SAM HIRSCH
Acting Assistant Attorney General

ANDREW J. DOYLE (FL Bar No. 84948)
JOHN THOMAS H. DO (CA Bar No. 285075)
Trial Attorneys
United States Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington, DC 20044
(202) 514-4427

Attorneys for the Defendant and Counterclaim-Plaintiff

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DUARTE NURSERY, INC., a California Corporation; and JOHN DUARTE, an individual,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant.

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UNITED STATES OF AMERICA,

Counterclaim- Plaintiff,

v.

DUARTE NURSERY, INC., a California Corporation; and JOHN DUARTE, an individual,

Counterclaim- Defendants.

No. 2:13−CV−02095−KJM−DAD

UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS DUARTE'S FIRST SUPPLEMENTAL COMPLAINT

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INTRODUCTION

The arguments presented by Duarte Nursery, Inc. and John Duarte ("Plaintiffs" or "the Duarte parties") in opposition[1] to the United States' Motion to Dismiss their First Supplemental Complaint (or "Amended Complaint")[2] should be rejected. In their Amended Complaint, Plaintiffs allege that the United States Army Corps of Engineers ("Corps") acted improperly in enforcing the Clean Water Act ("CWA" or "Act"). With respect to the Amended Complaint's claims one, two, and five -- the due process claims -- the contention is that the Corps issued the February 2013 cease-and-desist order without sufficient process. The crux of the sixth (new) claim is that the Corps sought to commence a judicial enforcement action, i.e., the United States' counterclaim, for an unconstitutional, retaliatory reason.

Nothing in the Duarte parties' opposition alters the conclusion that they may not maintain these claims. The United States' counterclaim has mooted the due process claims because the Duarte parties will be fully heard on whether they are in violation of the Act, and the United States cannot be awarded *any* relief without proving its case *de novo*. The Duarte parties' new claim is simply not cognizable. At most, the Duarte parties may "urg[e] the [alleged] impropriety as a defense" to the United States' counterclaim. *See Buntrock v. SEC*, 347 F.3d 995, 997 (7th Cir. 2003) (finding no jurisdiction for an alleged violator to assert claims against an enforcement agency).

ARGUMENT

I. PLAINTIFFS' DUE PROCESS CLAIMS SHOULD BE DISMISSED AS MOOT

With respect to Plaintiffs' due process claims, the United States previously explained that: (a) claims become moot when "changes in . . . circumstances . . . forestall[] any occasion for meaningful relief," U.S. Mot. at 8:20-21 (quoting *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005) (*en banc*)); (b) the counterclaim represents a change in

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[1] ECF No. 51 ("Plaintiffs' Opp'n").

[2] ECF No. 46 ("U.S. Mot."); ECF No. 41 ("Amended Complaint").

circumstances, U.S. Mot. at 8:22-28; and (c) the fact that the Court will conduct plenary review of the counterclaim forestalls any occasion for meaningful relief on the Duarte parties' claims that the Corps failed to provide due process in conjunction with issuing the cease-and-desist order. U.S. Mot. at 9:1 through 10:11.

Plaintiffs do not appear to dispute that the counterclaim's existence means they "will be fully heard with respect to whether they are in violation of the CWA and, if so, what remedies are appropriate." *Compare* U.S. Mot. at 9:1-3 *with* Plaintiffs' Opp'n at 13:13 through 17:15. Plaintiffs instead argue that the Court "can [still] grant effective relief by granting declaratory relief that the Corps violated the Due Process Clause when it issued the Cease and Desist Order." Plaintiffs' Opp'n at 14:20-21.[3] Plaintiffs are wrong.

Such declaratory relief would not be *meaningful* relief. It would do nothing to insulate the Duarte parties from CWA liability. Indeed, according to Plaintiffs themselves, the due process claims "do not address whether farming the Property violated the Act." Plaintiffs' Opp'n at 13:26-27; *id.* at 14:2 ("The Counterclaim will litigate that underlying allegation[.]").

