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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROGER J. LAPANT, JR.; J&J
FARMS; GOOSE POND AG, INC.;
and FARMLAND MANAGEMENT
SERVICES,

Defendants.

No.

COMPLAINT

The United States of America ("United States"), through its undersigned attorneys, by the authority of the Attorney General, and at the request of the Secretary of the Army acting through the United States Army Corps of Engineers ("Corps"), alleges as follows:

NATURE OF THE ACTION

1
2 1. This is a civil enforcement action commenced under
3 sections 309 and 404 of the Clean Water Act ("CWA"), 33 U.S.C.
4 §§ 1319 and 1344, against four persons (an individual and three
5 corporations) for discharging pollutants into waters of the
6 United States in Tehama County, California without authorization,
7 in violation of CWA section 301(a), 33 U.S.C. § 1311(a).

8 2. The United States seeks: (a) injunctive relief
9 prohibiting these persons from further unauthorized discharges;
10 (b) injunctive relief compelling these persons to restore and
11 mitigate the impacts of the unauthorized discharges; (c) civil
12 penalties in favor of the United States and against these
13 persons; and (d) such other relief as the Court may deem
14 appropriate.

15 3. The United States has provided notice of the
16 commencement of this action to the State of California pursuant
17 to 33 U.S.C. § 1319(b).

JURISDICTION AND VENUE

18
19 4. This Court has jurisdiction over the subject matter of
20 this action pursuant to section 309(b) of the CWA, 33 U.S.C.
21 § 1319(b), and 28 U.S.C. §§ 1331 and 1345.

22 5. Venue is proper in the United States District Court for
23 the Eastern District of California pursuant to 33 U.S.C.
24 § 1319(b) and 28 U.S.C. § 1391(b) and (c) because these four
25 persons reside or conduct business in this District; the waters
26 of the United States into which pollutants were discharged are
27 located in this District; and the events giving rise to these
28 claims occurred in this District.

PARTIES

6. Plaintiff is the United States of America, and authority to bring this action is vested in the United States Department of Justice pursuant to Section 506 of the CWA, 33 U.S.C. § 1366, and 28 U.S.C. §§ 516 and 519.

7. Defendants are Roger J. LaPant, Jr.; J&J Farms; Goose Pond Ag, Inc.; and Farmland Management Services.

8. Roger J. LaPant, Jr. is an individual residing at 147 Shippee Road, Oroville, California 95965, or 9032 Goodspeed St., Durham, CA 95938.

9. Upon information and belief, J&J Farms is a privately held company, incorporated in the State of California, with a business address of 147 Shippee Road, Oroville, California 95965, or 9032 Goodspeed St., Durham, CA 95938.

10. Roger J. LaPant, Jr. owns, controls, or occasionally does business as J&J Farms.

11. Goose Pond Ag, Inc. is a corporation registered in the State of Florida with a principal place of business at 99 High Street, 26th Floor, Boston, MA 02110.

12. Farmland Management Services is a corporation registered in the State of California with a business address of 301 East Main Street, Turlock, CA 95380.

13. Defendants at this time do not include other persons such as Todd LaPant, LaPant Farms LLC, Carl Evers, Jr., David Evers, Oliver Williams, Hancock Agricultural Investment Group, and Hancock Farmland Services, but the United States may seek to amend this complaint as appropriate based on information obtained during discovery regarding other persons' involvement with or

responsibility for the CWA violations alleged in this complaint.

STATUTORY AND REGULATORY BACKGROUND

14. Section 101(a) of the CWA, 33 U.S.C. § 1251(a), provides that "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

15. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the "discharge of any pollutant by any person" except, *inter alia*, in compliance with a permit issued by the Corps pursuant to section 404 of the CWA, 33 U.S.C. § 1344.

16. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines "person" to include, *inter alia*, an "individual" and a "corporation."

17. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines "pollutant" to include, *inter alia*, "dredged spoil," "biological materials," "rock," "sand," and "cellar dirt."

18. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source."

19. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines "point source" to include "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."

20. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters" as "the waters of the United States, including the territorial seas."

21. 33 C.F.R. § 328.3(a)(1), (5) and (7), at all times relevant to the CWA violations alleged in this complaint, define

1 "waters of the United States" to include, *inter alia*: all waters
2 that are currently used, were used in the past, or may be
3 susceptible for use in interstate or foreign commerce
4 ("traditional navigable waters"); tributaries of traditional
5 navigable waters; and wetlands adjacent to traditional navigable
6 waters or their tributaries.¹

7 22. 33 C.F.R. § 328.3(b) defines "wetlands" as "those areas
8 that are inundated or saturated by surface or ground water at a
9 frequency and duration sufficient to support, and that under
10 normal circumstances do support, a prevalence of vegetation
11 typically adapted for life in saturated soil conditions."

12 23. 33 C.F.R. § 328.3(c), at all times relevant to the CWA
13 violations alleged in this complaint, defines "adjacent" as
14 "bordering, contiguous, or neighboring." It further provides:
15 "Wetlands separated from other waters of the United States by
16 man-made dikes or barriers, natural river berms, beach dunes and
17 the like are 'adjacent wetlands.'"²

18 24. Section 309(b) of the CWA, 33 U.S.C. § 1319(b),
19 authorizes the commencement of a civil action for appropriate
20 relief, including a permanent injunction, against any person who,
21 *inter alia*, violates 33 U.S.C. § 1311(a) by discharging dredged
22 or fill material without obtaining and complying with a permit
23 issued by the Corps pursuant to 33 U.S.C. § 1344.

24
25 ¹ This regulation has since been amended by the "Clean Water
26 Rule," 80 Fed. Reg. 37,054 (June 29, 2015), but the activities in
27 question occurred before the effective date of the Clean Water
28 Rule. The Clean Water Rule has been stayed pending resolution of
claims that it is arbitrary, capricious, and contrary to law.
See In re EPA, 803 F.3d 804 (6th Cir. 2015).

² *See supra* n.1.

1 25. 33 U.S.C. § 1319(d) provides that any person who
2 violates 33 U.S.C. § 1311(a) shall be subject to a civil penalty
3 not to exceed \$25,000 per day for each violation.

4 26. Effective after January 12, 2009, 40 C.F.R. § 19.4
5 adjusts the \$25,000 amount provided in 33 U.S.C. § 1319(d) to
6 \$37,500.

7 27. Each day that dredged or fill material remains in the
8 place where it was discharged without authorization constitutes
9 an additional and continuing violation of 33 U.S.C. § 1311(a).

10 28. Unauthorized discharges into waters of the United
11 States do not eliminate CWA regulatory jurisdiction, even if such
12 unauthorized discharges have the effect of destroying waters of
13 the United States.

14 29. Liability for violating 33 U.S.C. § 1311(a) is strict,
15 joint, and several.

16 **GENERALLY APPLICABLE ALLEGATIONS**

17 **Location of the CWA Violations**

18 30. The CWA violations alleged in this complaint occurred
19 on real property in rural Tehama County, California, just south
20 of the city of Red Bluff and due west of Interstate 5.

