Include the Elements of**
8 **(1) Notice, the Opportunities to (2) Present Evidence and**
9 **(3) Rebut Adverse Evidence, (4) Counsel, (5) a Decision**
10 **Based on a Complete Record, and (6) a Neutral Tribunal**

11 "An elementary and fundamental requirement of due process in any proceeding which is
12 to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise the
13 interested parties of the pendency of the action and afford them the opportunity to present their
14 objections." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950).

15 "The right to a hearing embraces not only the right to present evidence, but a reasonable
16 opportunity to know the claims of the opposing party and to meet them. The right to submit
17 argument implies that opportunity; otherwise the right may be but a barren one. Those who are
18 brought into contest with the Government in quasijudicial proceeding aimed at control of their
19 activities are entitled to be fairly advised of what the Government proposes and to be heard on its
20 proposals before it issues its final command." *Morgan v. United States*, 304 U.S. 1, 18 (1938).

21 "In almost every setting where important decisions turn on questions of fact, due process
22 requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397
23 U.S. 254, 269 (1970). The right to cross-examination applies "in all types of cases where
24 administrative and regulatory actions are under scrutiny." *Greene v. McElroy*, 360 U.S. 474, 497
(1959) (collecting cases); accord *NLRB v. Doral Building Services*, 666 F.2d 432 (9th Cir 1982).

25 "The right to be heard would be, in many cases, of little avail if it did not comprehend the
26 right to heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). A government decision
27 to deprive a person of property must "rest solely on the legal rules and evidence adduced at the
28 hearing. To demonstrate compliance with this elementary requirement, the decision maker should

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1 state the reasons for [the] determination and indicate the evidence [] relied on.” *Goldberg v. Kelly*,
2 397 U.S. at 271 (citations omitted). “And, of course, an impartial decision maker is essential.” *Id.*

3 **c. The Government must Ordinarily Provide a**
4 **Hearing Before Depriving Any Person of Property**

5 When property interests are seized or impaired, the Supreme Court holds that
6 pre-deprivation hearings are the norm. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969);
7 *Fuentes v. Shevin*, 407 U.S. 67, 90-92 (1972). “[T]he Court has traditionally insisted that,
8 whatever its form, opportunity for that hearing must be provided before the deprivation at issue
9 takes effect.” *Id.* at 82 (citations omitted).

10 **d. A Post Deprivation Hearing Is Not Adequate**
11 **Where the Deprivation Is Not Based on Emergency**
12 **Conditions, Where the Deprivation Is Made**
13 **Under Vague Standards Which Afford Substantial**
14 **Discretion to the Decision Maker, or Where it Is Not Prompt**

15 Under *Fuentes v. Shevin*, only extraordinary situations allow a post-deprivation hearing.
16 *Fuentes*, 407 U.S. at 90-92. These situations require (1) direct necessity to secure important
17 governmental or public interests, (2) a “special need for very prompt action,” and (3) “a narrowly
18 drawn statute” under which the deprivation is determined to be “necessary and justified in the
19 particular instance.” *Id.* at 91.

20 A post-deprivation hearing only satisfies the Due Process Clause in the limited case where
21 the government must act quickly, or where it would be impractical to provide a pre-deprivation
22 hearing, “accompanied by a substantial assurance that the deprivation is not baseless.” *Gilbert v.*
23 *Homar*, 520 U.S. 924, 930-31 (1997) (citing *FDIC v. Mallen*, 468 U.S. 230, 240 (1988)). And, a
24 post-deprivation hearing must be prompt to be constitutionally adequate. *Gilbert v. Homar*, 520
25 U.S. at 932, 935.

26 **3. The Clean Water Act and Regulations Allow the Corps to Order**
27 **Owners to Cease Using Their Property Without Any of the Processes**
28 **Applicable to Other Corps Actions**

The Clean Water Act (Act) authorizes the Corps of Engineers to regulate certain
“discharges” to “waters of the United States.” 33 U.S.C. §§ 1311(a) & 1362(7). Unless exempt,
a discharge of a pollutant into jurisdictional waters is prohibited without a federal permit. *See* 33

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1 U.S.C. §§ 1251(a), 1311(a), 1362(6). The Act expressly exempts several activities from the ban
2 on discharging dredged and fill material and the requirement to obtain permits, including “normal
3 farming activities.” 33 U.S.C. § 1344(f)(1)(A). Corps regulations in turn limit this exemption to
4 activities that are part of “an established (i.e., ongoing) farming . . . operation.” 33 C.F.R. §
5 323.4(a)(1)(ii). Corps regulations also establish that plowing itself is not a discharge so long as
6 it does not convert waters of the United States to dry land. C.F.R. § 323.4(a)(1)(iii)(D). A party
7 who discharges dredged or fill material into “navigable waters” without a permit is subject to civil
8 and/or criminal penalties of up to \$37,500 per day for negligent violations and up to \$50,000 per
9 day for knowing violations, and imprisonment for up to three years. 33 U.S.C. § 1319(b) - (g), as
10 modified by 19 C.F.R. § 19.4, 78 Fed.Reg. 66643, 66647 (Nov. 6, 2013).