Moreover, such declaratory relief would not restore Plaintiffs to the position they were in before the Corps issued the cease-and-desist order. That ship has sailed, and Plaintiffs are not seeking damages.[4] The only effectual relief going forward is precisely that which the Duarte parties are guaranteed as a result of the filing of the counterclaim: a full and fair opportunity to be heard. *See Center for Biological Diversity v. Lohn*, 511 F.3d 960, 964 (9th Cir. 2007)

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[3] *See also id.* at 16:10-12 ("[T]he Court can provide declaratory relief on whether the Corps provided Duarte with an adequately prompt post-deprivation hearing."); *id.* at 16:13-15 (Plaintiffs seek "declaratory judgment that the Corps' enforcement regulations are unconstitutional as applied to Duarte for failure to afford either a pre-deprivation hearing or an adequate post-deprivation hearing").

[4] *Cf. Weinberg v. Whatcom County*, 241 F.3d 746, 755 (9th Cir. 2001) ("Although questions of fact remain as to whether the County violated Weinberg's right to procedural due process by failing to provide a hearing before issuing the stop work order and development moratorium (or, in the alternative, by failing to offer Weinberg a prompt post-deprivation hearing), we do not remand for trial on these issues . . . Weinberg is entitled to nominal damages as a matter of law on this claim.").

("[D]eclaring the [Distinct Population Segment] Policy unlawful would serve no purpose in this case because the [Fish and Wildlife] Service has listed the Southern Resident as an endangered species, the [Plaintiff's] ultimate objective.").

Plaintiffs mistakenly contend that the cease-and-desist order "causes the same harm as it did before: it deprives Duarte of property without due process." Plaintiffs' Opp'n at 14:13-14. *See also id.* at 15:10-12. But the Court has already determined that the cease-and-desist order has "no legal consequences." April 2014 Order, ECF No. 27, at 2 n.2. Furthermore, it is uncontested (or at least uncontestable) that "[t]o stop Duarte from deep ripping or operating other earthmoving equipment in or near aquatic resources protected by the Act, the United States would have to seek and obtain from the Court a temporary restraining order or preliminary injunction." *See* Plaintiffs' Opp'n at 15:7-9. That means that if Plaintiffs are confident that their activities are fully consistent with the CWA, then nothing but an Order from this Court can stop them from filling more streams and wetlands without a permit.[5]

The record refutes Plaintiffs' contention that the cease-and-desist order "far exceeds the relief that the United States could obtain in a preliminary injunction." Plaintiffs' Opp'n at 15:36 through 16:1. The cease-and-desist order, by its terms, is limited to "work in waters of the United States," not the entire Site. Am. Compl., Ex. A (cease-and-desist order), at 1. Any preliminary injunction that the United States might be compelled to seek here would be similarly limited.

The Duarte parties also misread *Sackett v. EPA*, 132 S. Ct. 1367 (2012). There, the Supreme Court held that the plaintiff-landowners could challenge the validity of a CWA compliance order issued by the United States Environmental Protection Agency ("CWA"), even in the absence of a judicial enforcement action, because: (a) the compliance order constituted "final agency action" within the meaning of the Administrative Procedure Act ("APA"); and (b)

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[5] *Contra* Plaintiffs' Opp'n at 15:10-12 (Plaintiffs' baseless argument that dismissing their due process claims "would improperly convert the Cease and Desist Order into an extra-judicial provisional remedy to which the Corps can help itself with no process at all").

the CWA did not preclude pre-enforcement review of such order. The Court had no occasion to, and did not, address whether the plaintiff-landowners also had a *constitutional* right to such review. Thus, *Sackett* did not "supersede[] the cases cited by the United States," Plaintiffs' Opp'n at 17:11-12, and in any event does not support allowing Plaintiffs to maintain stale due process claims.