21 31. This real property is approximately 1,505 acres.

22 32. This real property is generally bounded on the north by
23 Ohm Road (which may also be known as Rawson Avenue), on the south
24 by the main stem of Coyote Creek (discussed *infra*), on the west
25 by Paskenta Road, and on the east by Rawson Road.

26 33. Tehama County records indicate that this real property
27 includes Tehama County parcels with Assessor Parcel Numbers
28 ("APN") 037-020-01, -03, -04, -023, -024, -025, and -026.

1 34. For shorthand purposes, this complaint refers to the
2 real property referenced in paragraphs 30-33 above as "the Site."

3 35. On or about March 22, 2011, Defendant Roger J. LaPant,
4 Jr. acquired ownership of the Site (as well as additional real
5 property comprising approximately 450 acres immediately to the
6 south of the main stem of Coyote Creek).

7 36. During Defendant Roger J. LaPant, Jr.'s ownership of
8 the Site, he and/or Defendant J&J Farms contracted and
9 corresponded with at least one environmental consultant,
10 NorthStar Environmental, regarding the Site and its aquatic
11 features.

12 37. On or about March 23, 2012, Duarte Nursery, Inc.
13 acquired ownership of the Site (as well as additional real
14 property comprising approximately 450 acres immediately to the
15 south of the main stem of Coyote Creek).

16 38. On or about October 29, 2012, Defendant Goose Pond Ag,
17 Inc. acquired ownership of the Site (without acquiring ownership
18 of the 450 acres immediately to the south of the main stem of
19 Coyote Creek; Duarte Nursery, Inc. continues to own that real
20 property).

21 39. Defendant Farmland Management Services is the land
22 manager for Defendant Goose Pond Ag, Inc.

23 **The Sacramento River, Coyote Creek, and Oat Creek**

24 40. From its headwaters in the Klamath Mountains, the
25 Sacramento River flows generally south for approximately 445
26 miles before it reaches the Sacramento-San Joaquin River Delta,
27 San Francisco Bay, and the Pacific Ocean.

28 41. The Sacramento River is the longest river in

1 California.

2 42. The Sacramento River's watershed is approximately
3 27,500 square miles.

4 43. The Sacramento River is currently used for interstate
5 commerce.

6 44. The Sacramento River was used in the past for
7 interstate commerce.

8 45. The Sacramento River is susceptible for use in
9 interstate commerce.

10 46. The Sacramento River is navigable in fact from, at
11 least, Tehama County to and including the Pacific Ocean.

12 47. Among the biota that depend on the Sacramento River are
13 "anadromous" salmon, steelhead, and other fish that are hatched
14 in freshwater, spend most of their life in oceanic waters, and
15 return to freshwater to spawn.

16 48. Anadromous fish also depend on streams that contribute
17 flow to the Sacramento River.

18 49. One such stream is Coyote Creek, the main stem of which
19 forms the southern boundary of the Site.

20 50. Coyote Creek carries water.

21 51. Coyote Creek has a bed and bank.

22 52. Coyote Creek originates generally west of the Site.

23 53. The direction of the flow of water in Coyote Creek is
24 generally from west to east.

25 54. Coyote Creek's watershed, or the area from which it
26 receives water, exceeds 16,000 acres.

27 55. Downstream (east) of the Site, Coyote Creek joins Oat
28 Creek.

1 56. Oat Creek carries water.

2 57. Oat Creek has a bed and bank.

3 58. The direction of the flow of water in Oat Creek is
4 generally from west to east.

5 59. Oat Creek's watershed, at its junction with Coyote
6 Creek, exceeds 22,000 acres.

7 60. Downstream (east) of Coyote Creek's confluence with Oat
8 Creek, Oat Creek joins the Sacramento River.

9 61. Coyote Creek and Oat Creek contribute flow to the
10 Sacramento River.

11 62. The Sacramento River, Coyote Creek, and Oat Creek are
12 critical habitat for, *inter alia*, two threatened species:
13 Central Valley Spring Run Chinook Salmon (*Oncorhynchus*
14 *tshawytscha*) and Central Valley Steelhead (*Oncorhynchus mykiss*).
15 50 C.F.R. § 223.102(c)(4) and (17); *id.* § 226.211(k) and (l).
16 The Endangered Species Act ("ESA") defines "critical habitat" for
17 a threatened or endangered species, in pertinent part, as "the
18 specific areas within the geographical area occupied by the
19 species, at the time it is listed in accordance with the
20 provisions of section 1533 of this title, on which are found
21 those physical or biological features (I) essential to the
22 conservation of the species and (II) which may require special
23 management considerations or protections"; and "specific areas
24 outside the geographical area occupied by the species at the time
25 it is listed in accordance with the provisions of section 1533 of
26 this title, upon a determination by the Secretary that such areas
27 are essential for the conservation of the species." 16 U.S.C.
28 § 1532(5)(A)(i), (ii). The ESA defines "endangered species" in

1 pertinent part as "any species which is in danger of extinction
2 throughout all or a significant portion of its range." *Id.*
3 § 1532(6). The ESA defines "threatened species" as "any species
4 which is likely to become an endangered species within the
5 foreseeable future throughout all or a significant portion of its
6 range." *Id.* § 1532(20). The ESA defines "species" to include
7 "subspecies" and certain "distinct population segment[s]." *Id.*
8 § 1532(16).

9 63. Central Valley Spring Run Chinook Salmon and Central
10 Valley Steelhead are anadromous fish.

11 64. Critical habitat for Central Valley Spring Run Chinook
12 Salmon extends upstream (west) from the confluence of Oat Creek
13 with the Sacramento River to the following location in Coyote
14 Creek: Latitude 40.0929°, Longitude -122.1621°. 50 C.F.R.
15 § 226.211(k)(1)(ii).

16 65. Critical habitat for Central Valley Steelhead extends
17 upstream (west) from the confluence of Oat Creek with the
18 Sacramento River to the following location in Oat Creek:
19 Latitude 40.0769°, Longitude -122.2168°. 50 C.F.R.
20 § 226.211(l)(1)(ii).

21 66. The Site is upstream (west) of critical habitat for
22 Central Valley Spring Run Chinook Salmon and Central Valley
23 Steelhead.

24 67. Alteration in the timing and volume of water flows and
25 sediment transport delivered from the Coyote Creek ecosystem to
26 Oat Creek and then to the Sacramento River will alter conditions
27 in the Sacramento River for maintaining water quality and
28 navigation.

1 68. Alteration in the timing and volume of water flows and
2 sediment transport delivered from the Coyote Creek ecosystem to
3 Oat Creek and then to the Sacramento River will alter conditions
4 in the Sacramento River for maintaining suitable habitat for
5 support of several classes of aquatic faunal species such as
6 macroinvertebrate communities (food webs for fish) and adult and
7 juvenile fishes.