11 The Corps is authorized to investigate “unauthorized activities” that require permits, to
12 confirm whether such actions violate the Act, and to determine a course of action in resolving the
13 violation. 33 C.F.R. § 326.3. In the case of a violation involving a project that is not complete,
14 the regulations direct the issuance of a cease and desist order. 33 C.F.R. § 326.3(c)(1).

15 A cease and desist order is an adjudicatory action to which due process protections apply,
16 because it involves the application of general principles of law to a specific acts on a single parcel
17 of property. *Londoner v. City of Denver*, 210 U.S. 373, 385 (1908).

18 Cease and desist orders are enforceable through legal action initiated by the Corps.
19 33 C.F.R. § 326.5(a) (legal action to obtain compliance with cease and desist and other orders
20 issued under § 326.3). The Corps may seek also civil and criminal penalties for violations of the
21 Act. 33 U.S.C. § 1319(c),(d). Under the regulations, willful and/or repeated violations are
22 appropriate for civil or criminal action. 33 C.F.R. § 326.5(a).

23 The Corps regulations provide a robust hearing procedure for permit holders from whom
24 the Corps seeks administrative penalties. 33 C.F.R. § 326.6. Similarly, the regulations establish
25 an extensive public hearing process for evaluation of proposed permit actions. 33 C.F.R. § 327.
26 Regulations also establish an administrative appeal process for approved jurisdictional
27 determinations, denied permit applications, and declined permits. 33 C.F.R. § 331.

28 But the regulations provide no procedure for persons whom the Corps has ordered to cease

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1 and desist using their property. 33 C.F.R. § 326.3.

2 **III**

3 **SUMMARY OF UNDISPUTED FACTS**

4 **A. Duarte Owns 450 Acres of Farmland That It**
5 **Plowed and Planted to Winter Wheat in Late 2012**

6 In early 2012, Duarte Nursery, Inc. (“Duarte”) acquired approximately 450 acres of
7 farmland in Tehama County, California, consisting of Tehama County Assessor’s Parcel Numbers
8 037-070-351 and 037-070-371 (“the Property”).¹ (Separate Statement of Undisputed Material
9 Facts (“Sep. Statement”), ¶ 1)² Duarte has owned the Property from November, 2012, till the
10 present. (Sep. Statement, ¶ 2) The Property is zoned A2 Agricultural by the county. Growing
11 wheat is an agricultural use consistent with the Property’s zoning. (Sep. Statement, ¶ 3)

12 The Property was prepared for planting wheat in November and December of 2012, Sep.
13 Statement, ¶ 4, and a wheat crop was planted in December 2012, Sep. Statement, ¶ 5. Duarte
14 owned the wheat crop. (Sep. Statement, ¶ 6)

15 **B. The Corps Staff Drove by the Property, Took Photographs,**
16 **and Concluded That Duarte Violated the Clean Water Act**

17 On or about November 28, 2012, Mr. Matthew Kelley³ of the Corps’ Redding office drove
18 past the Property, observed plowing there in preparation for planting wheat, took some photos, and
19 concluded that the plowing violated the Act. (Sep. Statement, ¶¶ 7, 9) Mr. Kelley returned to the
20 Property on December 6, 2012, and took some more photographs from the road. (Sep. Statement,
21 ¶ 10) During these two visits, Mr. Kelley concluded that the plowing violated the Clean Water
22 Act. (Sep. Statement, ¶ 11)

23 _____
24 ¹ Duarte acquired the Property as part of a larger transaction involving approximately 1500
additional acres in adjacent parcels which were then sold.

25 ² References to the Sep. Statement are to Plaintiff Duarte Nursery, Inc.’s Separate Statement of
26 Undisputed Material Facts In Support of Motion for Summary Judgment or Partial Summary
27 Judgment On Due Process Claims. See Sep. Statement for supporting evidentiary references for
those facts which Defendants have not agreed are undisputed.

28 ³ Mr. Kelley has responsibility for Corps permitting and enforcement under the Clean Water Act
in Tehama County. (Sep. Statement, ¶ 8)

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2 **C. The Corps' Sole Communication with Duarte Before Issuing**
3 **the Cease and Desist Order Was a Brief Call from Mr. Kelley**

4 On or about December 11, 2012, Mr. Kelley placed a brief telephone call to John Duarte.
5 (Sep. Statement, ¶ 12, Exhibit 17) During the call he stated that ripping activities were underway
6 on the Property, which required a permit. Mr. Duarte explained that wheat was being planted on
7 the Property, that the operator was not supposed to be operating in wetlands, and offered to meet
8 Mr. Kelley at the Property. (Sep. Statement, ¶ 12, Exhibit 17)

9 During preparation of the Property for planting wheat, John Duarte was aware of other
10 parties doing work on other land north of the Property. During the call from Mr. Kelley, Mr.
11 Duarte thought that he might be describing this activity north of the Property, and that Mr. Kelley
12 might be confused as to who owned which land. (Sep. Statement, ¶ 14)