II. PLAINTIFFS' RETALIATORY PROSECUTION CLAIM SHOULD BE DISMISSED

A. The Sixth Claim Falls Outside the APA's Waiver of Sovereign Immunity

1. The United States' Decision to Enforce the CWA is Committed to its Discretion by Law

With respect to Plaintiffs' new sixth claim against the Corps, alleging retaliatory prosecution, the United States previously explained that: (a) the only waiver of sovereign immunity Plaintiffs rely upon is 5 U.S.C. § 702, part of the APA, U.S. Mot. at 10:18-20; (b) this waiver is constrained by another provision of the APA, 5 U.S.C. § 701(a)(2), which disallows judicial review if the action in question is "committed to agency discretion by law," U.S. Mot. at 10:25-27 through 11:8; (c) 5 U.S.C. § 701(a)(2) applies in two circumstances as explained in *Ctr. for Policy Analysis on Trade and Health v. Office of the United States Trade Rep.*, 540 F.3d 940, 944 (9th Cir. 2008) ("*Ctr. for Policy*"), U.S. Mot. at 10:28 through 11:7; and (d) one or both of those circumstances exist here, U.S. Mot. at 11:7-26.

Plaintiffs, in response, acknowledge that they rely upon 5 U.S.C. § 702. *See* Plaintiffs' Opp'n at 9:17-18. At the same time, however, they appear to argue that 5 U.S.C. § 701(a)(2) constrains only § 704 as opposed to both § 702 and § 704. *See* Plaintiffs' Opp'n at 11:9 through 11:18. Any such argument is baseless. 5 U.S.C. § 701 on its face makes clear that it applies to and throughout "[t]his chapter," i.e., Chapter 7 of Title 5 (5 U.S.C. §§ 702-06).

Moreover, Plaintiffs dispute the existence of the first (of two) circumstances set forth in *Ctr. for Policy* -- i.e., "a court would have no meaningful standard against which to judge the agency's exercise of discretion," 540 F.3d at 944 -- because, as Plaintiffs argue, "the Corps'

decision to refer an alleged violation for civil prosecution is not committed to its absolute judgment." Plaintiffs' Opp'n at 11:12-14 (citing 33 C.F.R. § 326.5(a)). As an initial matter, the CWA regulation Plaintiffs cite does not support their argument. It states, in pertinent part, that "[f]or cases the [Corps'] district engineer determines to be appropriate, he will recommend . . . civil actions." 33 C.F.R. § 326.5(a). Furthermore, the regulation provides that "[a]ppropriate cases . . . include, but are not limited to, violations which, in the district engineer's opinion, are willful, repeated, flagrant, or of substantial impact." *Id.* Given the breadth of the district engineer's discretion under this regulation, there simply is no law for the Court to apply.

Nor is Plaintiffs' argument supported by the CWA and related statutes, wherein Congress provided broad authority to the United States Department of Justice to make decisions about whether to file CWA civil enforcement actions against alleged violators. *See* 33 U.S.C. §§ 1319 and 1344; 28 U.S.C. §§ 516 and 519. As the Ninth Circuit has explained, "[t]he presumption that enforcement decisions are left to the executive agency responsible for administering a given law, unless Congress indicates otherwise, is a longstanding and well-reasoned one." *Sierra Club v. Whitman*, 268 F.3d 898, 905 (9th Cir. 2001). That presumption stands here. *See e.g., Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011) ("if the statute in question does not give any indication that violators must be pursued in every case, or that one particular enforcement strategy must be chosen over another . . . then enforcement is committed to the agency's discretion") (internal quotation omitted).

Plaintiffs also contend, incorrectly, that the reasoning of *Heckler v. Chaney*, 470 U.S. 821 (1985), "supports denying the United States' motion." Plaintiffs' Opp'n at 11:16. As the United States previously explained, a decision *to* enforce "involves the balancing of a number of factors" similar to a decision *not* to enforce. U.S. Mot. at 11:20. This is the second (of two) circumstances set forth in *Ctr. for Policy*, 540 F.3d at 944, and it is not mentioned in Plaintiffs' opposition.