8 69. Exhibit 1 to this complaint is a map that fairly and
9 accurately depicts the flow path from the main stem of Coyote
10 Creek at the Site to the Sacramento River.

11 **Branches of Coyote Creek**

12 70. In addition to being bordered by the main stem of
13 Coyote Creek, the interior of the Site contains -- or contained
14 prior to the CWA violations alleged in this complaint -- streams.

15 71. These streams carry -- or carried prior to the CWA
16 violations alleged in this complaint -- water.

17 72. These streams have -- or had prior to the CWA
18 violations alleged in this complaint -- beds and banks.

19 73. The direction of the flow of water in these streams is
20 -- or was prior to the CWA violations alleged in this complaint
21 -- generally from west to east, north to south, or northwest to
22 southeast.

23 74. These streams contribute -- or contributed prior to the
24 CWA violations alleged in this complaint -- flow to the main stem
25 of Coyote Creek.

26 75. These streams function -- or functioned prior to the
27 CWA violations alleged in this complaint -- as branches of Coyote
28 Creek.

Adjacent Wetlands

76. In addition to streams, the interior of the Site contains -- or contained prior to the CWA violations alleged in this complaint -- other aquatic features.

77. These aquatic features include -- or included prior to the CWA violations alleged in this complaint -- vernal pools and swales.

78. These aquatic features are -- or were prior to the CWA violations alleged in this complaint -- inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances did support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

79. These aquatic features are -- or were prior to the CWA violations alleged in this complaint -- "wetlands" within the meaning of 33 C.F.R. § 328.3(a)(7), (b).

80. Wetlands at the Site provide -- or provided prior to the CWA violations alleged in this complaint -- suitable habitat for, *inter alia*, vernal pool fairy shrimp (*Branchinecta lynchi*), a threatened species, and vernal pool tadpole shrimp (*Lepidurus packardii*), an endangered species. 50 C.F.R. § 17.11(h); *Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Conservancy Fairy Shrimp, Longhorn Fairy Shrimp, and Vernal Pool Tadpole Shrimp; and Threatened Status for the Vernal Pool Fairy Shrimp*, 59 Fed. Reg. 48,136 (Sept. 19, 1994).

81. Since at least 2006, wetlands at the Site have been designated critical habitat for vernal pool fairy shrimp. 50

1 C.F.R. § 17.95(h)(13); *Endangered and Threatened Wildlife and*
2 *Plants; Designation of Critical Habitat for Four Vernal Pool*
3 *Crustaceans and Eleven Vernal Pool Plants*, 71 Fed. Reg. 7,118,
4 7,141-42 (Feb. 10, 2006).

5 82. Exhibit 2 to this complaint is a true and correct copy
6 of a map, codified at 50 C.F.R. § 17.95(h)(13), depicting areas
7 of critical habitat for vernal pool fairy shrimp.

8 83. The Site falls within the area marked as "Unit 6" on
9 Exhibit 2.

10 84. Wetlands at the Site border (or bordered prior to the
11 CWA violations alleged in this complaint), are (or were prior to
12 the CWA violations alleged in this complaint) contiguous to, or
13 neighbor (or neighbored prior to the CWA violations alleged in
14 this complaint) the main stem of Coyote Creek and/or the streams
15 or branches of Coyote Creek within the interior of the Site.

16 **Waters of the United States**

17 85. The Sacramento River is a traditional navigable water
18 within the meaning of 33 C.F.R. § 328.3(a)(1) from at least Tehama
19 County to the Pacific Ocean.

20 86. Coyote Creek is a "tributary" of the Sacramento River
21 within the meaning of 33 C.F.R. § 328.3(a)(5).

22 87. Oat Creek is a "tributary" of the Sacramento River
23 within the meaning of 33 C.F.R. § 328.3(a)(5).

24 88. The streams or branches of Coyote Creek within the
25 interior of the Site are -- or were prior to the CWA violations
26 alleged in this complaint - "tributaries" of Oat Creek and the
27 Sacramento River within the meaning of 33 C.F.R. § 328.3(a)(5).

28 89. Wetlands at the Site are -- or were prior to the CWA

1 violations alleged in this complaint -- "adjacent" to one or more
2 tributaries within the meaning of 33 C.F.R. § 328.3(a)(7), (c).

3 90. Coyote Creek, including the streams or branches of
4 Coyote Creek within (or previously within) the interior of the
5 Site, either alone or in combination with similarly situated
6 lands in the region, significantly affects the chemical,
7 physical, or biological integrity of the Sacramento River.

8 91. Oat Creek, either alone or in combination with
9 similarly situated lands in the region, significantly affects the
10 chemical, physical, or biological integrity of the Sacramento
11 River.

12 92. Adjacent wetlands at the Site, either alone or in
13 combination with similarly situated lands in the region,
14 significantly affect or affected the chemical, physical, or
15 biological integrity of the Sacramento River.

16 93. At all times relevant to the CWA violations alleged in
17 this complaint, the Sacramento River, Oat Creek, Coyote Creek,
18 including the streams or branches of Coyote Creek within the
19 interior of the Site, and adjacent wetlands at the Site
20 constitute "waters of the United States" and "navigable waters"
21 within the meaning of 33 U.S.C. § 1362(7).

22 **COUNT ONE: CWA VIOLATIONS BY DEFENDANTS LAPANT AND J&J FARMS**

23 94. The United States repeats the allegations set forth in
24 Paragraphs 1 through 93 of this complaint.

25 95. Defendants Roger J. LaPant, Jr. and J&J Farms are each
26 a "person" under 33 U.S.C. § 1362(5).

27 96. Beginning in or about July 2011, Defendants Roger J.
28 LaPant, Jr. and J&J Farms or a person at their (or either

1 person's) behest operated a tractor with tillage implements
2 and/or other earthmoving equipment at the Site.

3 97. This equipment operated in uplands as well as in waters
4 of the United States -- potentially 100 or more acres of waters
5 of the United States.

6 98. As operated, this equipment constituted a "point
7 source" within the meaning of 33 U.S.C. § 1362(14).

8 99. Operation of this equipment resulted in the placement
9 of dredged spoil, biological materials, rock, sand, cellar dirt,
10 or other earthen material constituting "pollutants" within the
11 meaning of 33 U.S.C. § 1362(6) into waters of the United States.

12 100. Operation of this equipment fragmented and severely
13 impacted hydrophydic plants, substantially disturbed the root
14 system, or involved the mechanized pushing, dragging, or other
15 redepositing of excavated soil material.

16 101. Operation of this equipment had the effect of replacing
17 one or more portions of waters of the United States with dry land
18 or changing the bottom elevation of one or more portions of
19 waters of the United States.

20 102. Operation of this equipment had the effect of
21 redistributing surface and/or sub-surface material in a manner
22 which changed one or more areas of waters of the United States to
23 dry land.

24 103. Operation of this equipment resulted in the "discharge
25 of any pollutant" within the meaning of 33 U.S.C. § 1311(a).