13 During this telephone call, Mr. Kelley did not inform Mr. Duarte that Michael Jewell would
14 be deciding whether to issue a cease and desist order to Duarte Nursery, Inc. (Sep. Statement, ¶
15 13) After the December 11, 2012 telephone call, Duarte Nursery received no further
16 communications from the Army Corps regarding the Property until on or about February 23, 2013.
17 (Sep. Statement, ¶ 15)

18 **D. The Corps Orders Duarte to Cease All Operations**
19 **in Waters of the United States on the Property**

20 **1. The Corps Issued the Order Without Disclosing Mr. Kelley's**
21 **Factual Assertions to Duarte or Affording Duarte an Opportunity**
22 **to Rebut Those Facts or Present Independent Information**

23 On or about February 19, 2013, Mr. Kelley completed an initial investigation memo
24 ("Kelley Report") for Duarte Nursery's actions on the Property. (Sep. Statement, ¶ 16, Exhibit 30)
25 Mr. Kelley completed and forwarded the Kelley Memo to his supervisor, Nancy Haley, along with
26 a proposed cease and desist order for Haley's supervisor, Michael Jewell, to sign. (Sep. Statement,
27 ¶ 17, ¶ 18)

28 The Kelley Report states that the Property was plowed 3 feet deep, that wetlands had been
lost as a result of the plowing, and that wetlands on the Property were plowed with Mr. Duarte's

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1 prior knowledge and approval, with his full knowledge that a Corps permit was required to plow
2 the Property. Based on this latter error, Mr. Kelley identified the violation as flagrant. (Sep.
3 Statement, ¶ 16, Kelley Report, p 000043)⁴ Ms. Haley reviewed the Report to ensure that it was
4 complete and then forwarded it to Mr. Jewell. (Sep. Statement, ¶ 18) Mr. Jewell reviewed the
5 Report for completeness and signed the Order on February 23, 2013. (Sep. Statement, ¶ 19,
6 Exhibit 34)

7 Prior to signing the Order, the Corps never notified Duarte that the Order would be
8 considered by Mr. Jewell. (Sep. Statement, ¶¶ 13,15) As a necessary corollary, prior to signing
9 the Order, the Corps never afforded Duarte an opportunity to submit its own information, and
10 never provided Duarte with the information on which Mr. Jewell decided to issue the Order.

11 If afforded a hearing, Duarte Nursery would have presented information that: the Property
12 was plowed to no more than one foot; John Duarte had directed that farm equipment not operate
13 in wetlands on the Property; John Duarte was not aware that farm equipment was operating in
14 wetlands on the Property prior to Mr. Kelley's call; John Duarte thought that Mr. Kelley might
15 have been referring to activity on an adjacent farm, rather than on the Property, during the call;
16 and wetlands on the Property were not destroyed by plowing. (Sep. Statement, ¶¶ 29-33)

17 Mr. Kelley testified during his deposition that the Property had been plowed less than three
18 feet. (Sep. Statement, ¶ 34) Mr. Jewell testified during his deposition that if it had been the fact
19 that Mr. Duarte had given instructions that operations stay out of waters of the United States, it
20 would have changed his assessment of the case. (Sep. Statement, ¶ 35)

21 **2. The Order Directs Duarte to Stop All**
22 **Operations, Without Limitation, in Waters**
23 **of the United States Wherever They Occur on**
24 **the Property, Which Duarte Obeyed, Losing the Wheat Crop**

24 The Order communicates the Corps' determination that Duarte violated the Act, and directs
25 the company to "cease and desist all work in waters of the United States until this violation is
26 resolved." The Order attaches provisions of the Act threatening criminal penalties of up to

27 _____
28 ⁴ The Kelley Report does not include page numbers; the page reference is to the BATES stamped
page number on the copy of the document used in Mr. Kelley's deposition.

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1 | \$25,000 per day of violation and up to a year in prison, and civil penalties of up to \$25,000 per day
2 | of violation. The Order contains no information about any available hearing or other
3 | administrative procedure to challenge or contest the Order. (Sep. Statement, ¶ 19; Exhibit 34)

4 | Duarte complied with the order, ceased all work in waters of the United States on the
5 | Property as the Order directed, and lost the wheat crop. (Sep. Statement, ¶ 21) The Corps has
6 | never withdrawn the Order, which remains in effect to this date. (Sep. Statement, ¶ 22)

7 | **E. After Issuing the Order, the Corps Staff Refused**
8 | **Duarte’s Specific Request for Information, Dismissed**
9 | **a Letter from Duarte’s Counsel Rhonda Lucas as a “Ranting**
10 | **Fishing Expedition,” and Provided No Procedure to Lift the Order**

10 | Duarte retained attorney Ronda Lucas to respond to the Order. (Sep. Statement, ¶ 24,
11 | Exhibit 36) Ms. Lucas’ March 21, 2013 letter denies that Duarte violated the Clean Water Act,
12 | requests all information that the Corps used to issue the Order, explained that the Order as issued
13 | threatened Duarte with fines and criminal penalties for protecting and harvesting the wheat crop,
14 | asked whether the Order was advisory or not, pointed out that the Order had been issued without
15 | a hearing, requested information on all available administrative remedies and proceedings related
16 | to the Order, and advised that upon receipt of the information requested, Duarte would consider
17 | submitting further information. (Sep. Statement, ¶ 24, Exhibit 36).