Similarly, Plaintiffs misread *Heckler* as "distinguish[ing] government decisions *to* enforce." Plaintiffs' Opp'n at 11:16. Courts do not share Plaintiffs' cramped reading of

Heckler's rationale. *See, e.g., Greer v. Chao*, 492 F.3d 962, 964-65 (8th Cir. 2007) ("[W]hen an agency decides to seek enforcement actions (or declines to seek enforcement actions), it is entitled to the same type of discretion that a prosecutor is afforded in bringing (or not bringing) criminal charges."); *Finazzo v. S.E.C.*, No. 08-2176 (RJS), 2008 WL 3521351, at *6 (S.D.N.Y. Aug. 8, 2008) *aff'd*, 360 Fed. App'x. 169 (2d Cir. 2009) ("The Court … finds that § 701(a)(2) provides no basis on which to review the [agency's] discretionary decision to commence an enforcement action and issue a subpoena to defendant … .") Furthermore, Plaintiffs ignore the following portion of *Heckler* that immediately follows the excerpt Plaintiffs cite: "[W]hen an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. *The action at least can be reviewed to determine whether the agency exceeded its statutory powers*." 470 U.S. at 832 (emphasis added). This is precisely the kind of plenary review that to which the Duarte parties will have full and fair access in defending themselves against the United States' counterclaim.

Indeed, that is the crux of *Buntrock v. SEC*, 347 F.3d 995 (7th Cir. 2003), discussed in the United States' opening motion and at the outset of this reply. That is, Plaintiffs have ample ability to defend themselves in the enforcement action, and they may not invoke the Court's jurisdiction by seeking to enjoin enforcement through a claim of impropriety. Other courts agree. *See e.g., Finazzo*, 2008 WL 3521351, at *4 ("A district court has no jurisdiction to award non-monetary relief against an agency on a claim that it is conducting an improper investigation . . . where the action complained of is committed to agency discretion.") (citing *Sprecher v. Von Stein*, 772 F.2d 16, 18 (2d Cir.1985)).

Plaintiffs' contention that *Buntrock* "does not apply" here is baseless. Plaintiffs' Opp'n at 11:24. That *Buntrock* involved a claim of impropriety "in a separate lawsuit," *id.* at 11:25, while Plaintiffs' claim of impropriety has been asserted in a supplemental complaint is a distinction without a difference. In both procedural contexts, the alleged violator is seeking to prevent or forestall a federal agency from enforcing a statute that Congress has entrusted that agency to enforce. Thus, as in *Buntrock*, dismissal is warranted -- without prejudice to the

Duarte parties' right to "urg[e] the impropriety as a defense in the [enforcement] suit." 347 F.3d at 997.

2. The United States' Counteclaim is Not "Agency Action

As the United States previously explained, there is an additional basis to dismiss Plaintiffs' sixth claim for lack of jurisdiction: (a) "[P]laintiffs must be challenging 'agency action' for their claims to be within the [APA's] waiver of sovereign immunity"; and (b) "[t]he United States' enforcement counterclaim is none of the[] things" referenced in 5 U.S.C. § 551(13), which sets forth the APA's definition of "agency action." U.S. Mot. at 12:18 through 13:6. The Duarte parties' response to these points falls short of the mark.

The first of these points is uncontestable, given the Court's Order of April 2014. With respect to the second point, contrary to the Duarte parties' argument (Plaintiffs' Opp'n at 10:4-8), the counterclaim is not a "sanction" or "relief," i.e., two subcategories of "agency action" as defined in 5 U.S.C. § 551(13). The counterclaim is not self-effectuating. It does not sanction or award any relief. The most that the counterclaim does is to *request* that a sanction or other relief be awarded by the Court. The Duarte parties cannot be required to pay any civil penalty, perform any injunctive relief, or stop any activity unless and until this Court issues an Order to that effect. That is judicial --not agency-- action.