26 104. At no time did Defendants Roger J. LaPant, Jr. and J&J
27 Farms, or any person on their (or either person's) behalf, apply
28 for, secure, or comply with a CWA section 404 permit to discharge

1 pollutants at the Site.

2 105. Defendants Roger J. LaPant, Jr. and J&J Farms violated
3 33 U.S.C. § 1311(a).

4 106. The operation of equipment and resulting discharges of
5 pollutants by or on behalf of Defendants Roger J. LaPant, Jr. and
6 J&J Farms ceased no later than on or about March 23, 2012, when
7 Defendant Roger J. LaPant, Jr. transferred ownership of the Site
8 to Duarte Nursery, Inc.

9 107. After such cessation, Defendants Roger J. LaPant, Jr.
10 and J&J Farms allowed pollutants that had been discharged without
11 authorization to remain in waters of the United States.

12 108. Defendants Roger J. LaPant, Jr. and J&J Farms remain in
13 violation of 33 U.S.C. § 1311(a).

14 **COUNT TWO: CWA VIOLATIONS BY DEFENDANTS**

15 **GOOSE POND AG, INC. AND FARMLAND MANAGEMENT SERVICES**

16 109. The United States repeats the allegations set forth in
17 Paragraphs 1 through 108 of this complaint.

18 110. On or about October 29, 2012, Duarte Nursery, Inc.
19 transferred ownership of the Site to Defendant Goose Pond Ag,
20 Inc.

21 111. Defendants Goose Pond Ag, Inc. and its land manager,
22 Farmland Management Services, are each a "person" under 33 U.S.C.
23 § 1362(5).

24 112. Beginning on or about November 15, 2012, Defendants
25 Goose Pong Ag, Inc. and Farmland Management Services or persons
26 at their behest operated a slip plow, tractor with tillage
27 implements, road-building machinery, land-leveler, trencher,
28 and/or other earthmoving equipment at the Site.

1 113. This equipment operated in uplands as well as in waters
2 of the United States -- potentially 100 or more acres of waters
3 of the United States.

4 114. As operated, this equipment constituted a "point
5 source" within the meaning of 33 U.S.C. § 1362(14).

6 115. Operation of this equipment resulted in the placement
7 of dredged spoil, biological materials, rock, sand, cellar dirt,
8 or other earthen material constituting "pollutants" within the
9 meaning of 33 U.S.C. § 1362(6) into waters of the United States.

10 116. Operation of this equipment fragmented and severely
11 impacted hydrophydic plants, substantially disturbed the root
12 system, or involved the mechanized pushing, dragging, or other
13 redepositing of excavated soil material.

14 117. Operation of this equipment had the effect of replacing
15 one or more portions of waters of the United States with dry land
16 or changing the bottom elevation of one or more portions of
17 waters of the United States.

18 118. Operation of this equipment had the effect of
19 redistributing surface and/or sub-surface material in a manner
20 which changed one or more areas of waters of the United States to
21 dry land.

22 119. Operation of this equipment resulted in the "discharge
23 of any pollutant" within the meaning of 33 U.S.C. § 1311(a).

24 120. At no time did Defendants Goose Pond Ag, Inc. or
25 Farmland Management Services, or any person on their behalf,
26 apply for, secure, or comply with a CWA section 404 permit to
27 discharge pollutants at the Site.

28 121. Defendants Goose Pond Ag, Inc. and Farmland Management

Services violated 33 U.S.C. § 1311(a).

122. After ceasing operation of equipment in waters of the United States at the Site, Defendants Goose Pond Ag, Inc. and Farmland Management Services allowed pollutants that had been discharged without authorization to remain in waters of the United States.

123. Defendants Goose Pond Ag, Inc. and Farmland Management Services remain in violation of 33 U.S.C. § 1311(a).

REQUEST FOR RELIEF

WHEREFORE, the United States respectfully requests that this Court order the following relief:

Enjoin Defendants from further discharges of pollutants except as in compliance with the CWA;

Compel Defendants to restore impacted waters of the United States;

Require Defendants to mitigate for impacted waters of the United States;

Assess and direct Defendants to pay civil penalties;

Award the United States the costs and disbursements of this action; and

Grant the United States such other relief as the Court deems appropriate.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

Dated: June 30, 2016

/s/ Andrew J. Doyle
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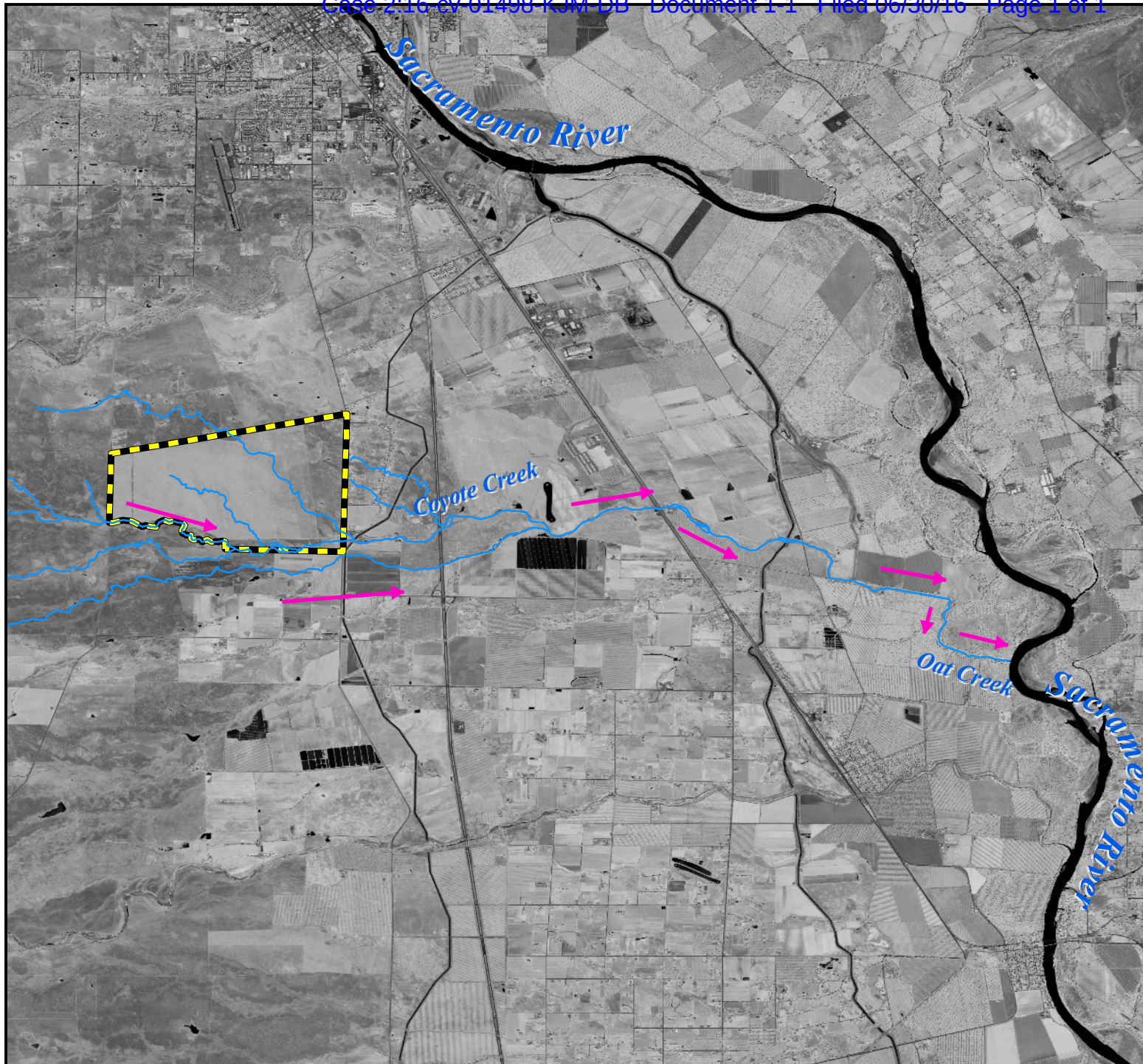
19 *Attorneys for the United States*