18 | Mr. Kelley received Ms. Lucas’ letter on March 25, 2013, and forwarded it to his
19 | supervisor Nancy Haley, characterizing it as follows:

20 | No substance just a ranting fishing expedition. My guess is that she has
21 | seen the North Star delineation and the letter from them telling him not to rip the
22 | site. I think they know they are in a very bad position and are fishing to see how
23 | much of this information we know. Since the majority of the letter is throwing out
24 | court cases and wanting all information without filing a FOIA we may need to have
25 | OC respond to them. I’m finishing my conversation notes and then I’m sending the
26 | file down to you all.”

24 | (Sep. Statement, ¶ 25, Exhibit 37)

25 | Before forwarding the file, Mr. Kelley “purged” it by removing and discarding notes and
26 | other documents which he determined did not need to be in it anymore. (Sep. Statement, ¶ 23)
27 | These documents are now irretrievably lost.

28 | The Corps wrote to Mr. Lucas on April 18, 2013. (Sep. Statement, ¶ 26, Exhibit 38. The

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1 April 18 Letter asserted that Duarte had “deep ripped” the Property, that the farming practices
2 exemption did not apply, and transmitted a 19-year-old delineation of wetlands on the Property.
3 Other than the delineation, the April 18 letter did not provide any of the information contained in
4 the Kelley Report or any other information about the case. It contained no information on any
5 administrative proceeding or remedy. It did not address Ms. Lucas’ question regarding whether
6 the Corps intended that Duarte not harvest the wheat crop. The April 18 letter asked Duarte for
7 information the Corps would use in “resolving the violation.” (Sep. Statement ¶ 26, Exhibit 38).

8 James Robb of the Army Corps emailed Ronda Lucas on or about June 25, 2013. (Sep.
9 Statement, ¶ 27, Exhibit USACE 9519. The June 25 Email merely follows up a request that Duarte
10 provide information to the Army Corps. It does not contain any of the information requested in
11 the Lucas Letter. Exhibit USACE 9519. The December 11, 2012 telephone call, the Cease and
12 Desist Order, the April 18 Letter, and the June 25 Email, are the only communications that Duarte
13 received from the Army Corps related to the Property before commencement of this lawsuit. (Sep.
14 Statement, ¶ 28)

15 After issuing the Order, and until discovery in this case, the Corps never provided Duarte
16 with the Kelley Report or any of the information contained in it, other than a copy of the 1994
17 delineation. The Corps never gave Duarte the ability or opportunity to respond to or rebut that
18 information. The Corps never identified any procedure to reconsider or lift the Order. Neither the
19 Order nor the April 18 letter even suggest that any such procedure exists.

20 IV

21 STATEMENT OF THE CASE

22 A. Duarte Files Suit Against the Corps for Due Process Violations

23 Duarte Nursery Inc., and John Duarte filed this lawsuit on October 10, 2013. The
24 Complaint alleges three procedural due process claims against the Corps: failure to provide a
25 hearing before issuing the Order, failure to provide a prompt post-deprivation hearing, and the
26 unconstitutionality of the Corps’ enforcement regulations as applied. ECF 1. The Complaint also
27 stated similar claims against members of the California Regional Water Quality Control Board,
28 Central Valley, in their official capacity, arising from a separate action of that agency arising out

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1 of the same facts.

2
3 **B. The Court Denies the Corps' First Motion to Dismiss,**
4 **Ruling That Duarte States a Claim That the Issuance**
5 **of the Order Violates the Due Process Clause, Including**
6 **That the Order Deprived Duarte of Property Without a Hearing**

7 The Corps moved to dismiss these claims on the ground that they were not ripe. ECF 10.
8 The essence of the Corps' argument was that the Order did not deprive Duarte of any property.
9 ECF 10-1 at 10-12. The Corps contended instead that any loss of use of the Property or of the
10 wheat crop was Duarte's own fault, for obeying the Order. ECF 10-1, at 11.

11 On April 24, 2014, the court denied the motion, rejecting these arguments. ECF 27, *Duarte*
12 *Nursery v. Corps of Engineers*, 17 F. Supp. 3d 1013 (E.D. Cal. 2014). The Court ruled that a plain
13 reading of the Order clearly commanded Duarte to cease operations, and on this basis the
14 Complaint adequately alleged a deprivation of property under the Due Process Clause. *Id.*, at
15 1023. The Court also noted that nothing about the Order suggests that it is advisory or that
16 compliance with it is voluntary. *Id.*, at 1020 and n. 11. The court also held that the Complaint
17 states a ripe claim for violation of procedural due process. *Id.*, at 1023.