City of Oakland v. Holder, 901 F. Supp. 2d 1188, 1195 (N.D. Cal. 2013), examined a similar question, whether a civil action is an "agency action" for the purposes of establishing jurisdiction, and readily determined that it did not fit the definition found in 5 U.S.C. § 551(13). Just so here; lacking a discrete agency action, Plaintiffs' sixth claim is barred by sovereign immunity as it does not fall within the scope of 5 U.S.C. § 702's waiver.

B. Plaintiffs' Retaliatory Prosecution Claim is Not a Claim at All

The United States previously explained that, in addition to failing to properly invoke the Court's limited jurisdiction, Plaintiffs' sixth claim is not a claim at all and should be dismissed

under Fed. R. Civ. P. 12(b)(6). U.S. Mot. at 13:9 through 15:1. In opposition, Plaintiffs seek to rebrand this part of their Amended Complaint as a "First Amendment retaliation claim" instead of a "Retaliatory Prosecution" claim. *Compare* Plaintiffs' Opp'n at 12 n.3 & 17:16 through 19:23 *with* Am. Compl. at 19. The substance of Plaintiffs' allegations and requested relief have not changed, however, and dismissal remains warranted.

Indeed, there has been no change in Plaintiffs' inability to provide any precedent for what they regard to be a "well recognized constitutional claim." Plaintiffs' Opp'n at 17:16. *None* of the case law Plaintiffs rely upon involves such a claim detached from either *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), or 42 U.S.C. § 1983, which applies to persons acting under the color of state law (neither of which Plaintiffs invoke here). In *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 277-78 (1977), the Supreme Court expressly did not address whether 42 U.S.C. § 1983 precluded a discharged teacher's retaliatory claim against a school district. *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989), involved a § 1983 claim for damages against county officials for allegedly suspending a company's operating permit after the company had publicly criticized a new county regulation. Similarly, *Schneider v. County of Sacramento*, Civ. No. S-12-2457, 2014 WL 4187364 (E.D. Cal. Aug. 21, 2014), concerned a § 1983 claim for damages after a county increased mining fees for plaintiffs who had sued the county.

Needless to say, none of Plaintiffs' cited case law involve attempts to prevent or forestall the continuation of a civil enforcement action in which the alleged violators (like the Duarte parties here) would have full and fair opportunity to defend themselves. Nor do Plaintiffs' "examples" address the absurd result of recognizing a retaliatory prosecution (or First Amendment retaliation) claim in the context of a counterclaim brought pursuant to the compulsory counterclaim requirements of Fed. R. Civ. P. 13(a). The Duarte parties' attempt to reassure the Court that the counterclaim may proceed after certain conditions have been met provides no solace at all. For example, under Plaintiffs' baseless approach, before the counterclaim may even proceed, the United States would have to "show that [the Corps] would

have referred the Counterclaim absent Duarte's protected actions." Plaintiffs' Opp'n at 18:4-5.

In fact, by citing to *Louisiana-Pacific Corp. v. Beazer Materials & Services, Inc.*, 842 F. Supp. 1243 (E.D. Cal. 1994), Plaintiffs effectively acknowledge that if they have evidence of impropriety on the part of the regulator ("retaliatory" or otherwise), the appropriate way for the to bring this to the Court's attention is as a *defense* to the enforcement suit.

Plaintiffs' remaining arguments in support of their sixth claim also fail. Plaintiffs' reliance on references that the United States made in the prior motion to dismiss, Plaintiffs' Opp'n at 19:1-9, makes no sense and ignores the full context of the CWA's section 404 program. Although the Corps generally may not now accept an after-the-fact permit application until after the counterclaim is resolved, *see* 33 C.F.R. § 326.3(e)(ii), the United States, on behalf of the Corps, remains free to negotiate with the Duarte parties and to propose for the Court's approval a consent decree with terms and conditions that include after-the-fact authorization for filled streams and wetlands. *See* 77 Fed. Reg. 10,184 (Feb. 21, 2012) ("Nationwide Permit 32").