EXHIBITS TO THIS COMPLAINT:

- Exhibit 1: Flow path from the main stem of Coyote Creek at the Site to the Sacramento River
- Exhibit 2: Map from 50 C.F.R. § 17.95(h)(13) depicting areas of critical habitat for vernal pool fairy shrimp; Site falls within area marked "Unit 6"

ALSO ATTACHED TO THIS COMPLAINT:

- Civil Cover Sheet
- Notice of Related Cases and Summary Judgment Order dated June 10, 2016, by the Honorable Kimberly J. Mueller, United States District Judge, in *Duarte v. U.S. Army Corps of Eng'rs*, 2:13-cv-02095-KJM-AC (E.D. Cal.)



Legend

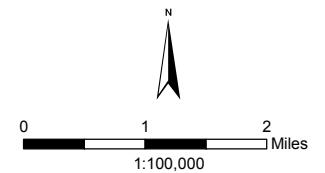
— Stream Flowline

NAME

Subject Area

Data Source:
USGS National Hydrography Dataset (Stream
Flowline) & USDA 2012 National Agriculture
Imagery Program (2012 NAIP)

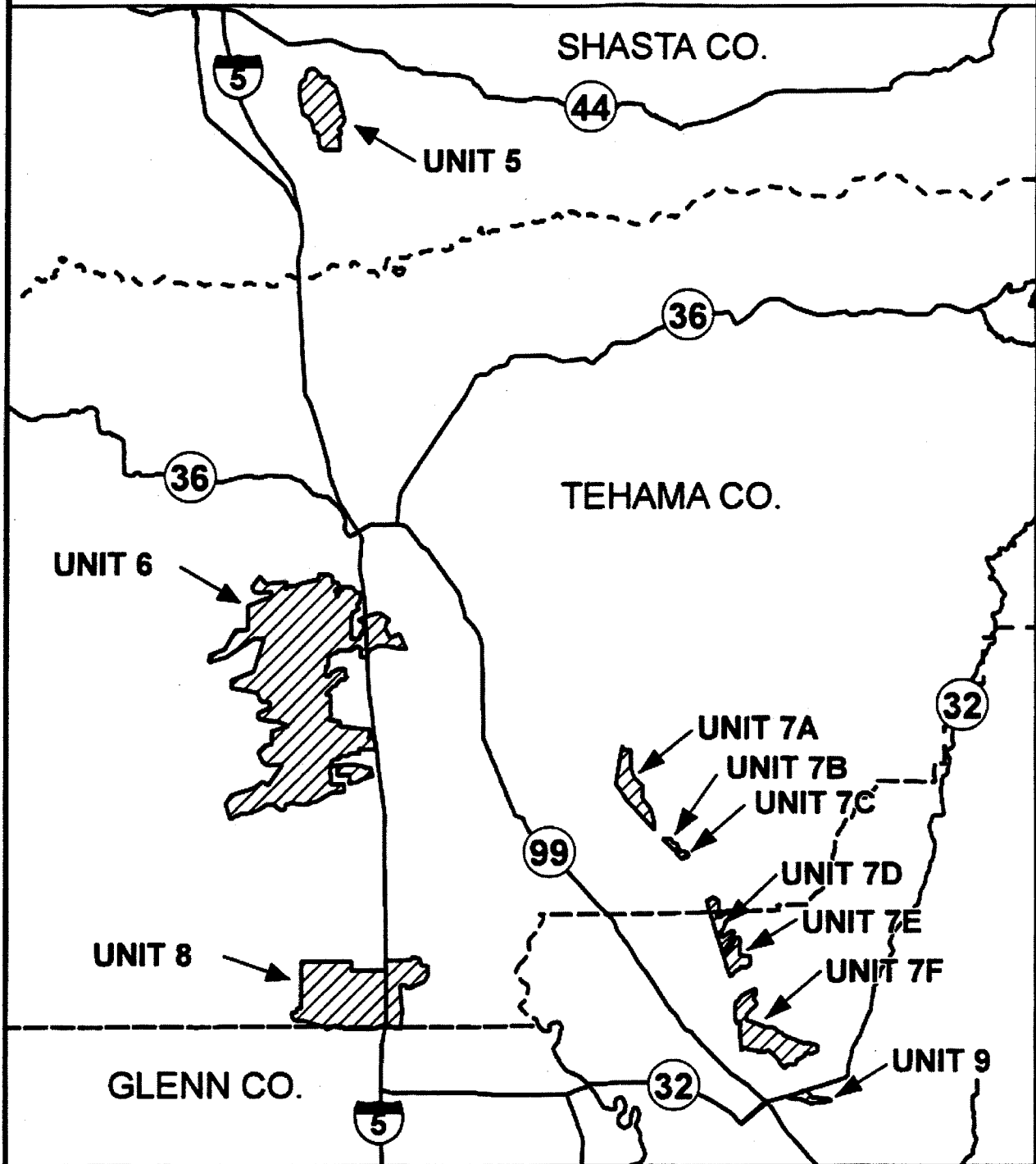
Coordinate System: GCS_WGS_1984



**Flow of Coyote Creek
from Subject Area to
Oat Creek to
Sacramento River**



Map 2. Vernal Pool Critical Habitat
 Vernal Pool Fairy Shrimp, Units 5 - 9



CIVIL COVER SHEET

Case 2:16-cv-01498-KJM-DB Document 1-3 Filed 06/30/16 Page 1 of 2

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

United States of America

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Gregory T. Broderick, USAO-E.D. Cal., 501 I Street, Suite 10-100, Sacramento, CA 95814, (916) 554-2700 (main line)

Andrew J. Doyle, John Thomas H. Do, Samara M. Spence, USDOJ-ENRD, P.O. Box 7611, Washington, DC 20044, (202) 514-2219 (main line)

DEFENDANTSRoger J. LaPant, Jr.
J&J Farms
Goose Pond Ag, Inc.
Farmland Management Services