18 **C. The United States Counterclaims Against Duarte and**
19 **the Court Denies the Second Motion to Dismiss, Ruling That**
20 **Duarte's Due Process Claims Against the Corps Are Not Moot**

21 Following denial of its motion to dismiss, the Corps answered, largely denying the key
22 allegations of the Complaint. In the same pleading, the United States stated its Counterclaim
23 against Duarte, alleging a violation of the Clean Water Act on the Property. ECF 28. Duarte
24 answered the Counterclaim on June 23, 2014, denying any violation of the Clean Water Act. ECF
25 33. After filing the Counterclaim, the United States moved a second time to dismiss Duarte's due
26 process claims, this time on the grounds that they were moot once the Counterclaim was filed.
27 ECF 46. The government's argument in this motion was that the Counterclaim alleges the same
28 violation of the Clean Water Act that the Corps determined Duarte to be guilty of in February of
2013, and Duarte will have a full due process proceeding in federal district court to defend the
Counterclaim, which satisfies Duarte's due process rights. ECF 46-1, at 8-10. The court again

1 denied the motion, agreeing with Duarte that the due process claims challenged the imposition of
2 the Order without a hearing (and not the underlying question of whether Duarte had violated the
3 Clean Water Act), and that since the Order remains in effect, Duarte’s due process claims are not
4 moot. ECF 63, at 6-7.

5 V

6 ARGUMENT

7 **A. The Due Process Clause Protects Duarte’s Vested Interest in Farming**
8 **the Property, and the Wheat Crop Planted on the Property in Late 2012**

9 As set forth in Section III.A. above, Duarte Nursery owns the Property, and owned the
10 wheat crop which it had planted on the Property. The Property is zoned for agricultural uses,
11 including growing wheat. Under California law, Duarte Nursery has a vested right to farm wheat
12 on the Property. *HFH, Ltd.*, 15 Cal. 3d at 516; *Livingston Rock & Gravel v. Los Angeles County*,
13 43 Cal. 2d 121,127 (1954). Duarte also had personal and real property interests in the wheat crop.
14 *Silviera v. Ohm*, 33 Cal. 2d 272, 274-75 (1949); *Congdon*, 207 Cal. 373. These property interests
15 are all protected by the Fifth Amendment, which “is addressed to every sort of interest the citizen
16 may possess.” *U.S. v. General Motors Corp.*, 323 U.S. at 378.

17 Duarte Nursery’s interests are also all “classic” property interests, i.e., interests in real and
18 personal property recognized under state law, *see Wedges/Ledges*, 24 F.3d at 62, which the
19 Supreme Court has analyzed in cases like *Sniadach* (wages) and *Fuentes v. Shevin* (replevin),
20 rather than the government benefits and employment interests toward which the Supreme Court
21 has shown a slightly more flexible approach in cases like *Board of Regents v. Roth*.

22 **B. The Order Deprived Duarte of the Ability**
23 **to Farm the Property, and of the Wheat Crop**

24 The Order on its face directs Duarte to “cease and desist all work in waters of the United
25 States.” This Court previously ruled that the allegation of this fact was adequate to satisfy the
26 “deprivation” element of a procedural due process claim. *Duarte Nursery v. Corps of Engineers*,
27 17 F. Supp. 3d at 1023-24. This ruling is consistent with the Supreme Court’s view of
28 environmental enforcement orders in *Hodel v. Virginia Surface Mining and Reclamation Ass’n*,

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1 | that such orders require either a pre- or post-deprivation hearing. 452 U.S. at 299-300
 2 | (post-deprivation hearing adequate in certain emergency situations effecting public safety).

3 | Duarte complied with and continues to comply with the Order. As a result, the wheat crop
 4 | was lost, because harvesting that crop would have required “work in waters of the United States”
 5 | which the Corps had ordered Duarte to cease. Ms. Lucas specifically brought this issue to the
 6 | Corps’ attention in her letter, and asked the agency to clarify whether the Order was merely
 7 | advisory. The agency never made any response to this question, leaving Duarte no option to but
 8 | to take seriously the Order’s direction that no further work be done in waters of the United States
 9 | on the Property. The Corps’ inclusion of excerpts of the Clean Water Act, reciting potential
 10 | criminal liability for violations, reinforces the propriety of Duarte’s compliance with the Order.
 11 | Similarly, the fact that knowing and repeat violations are grounds for criminal enforcement drives
 12 | home the importance of complying with such an order. See, e.g., *United States v. Appel*, 210 F.3d
 13 | 385 (Pregerson, J., dissenting) (describing the sequence of actions leading from defendant ignoring
 14 | cease and desist order to criminal prosecution).⁵

15 | **C. The Corps Violated the Due Process Clause**
 16 | **By Issuing the Order Without First Affording Duarte**
 17 | **Reasonable Notice and a Meaningful Opportunity to Be Heard**

18 | **1. The Corps Did Not Provide Duarte with Any**
 19 | **Notice of Michael Jewell’s Decision to Issue the Order.**

20 | The Corps gave Duarte no notice of Mr. Jewell’s decision to issue the Order before it was
 21 | issued. The Corps’ only pre-deprivation communication with Duarte was Mr. Kelley’s brief call
 22 | with John Duarte in December 2012. During this call, Mr. Kelley did not advise Mr. Duarte that
 23 | a formal decision would be made to prevent Duarte from tending and harvesting the wheat crop
 24 | or otherwise making any use of the Property to the extent such use required work in waters of the
 25 | United States. To the contrary, Mr. Duarte offered to meet at the Property to clear up what he took
 26 | to be a factual mistake, but Mr. Kelley never accepted the offer. Nor did the phone call apprise

27 | ⁵ This case is unpublished. It is cited in good faith for factual purposes under 9th Circuit Rule 36-
 28 | 3(c)(ii) to show that the Corps is aware that a private citizen ignores a cease and desist order at
 great peril, and to show factually that it is reasonable for Duarte to treat the Order seriously, and
 comply with it until administrative or judicial relief can be obtained.