Contrary to Plaintiffs' contention, even if the sixth claim was actually cognizable on its own (i.e., without *Bivens* or § 1983), the only reasonable inference that may be drawn from the facts is that, after the Court's April 2014 Order denying the United States' first motion to dismiss, the United States was forced to assert a counterclaim for enforcement of the CWA or risk forever losing those claims under Fed. R. Civ. P. 13(a).[6] That is the import of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *BellAtlantic v. Twombly*, 550 U.S. 544 (2007). *See, e.g.*, *George v. Rehiel*, 738 F.3d 562, 586 (3d Cir. 2013) (in considering First Amendment retaliation claims, "the [Supreme] Court held . . . that courts may infer … 'obvious alternative explanation[s]', which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer.").

C. Plaintiffs Cannot Pursue Their Claim While the Counterclaim is Pending

The United States previously explained that even if there were a waiver of sovereign

[6] The Duarte parties' eleventh-hour opinion that the counterclaim is "not compulsory" is beside the point. Plaintiffs' Opp'n at 18 n.5.

immunity, and even if Plaintiffs had alleged an actual claim, they may not assert their sixth claim *now*. *See* U.S. Mot. at 15:3 through 16:2.

Plaintiffs, in opposition, argue that "[t]he United States offers no reason why [the sixth claim] should not be litigated during an ongoing violation of a plaintiff's rights." Plaintiffs' Opp'n at 20:7-8. In fact, the United States has provided reasons, and they are sound. We explained, for example, that it is logical to treat any retaliatory prosecution claim as a malicious prosecution claim and await the civil prosecution's termination. *See* U.S. Mot. at 15.

To the contrary, it is Plaintiffs that have provided no "good reason" for their sixth claim to proceed at this time. Plaintiffs' Opp'n at 20:9.[7] "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959). Here, any harm is not irreparable and, as *Buntrock* instructs, Plaintiffs have an adequate remedy at law: defending themselves against the United States' counterclaim. *See Buntrock*, 347 F.3d 995, 997 (*citing Sokolow v. United States*, 169 F.3d 663, 665 (9th Cir.1999)).

CONCLUSION

The Court should dismiss Duarte's "First Supplemental Complaint for Declaratory Judgment and Injunctive Relief." ECF No. 41.

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[7] *Denney v. DEA*, 508 F. Supp. 2d 815 (E.D. Cal. 2007), does not support Plaintiffs. In *Denney*, the plaintiff brought a First Amendment retaliatory prosecution claim under *Bivens* and § 1983 against individual state and federal officials. *See Denney*, 508 F. Supp. 2d at 827. This Court held that a prior injunction in *Conant v. McCaffrey*, 2000 WL 1281174 (N.D. Cal. Sept.7, 2000), *aff'd Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), precluded the government from criminally investigating physicians who recommend the use of medical marijuana unless there was a good faith belief of criminal conduct. *Denney*, 508 F. Supp. 2d at 828. The prior injunction stemmed from a class action lawsuit that challenged a Department of Justice policy interpreting the Controlled Substances Act, 21 U.S.C. § 801, *et seq*. to allow for the government to revoke a physician's registration if he or she recommended medical marijuana. *Conant v. McCaffrey*, 2000 WL 1281174 at *11. The instant case is clearly distinguishable from *Denney* because: (1) there is no prior injunction to enforce, (2) Plaintiffs' sixth claim does not challenge a statute, regulation, or agency policy as being unconstitutional, (3) a criminal investigation or prosecution has not been instigated, and (4) Plaintiffs have not invoked *Bivens* or § 1983. *See Denney*, 508 F. Supp. 2d at 827.

Respectfully submitted,

SAM HIRSCH
Acting Assistant Attorney General

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/s John Thomas H. Do
ANDREW J. DOYLE (FL Bar No.84948)
JOHN THOMAS H. DO (CA Bar No. 285075)
Trial Attorneys
United States Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington, DC 20044
(202) 514-4427 (phone; Doyle)
(202) 514-2593 (phone; Do)
(202) 514-8865 (facsimile; both)
andrew.doyle@usdoj.gov
john.do@usdoj.gov