County of Residence of First Listed Defendant Butte
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

For Roger J. LaPant, Jr. and J&J Farms: Therese Y. Cannata, Cannata, O'Toole, Fickes & Almazan LLP, 100 Pine Street, Suite 350, San Francisco, CA 94111 (415) 409-8900 (main line). For Goose Pond Ag, Inc. and Farmland Management Services: Robert P. Soran, Downey Brand, 621 Capital Mall, 18th Floor, Sacramento, CA 95814 (916) 444-1000 (main line)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☒ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities Employment <input type="checkbox"/> 446 Amer. w/Disabilities Other <input type="checkbox"/> 448 Education PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTIONCite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Sections 301, 309, and 404 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311, 1319, 1344

Brief description of cause:

Unauthorized discharges of pollutants into waters of the United States, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a)

VII. REQUESTED IN COMPLAINT:☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$ Injunctive Relief and Civil Penalties

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE Kimberly J. Mueller

DOCKET NUMBER 2:13-cv-02095-KJM-AC

DATE

06/30/2016

SIGNATURE OF ATTORNEY OF RECORD

/s/ Andrew J. Doyle

FOR OFFICE USE ONLY

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. (a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

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Attorneys for the United States

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROGER J. LAPANT, JR.; J&J
FARMS; GOOSE POND AG, INC.;
and FARMLAND MANAGEMENT
SERVICES,

Defendants.

No.

NOTICE OF RELATED CASES

TO THE COURT AND THE PARTIES:

Pursuant to Local Rule 123, counsel for the United States hereby provides notice that the following case is related:

- *Duarte Nursery, Inc. v. U.S. Army Corps of Eng'rs*, No. 2:13-cv-02095-KJM-AC (E.D. Cal.) ("*Duarte*")

Both the present action and *Duarte* involve property in Tehama County, California, formerly owned by Duarte Nursery, Inc. and immediately to the north of Duarte Nursery, Inc.'s current property. Compare Judge Mueller's Summary Judgment Order dated June 10, 2016, in *Duarte* (ECF No. 195¹) at 5:23 to 9:20 with Complaint dated June 30, 2016, in the present case at ¶¶ 30-38. Moreover, both actions involve similar factual allegations and legal questions. Compare Judge Mueller's Summary Judgment Order in *Duarte* at 24:1 to 35:2 (determining that earthmoving activities conducted on Duarte Nursery, Inc.'s current property violated the Clean Water Act's prohibition against discharging dredged or fill material into waters of the United States without authorization) with Compl. at ¶¶ 94-123 (alleging that earthmoving activities conducted on Duarte Nursery, Inc.'s former property, immediately to the north of its current property, violated the same Clean Water Act prohibition).

As reflected in the Summary Judgment Order in *Duarte*, the Judge presiding over that case, the Honorable Kimberly J. Mueller, has already devoted substantial time and effort to understanding facts regarding the property; upstream, on-site, and downstream aquatic resources (Coyote Creek, associated streams and wetlands, Oat Creek, and the Sacramento River); and legal questions associated with the Clean Water Act's prohibition against discharging dredged or fill material into waters of the United States without authorization. As such, assigning the present case to Judge Mueller is likely to effect a substantial

¹ For the Court's convenience, a copy of Judge Mueller's Summary Judgment Order in *Duarte* is attached to this notice.

savings of judicial effort and prevent the duplication of labor.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

Dated: June 30, 2016

/s/ Andrew J. Doyle_____
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Attorneys for the United States

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF
ENGINEERS,

Defendant.

No. 2:13-cv-02095-KJM-AC

ORDER

AND RELATED COUNTERCLAIMS

This matter is before the court on cross-motions for summary judgment brought by plaintiff Duarte Nursery, Inc. (the Nursery), plaintiff John Duarte, and defendant United States Army Corps of Engineers (the Army Corps) and counterclaim-plaintiff United States of America (collectively, “the United States”). ECF Nos. 128, 136, 138, 139. The United States also moves to dismiss or in the alternative for summary judgment on plaintiffs’ retaliatory prosecution claim. ECF No. 134. The court received oppositions and replies, ECF Nos. 152–161, and held a hearing on November 20, 2015 on the cross-motions. Anthony Francois, David Ivester, Gerald Brunn, and Peter Prows appeared for the Nursery and Duarte. Andrew Doyle, Gregory Broderick, and Samara Spence appeared for the United States.

For reasons explained below, the court GRANTS the United States' motions for summary judgment on plaintiffs' Due Process claims and the United States' Clean Water Act (CWA) counterclaim. The court GRANTS the United States' motion to dismiss plaintiffs' retaliatory prosecution claim WITHOUT LEAVE TO AMEND.

I. PROCEDURAL HISTORY

The operative Second Amended Complaint (SAC) alleges that the Army Corps violated plaintiffs' Fifth Amendment right to due process and First Amendment right against retaliatory prosecution. *See generally* ECF No. 90. The United States' Counterclaim against plaintiffs alleges violation of § 301(a) of the CWA, 33 U.S.C. § 1311(a).¹ ECF No. 28 at 16. After two rounds of motions to dismiss, the parties have filed the pending cross-motions for summary judgment and motion to dismiss. ECF Nos. 127, 134, 136, 138, 139.

II. EVIDENTIARY OBJECTIONS

Rule 56 allows objections to evidence when "the material cited . . . cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). As this language suggests, at summary judgment, the evidence's propriety depends not on its form, but on its content. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Block v. City of L.A.*, 253 F.3d 410, 418–19 (9th Cir. 2001). The party seeking admission of evidence "bears the burden of proof of admissibility." *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1004 (9th Cir. 2002). Upon objection, that party must direct the district court to "authenticating documents, deposition testimony bearing on attribution, hearsay exceptions and exemptions, or other evidentiary principles under which the evidence in question could be deemed admissible" *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385–86 (9th Cir. 2010). But courts are sometimes "much more lenient" with the affidavits and documents of the party opposing summary judgment. *Scharf v. U.S. Atty. Gen.*, 597 F.2d 1240, 1243 (9th Cir. 1979).

¹ The parties previously stipulated with the court's approval that the United States need not reassert its Counterclaim, ECF No. 28, should Duarte file an amended complaint. ECF No. 64. The United States thus did not file an amended Counterclaim upon plaintiffs' filing of the Second Amended Complaint.

1 Plaintiffs' objections on relevance and hearsay grounds are addressed below.

2 A. Relevance

3 First, "moving papers themselves—not separate tables of objections—are the
4 correct mode of objection on relevance and similar grounds." *Gonzalez v. Cty. of Yolo*, No. 13-
5 01368 KJM AC, 2015 WL 4419025, at *4 (E.D. Cal. July 17, 2015) (citations omitted). Federal
6 Rule of Civil Procedure 56 expressly seeks out genuine disputes of material facts. "A court can
7 award summary judgment only when there is no genuine dispute of material fact. It cannot rely
8 on irrelevant facts, and thus relevance objections are redundant." *Burch v. Regents of Univ. of*
9 *Cal.*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006).