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1 Duarte of the fact that a determination would be made that wetlands on the Property had been
2 destroyed, that plowing the Property was considered a discharge, the regulatory exclusion
3 notwithstanding, or that the plowing would be considered non-exempt despite the statutory
4 exemption for farming practices. This brief phone call cannot legally satisfy the Corps' obligation
5 to provide "notice reasonably calculated, under all the circumstances, to apprise [Duarte] of the
6 pendency of the action and afford [] the opportunity to present their objections." *Mullane v.*
7 *Central Hanover Trust Co.*, 339 U.S. at 314.

8 **2. The Corps' Lack of Notice Denied Duarte Access to**
9 **the Information on Which Mr. Jewell Decided to Issue the**
10 **Order, and Precluded Duarte from Meaningfully Rebutting**
11 **That Information or Presenting Any Information on its Own Behalf**

11 As a necessary consequence of the Corps' failure of notice, Duarte had no opportunity,
12 meaningful or otherwise, to submit information to Mr. Jewell before he issued the Order, and no
13 opportunity to rebut the errors in the Kelley Report on which Mr. Jewell relied. For example,
14 Duarte could have rebutted the erroneous assertion in the Kelley Report that Duarte plowed the
15 Property 3 feet deep by submitting information from Mr. Munson and Mr. Unruh, neither of whom
16 Mr. Kelley ever spoke to, that the plow never went more than 12 inches deep, in compliance with
17 Mr. Munson's directions to Mr. Unruh.

18 And, if given the opportunity, Duarte could have rebutted the inaccurate statement in the
19 Kelley Report that waters of the United States were plowed with Duarte's knowledge and
20 direction, after having allegedly been told by a consultant that a permit would be necessary. This
21 error was the basis on which the supposed violation was deemed flagrant. And yet Mr. Duarte
22 would have been able to explain that he was not aware that wetlands were being plowed and had
23 not intended that they be plowed; and that he had given directions that they not be: Duarte could
24 have supplied all of this information to Mr. Jewell to rebut the mistakes in the Kelley Report, but
25 was denied the ability to do so because Duarte was never informed of the impending decision,
26 provided with the information contained in the Kelley Report, or given any opportunity to submit
27 information to rebut the Kelley Report.

28 These errors were far from harmless. Mr. Jewell agreed, during his deposition, that if it

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1 | were the case that Mr. Duarte had intended that the wetlands not be plowed, and given direction
2 | to avoid operation of equipment in wetlands, and had not been aware that wetlands were being
3 | plowed, he would likely have evaluated the case differently.

4 | The Corps' failure to afford Duarte these basic procedural protections violated several
5 | required elements of due process: the meaningful opportunity to present information, rebut
6 | adverse information and cross examine witnesses, and appear through counsel. See *Morgan v.*
7 | *U.S.*, 304 U.S. at 18; *Goldberg v. Kelley*, 397 U.S. at 269-270.

8 | **3. The Corps' Decision to Issue the Order**
9 | **Was Made by the Investigator's Second Line**
10 | **Supervisor, Rather than a Neutral Decision Maker**

11 | Mr. Jewell is Mr. Kelley's second line supervisor; Mr. Kelley reports to Ms. Haley who
12 | reports to Mr. Jewell. (Sep. Statement, ¶¶ 17-18) The Ninth Circuit examined an analogous issue
13 | in *Ressler v. Pierce*, 692 F.2d 1212 (1982), in looking at whether Section 8 housing assistance
14 | applicants who had been rejected were entitled to impartial review of their application by HUD,
15 | rather than by another employee of the same private housing company that rejected their
16 | application. 692 F.2d at 1221. The Ninth Circuit reasoned that in sufficiently large agencies it was
17 | possible to afford impartial review by a designated agency staff member. But in a smaller
18 | operation with fewer staff, it would be inappropriate for one of that small group to have to be the
19 | impartial decision maker. *Id.* (citing cases).

20 | The reasoning of *Ressler* applies in this case. The Corps is a large national agency, and
21 | there are presumably many within it who have no direct working relationship with Mr. Kelley, Ms.
22 | Haley, or Mr. Jewell, and therefore could truly serve as an impartial decision maker to decide
23 | whether a cease and desist order should issue. For example, there are the hearing officers
24 | established to hear appeals from approved jurisdictional determinations and denied permits, under
25 | 33 C.F.R. § 331. A decision by the second line supervisor of the investigator, made in complete
26 | reliance on that investigator's report, is not one made by a neutral decision maker. See *Stypmann*
27 | *v. City and County of San Francisco*, 557 F.2d 1338 (1977) (decision of police officer who cited
28 | vehicle to also have it towed is not a neutral one).