10 Accordingly, the court overrules objections based on relevance.

11 B. Hearsay

12 Second, objections to form are often a poor fit for summary judgment. At this
13 stage, the propriety of evidence depends not on its form, but on its content. *Celotex*, 477 U.S. at
14 324 ("We do not mean that the nonmoving party must produce evidence in a form that would be
15 admissible at trial in order to avoid summary judgment [Rule 56] permits a proper summary
16 judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c),
17 except the mere pleadings themselves."); *see also Block*, 253 F.3d at 418–19. Rule 56(e) uses the
18 modal construction, "would be admissible," for a reason. In particular, hearsay objections are
19 often premature at summary judgment when asserted by the moving party. Should the court grant
20 a motion for summary judgment, it must do so on the basis of admissible evidence. *Gonzalez*,
21 2015 WL 4419025, at *4. But a party opposing a motion for summary judgment seeks a trial, not
22 a verdict, and it stands to reason that if evidence may probably be converted to admissible form
23 for trial, it should not be excluded at summary judgment. *See Fraser*, 342 F.3d at 1036 (declining
24 to exclude hearsay statements because in a different form the testimony could be admitted at
25 trial); *Hatcher v. Cty. of Alameda*, No. 09-1650, 2011 WL 1225790, at *3 (N.D. Cal. Mar. 31,
26 2011) (same).

27 To the extent objections are not premature and are proper at this time, evidence is
28 admissible if it is defined as non-hearsay under Federal Rule of Evidence 801(d) or falls within a

1 hearsay exception under Rules 803, 804, or 807. Rule 803(6) provides an exception for records
2 of a regularly conducted activity. Rule 803(8) provides an exception for public records. And an
3 opposing party's statement offered against that party is not considered hearsay. Fed. R. Evid.
4 801(d)(2)(A). Likewise, statements offered against a party that were made by the party's agent or
5 employee on a topic that is within the scope of the employment relationship are excluded from
6 the hearsay rule. Fed. R. Evid. 801(d)(2).

7 The objections to hearsay are overruled to the extent the evidence objected to on
8 this ground is discussed below.

9 III. UNDISPUTED FACTS

10 Under the CWA regulations, "waters of the United States" cover all traditionally
11 navigable waters, tributaries of these waters, and wetlands adjacent to traditionally navigable
12 waters, the last of which will be discussed below. 33 C.F.R. § 328.3(a)(1), (5) and (7). In
13 Tehama County, California, the Sacramento River is navigable-in-fact until it reaches San
14 Francisco Bay and the Pacific Ocean. Duarte's Resp. to the United States' CWA Separate Stmt.
15 (DRCWA) No. 1, ECF No. 150-11. Two tributaries of the Sacramento River in Tehama County
16 are Coyote Creek and Oat Creek. DRCWA No. 2. In Tehama County, Coyote Creek generally
17 flows easterly and southeasterly to its junction with Oat Creek. DRCWA No. 3. From that
18 junction, Oat Creek meets the Sacramento River within a mile. DRCWA No. 4. The watersheds
19 of Coyote Creek and Oat Creek contain associated streams and wetlands. DRCWA No. 5. A
20 report by the United States' expert provides several aerial maps that show these waterways and
21 their relation to plaintiff's property. The court includes several of the maps below for the purpose
22 of clarifying the locations of plaintiff's property and the "waters of the United States" at issue
23 here. Each map is marked with a compass on the upper right hand corner, indicating the top of
24 the map is the North, the right of the map is the East, the left of the map is the West, and the
25 bottom of the map is the South.

26 /////

27 /////

28 /////

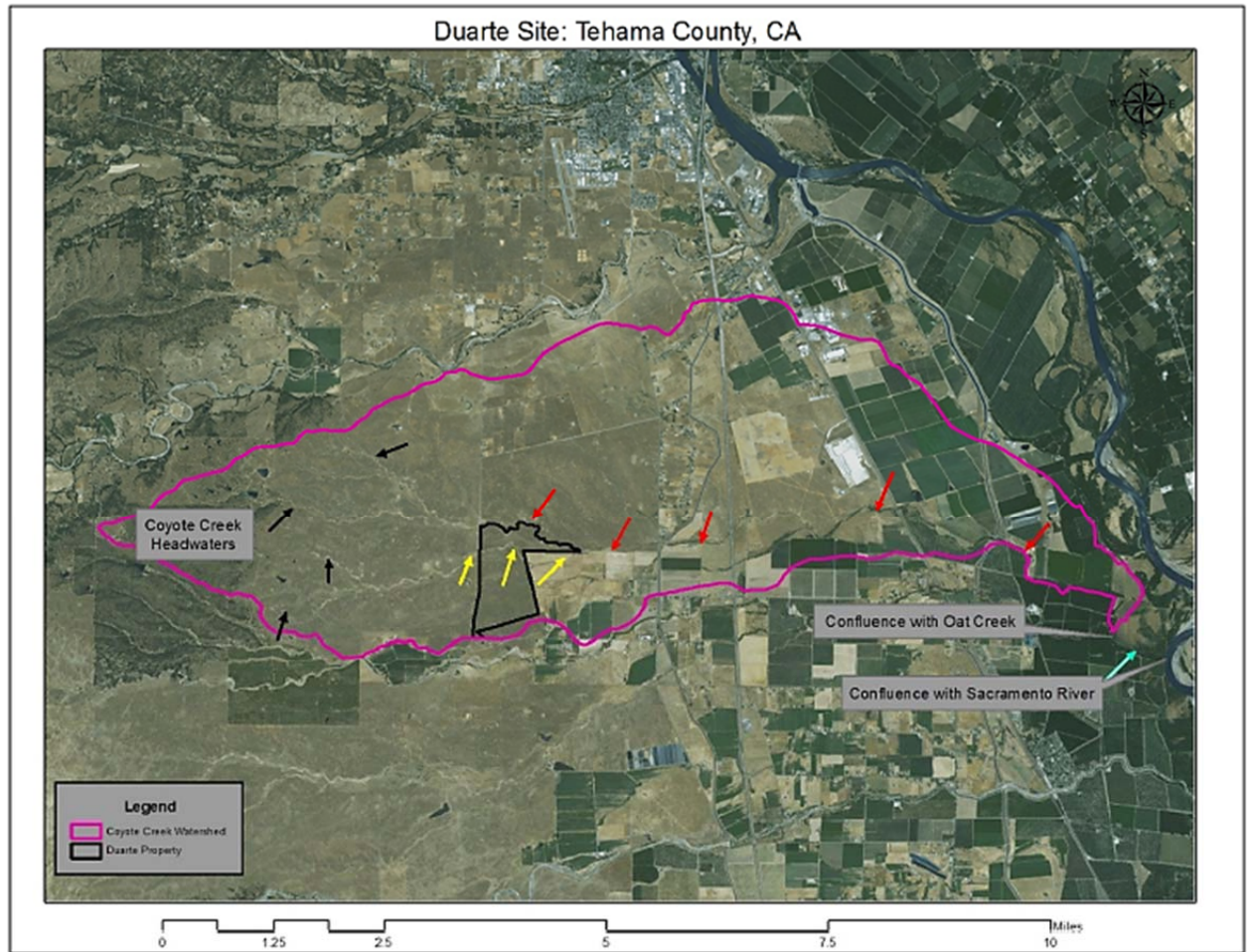


Figure 34 Coyote Creek and its tributaries

Stokely Expert Report at 55, ECF No. 124-1 (showing Coyote Creek Watershed outlined in pink, and the plaintiffs' property outlined in black; black arrows point to headwater tributaries; yellow arrows point to a tributary of Coyote Creek; red arrows point to main stem of Coyote Creek below Paskenta Road; all branches and headwater tributaries join mainstem of Coyote Creek on or just downstream of plaintiffs' property).