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4 **4. The Army Corps Destroyed Materials in the Duarte**
5 **Investigation File after Issuing the Order, Thwarting the**
6 **Constitutional Requirement for a Complete Record of the Decision**

7 Mr. Kelley's destruction of his notes and other materials in the file renders it impossible
8 for Duarte to ever adequately cross-examine him as the investigating witness, and prevents the
9 Army Corps from ever making a decision exclusively on the record, since a portion of the record
10 has been "purged." But "due process require an opportunity to confront and cross-examine adverse
11 witnesses." *Goldberg v. Kelly*, 397 U.S. at 269. Destruction of a part of the file prevents the
12 person whose property has been taken from ever having a truly meaningful opportunity to confront
13 and rebut adverse information and cross-examine a witness like Mr. Kelley.

14 **5. The Corps Was Required to Provide Duarte with a Pre-Deprivation**
15 **Hearing Because the Order Was Not Based on Emergency**
16 **Conditions and Was Not Issued Based on Narrowly Drawn Criteria**

17 A pre-deprivation hearing is the norm for property deprivations. *Fuentes v. Shevin*, 407
18 U.S. at 81-82. This standard may only be varied in favor of a prompt post-deprivation hearing
19 when there is "a special need for very prompt action" "to secure important governmental or public
20 interest" and a deprivation is made under a "narrowly drawn statute" which restricts the discretion
21 or professional judgment of the decision maker. *Id* at 91.

22 First, there is no evidence that the Corps issued the Order in response to emergency
23 conditions or any other "special need for very prompt action." Rather, Mr. Kelley first observed
24 what he took to be illegal plowing of the Property on November 28, then observed it again on
25 December 6, and then called Mr. Duarte on December 11. He did not complete his investigation
26 report until more than two months after his one brief phone call with Mr. Duarte. Nothing about
27 the pace of the investigation suggests an emergency. Nor did the Corps direct Duarte to conduct
28 initial corrective measures, which are appropriate where a site requires stabilization or other
actions to avoid degradation. So, this is not a case like *Hodel*, in which the Supreme Court
acknowledged the possibility (in a facial challenge to newly adopted procedural regulations) of

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1 pre-hearing deprivation in emergency situations to protect public safety. 452 U.S. at 299-300.

2 Second, the Order was not issued under a “narrowly drawn statute.” As discussed above,
3 the applicable regulations provide no evidentiary standard by which the district engineer is to
4 determine that a violation has occurred, and no substantive guidelines for determining whether a
5 farming activity is exempt under the statute or whether a farming activity is part of “an established
6 (i.e., ongoing) farming operation.”

7 Under these conditions, there is no basis for deviating from the normative requirement for
8 a pre-deprivation hearing. The Order was not issued to address an emergency or other exigent
9 circumstance, and was not issued under “a narrowly tailored statute.” *Fuentes*, 407 U.S. at 81-82,
10 91. The Corps’ failure to afford Duarte a hearing before issuing the Order violated Duarte’s
11 procedural rights under the Due Process Clause.

12 **D. The Corps Did Not Provide Duarte with a Prompt and**
13 **Constitutionally Adequate Hearing after Issuing the Order**

14 The Corps failed to afford Duarte a prompt post-deprivation hearing as well. Several
15 aspects of the Corps’ conduct subsequent to issuing the Order violated Duarte’s Due Process rights
16 and precluded a constitutionally adequate hearing. First, the Corps staff ridiculed and ignored the
17 letter of Duarte’s counsel, Ronda Lucas, describing it is a “ranting fishing expedition,” and actively
18 proposed that her demand for all of the information on which the Order was based not be treated
19 as a FOIA request. The Corps never did provide all of the information requested in her letter until
20 it presumably did so upon commencement of discovery in this case, two years later, after it
21 unsuccessfully sought to have Duarte’s lawsuit dismissed twice.

22 Nor can the Corps’ April 18 letter to Ms. Lucas be taken as an offer of a hearing. First,
23 there is no such hearing procedure available. The Corps regulations provide for none. The ability
24 to negotiate “how to resolve the violation” is not a hearing. It is a closed door ad hoc discussion
25 more akin to plea bargaining, in which the Corps owes Duarte no information, there is no neutral
26 decision maker, and there is no obligation for the Corps to make any decision on whether to
27 reconsider or withdraw the Order. To provide due process, the government must afford actual
28 procedures of some sort, which establish what process the private party has available. *Cleveland*

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1 *Bd. of Educ. v. Loudermill*, 470 U.S. 532, 540 (1985).

2 Second, on its face, the April 18, 2013 letter does not respond to Ms. Lucas' request for
3 available administrative remedies, and only describes the information requested of Duarte in the
4 context of "resolving the violation." This takes the determination of violation, and the Order, as
5 fixed matters that are not subject to further adjudication. The only matter on the table is what
6 Duarte will do to rectify the violation that the Corps previously determined was committed. In the
7 meantime, the Order remains in place with no administrative procedure to force the Corps to
8 decide whether to withdraw it.

9 Third, neither the Order nor the April 18 Corps letter provide any notice of a hearing. They
10 request information from Duarte about the plowing (a step that might have been meaningful before
11 the issuance of the Order), but they do not specify anyone who will be deciding whether to rescind
12 or withdraw the Order, do not state a date or a forum in which such a decision would be made, or
13 any deadlines by which Duarte must submit information in order for it to be considered, or identify
14 any means by which Duarte can request or be provided the information on which a decision maker
15 will base such a decision.

16 **E. The Corps Regulations Fail to Provide a Constitutionally**
17 **Adequate Process for Duarte to Be Heard on the Questions**
18 **of Whether Plowing the Property Violated the Clean Water**
19 **Act and Whether a Cease and Desist Order Should Issue**

20 To satisfy the Due Process Clause, the government must afford actual procedures which
21 govern the government's decision-making. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532,
22 540 (1985). Mere ad hoc meetings, negotiations, or one-sided submission of information is
23 inadequate to ensure the purpose of the Due Process Clause, which is to constrain the manner in
24 which the government decides to deprive people of property. The only way to accomplish that
25 constraint is with established procedures to which the government is bound. *Duarte Nursery v.*
26 *Corps of Engineers*, 17 F. Supp. 3d at 1023 (citing *Mathews v. Eldridge*, 424 U.S. 319, 332
27 (1976)).

28 The Corps' regulations for issuance of cease and desist orders afford no procedures at all.
The pertinent section merely directs the district engineer to issue a cease and desist order to

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1 | potentially responsible parties who have been determined to have performed unauthorized
 2 | activities. 33 C.F.R. § 326.3(c)(1). That determination, in turn, is delegated to the district engineer
 3 | with no procedural protections for the potentially responsible party. 33 C.F.R. § 326.3(a)-(b).
 4 | These regulations do not require or even suggest any communications with the potentially
 5 | responsible party, much less provision of notice and a hearing before issuance of a cease and desist
 6 | order. *See, e.g.*, 33 C.F.R. § 326.3(a) (suggesting use of information from Corps staff, members
 7 | of the public, other agency staff); 33 C.F.R. § 326.3(b) (authorization to investigate suspected
 8 | violations so as to confirm whether violation exists and extent of, and parties responsible for,
 9 | same). Nor do the regulations contain any procedures following issuance of a cease and desist
 10 | order for the alleged responsible party to challenge either the determination or the order. *See* 33
 11 | C.F.R. § 326.3(d) (party responsible for the violation may be ordered to perform initial corrective
 12 | measures); 33 C.F.R. § 326.3(d) (after the fact permitting available in limited circumstances).

13 | 33 C.F.R. § 326.3(c)(3) requires that a cease and desist order also direct the potentially
 14 | responsible party to submit “additional information that the district engineer may need at that time
 15 | to determine what course of action [to] pursue *in resolving the violation.*” (emphasis added). This
 16 | submission is not related to whether the Corps correctly determined that a violation occurred or
 17 | that a cease and desist order was warranted. Rather, the regulation accepts the determination as
 18 | a given, and all subsequent regulatory steps are directed toward “resolving the violation.”

19 | The regulation simply does not direct the Corps to afford due process, and does not provide
 20 | any process that the Corps can afford. Compare 33 C.F.R. § 326.3(a)-(c) (cease and desist orders
 21 | without procedures) and 33 C.F.R. § 326.6(a)(1) (“This section sets forth *procedures* for initiation
 22 | and administration of Class I administrative penalty orders”) (emphasis added); *See also* 33 C.F.R.
 23 | § 327 (procedures for public hearings on proposed permit actions), 33 C.F.R. § 331 (procedures
 24 | for administrative appeals from approved jurisdictional determinations, denied permit applications,
 25 | and declined permits).

26 | Since 33 C.F.R. § 326.3(a)-(c) provide no procedures for notice and hearing to Duarte or
 27 | similarly situated suspected responsible parties before or after the issuance of cease and desist
 28 | orders, they are unconstitutional as applied to Duarte.

CONCLUSION

The undisputed facts are that the Corps issued the Order without satisfying any of the elements of a due process hearing, that the Order deprived Duarte of property interests recognized in California law, and that the Corps did not afford a hearing after issuing the Order. The Corps cannot show any evidence that it provided Duarte with a hearing, either before or after issuing the Order, or legally adequate notice of such a hearing. The Corps regulations similarly provide no such procedural protections. Since there is no disputed material fact that the Corps did not afford Duarte notice and either a pre- or post-deprivation hearing, and the regulations similarly fail to do so, Daurte is entitled to summary judgment on its First, Second, and Fifth Claims for relief.

DATED: October 23, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **PLAINTIFF DUARTE NURSERY INC.’S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT ON ITS DUE PROCESS CLAIMS** have been served through the Court’s CM/ECF system on all registered counsel this 23rd of October, 2015.

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