John Duarte was the president of the Nursery when it purchased approximately 1,950 to 2,000 acres of real estate in Tehama County, California in April 2012, after referral of the site from a Brad Munson. Nursery's Resp. to United States' Due Process Separate Stmt. (NRDP) No. 4, ECF No. 153-1³; Munson Dep. 16:13–18, ECF No. 112; John Duarte Dep.

³ The parties each submitted a separate statement of undisputed facts for each claim, and numerous facts overlap among the statements. To avoid lengthy string citations, though certain undisputed facts may appear in multiple statements, the court cites to only one.

1 21:11-13, 22–24, ECF No. 109. Coyote Creek flows along the northern border of the real estate,
2 which was bounded on the west by Paskenta Road; the property has an unusual shape in the
3 southwest corner, separated by a fence that is not shown on any of the maps. DRCW No. 7–9.

4 Prior to the April purchase, in March 2012, the Nursery entered into a contract
5 with Goose Pond to sell approximately 1,500 acres of the northern portion of the real estate.
6 NRDP No. 11. The Nursery then retained NorthStar Environmental (NorthStar), an
7 environmental consulting firm, to provide a report and delineation map for the 1,500 acres.
8 DRCWA No. 13; NRDP No. 19. The Nursery also asked NorthStar to provide a separate report
9 and delineation map for the remaining approximately 450 acres, the parcel retained by the
10 plaintiffs and at issue here (the Property).⁴ *Id.* The Nursery requested that NorthStar “map
11 appropriate buffers around all wetlands.” DRCWA No. 14. In May 2012, NorthStar sent a letter
12 to Jim Duarte, father of plaintiff John Duarte, suggesting the Nursery should have NorthStar’s
13 draft delineations verified by the Army Corps prior to any grading activities. ECF No. 131-3,
14 NSE0005677. At the time Jim Duarte was the chairman of the Nursery’s board; John Duarte was
15 the president of the Nursery, and had been the president since sometime between 2008 and 2010.
16 John Duarte Dep. 21:22–22:5. As president, John Duarte was responsible for the general
17 management of the Nursery, including decisions with respect to land purchase and land usage.
18 *Id.* 22:9–14. In 2012, John Duarte had significant input over activities and precautions taken with
19 respect to the real estate. *Id.* 23:7–15.

20 Prior to purchasing the approximately 2,000 acres, plaintiffs were aware of a
21 February 2012 draft delineation provided by NorthStar for the entire acreage. NRDP No. 2; ECF
22 No. 131-1 at 1. The February 2012 draft delineation noted there were a total of 40.78 acres of
23 pre-jurisdictional waters of the United States on the real estate as a whole. ECF No. 131-1 at 10.

24 In July 2012, NorthStar produced a “Draft Delineation of Waters of the United
25 States” for the Property, the 450 acres not covered by the Goose Pond contract. NRDP No. 14.
26 This NorthStar report stated:

27 _____
28

Areas of intact vernal and seasonal swales occur within the Property along with a number of intermittent and ephemeral drainages. Little evidence of past agricultural activities was observed on the Property. The Property has, however, been used in the past as open grazing land

. . .

A total of 16.17 of pre-jurisdictional waters of the U.S. were delineated within the Property. The types of waters of the U.S. identified on-site are distinguished as vernal pools, vernal swales, seasonal wetlands, seasonal swales and other waters including intermittent and ephemeral drainages. These features are mapped at a 1" to 200' scale and are presented in Attachment A. Waters of the U.S. acreages presented in this report should be considered preliminary, subject to review and modification by the [Army Corps] during the wetland delineation verification process.

NorthStar July 2012 Draft Delineation (NorthStar 2012 Draft), ECF No. 131-4 at 1, 9. The NorthStar 2012 Draft also provided a brief summary of the jurisdictional features of U.S. waters:

Vernal Pools and Swales

Vernal pools are defined by the positive indication of three wetland parameters: hydrophytic vegetation specific to vernal pools, hydric soils, and hydrology (*i.e.*, ponding). All three parameters must be present to satisfy the vernal pool definition In addition . . . vernal pools exhibit unique characteristics. Vernal pools form where there is a soil layer below or at the surface that is impermeable or nearly impermeable. Precipitation and surface runoff become trapped or "perched" above this layer. Hardpans are formed by leaching, re-deposition, and cementing of silica materials from high in the soil horizon to a lower horizon. In addition, vernal pools typically occur in landscapes that . . . are shallowly sloping or nearly level, but on a finer scale may be quite bumpy or uneven . . . vernal pools in the Central Valley tend to occur in clusters called "complexes." Within these complexes, pools may be fed or connected by low drainage pathways called "swales," which were detected throughout the site. Swales are often themselves seasonal wetlands that remain inundated with water for much of the wet season, but not long enough to support strong vernal pool characteristics. Vernal pools may remain inundated until spring or early summer, sometimes filling and emptying numerous times during the wet season. Vernal pools gradually dry down during the spring The project area supports 1.07 acres of vernal pools and 4.02 acres of vernal swales. Vernal pools and swales were located primarily in the southwestern portion of the Property where farming has not occurred.

Seasonal Wetlands and Swales

Similar to vernal features, seasonal wetlands and swales are defined by the positive indication of three wetland parameters: hydrophytic vegetation, hydric soils, and hydrology Seasonal wetlands

tend to lack standing water during the late summer months, or during prolonged dry periods The project area supports 0.82 acre of seasonal wetlands and 2.86 acres of seasonal swales.

Other Waters of the United States

Other waters of the U.S. are seasonal or perennial water bodies, including lakes, stream channels, drainages, ponds, and other surface water features that exhibit an ordinary high-water mark but lack positive indicators for one or more of the three wetlands parameters A total of 7.40 acres . . . of other waters of the U.S. were delineated on-site.

. . .

Significant Nexus

Wetlands within the [Property] hold floodwaters and intercept sheet flow from uplands, releasing water in a more consistent manner. These wetlands collect and hold water during significant rain events acting as a biological filter collecting the first flush prior to filtering into [downstream waters].

Hydrology

Hydrology within the Property is characterized by localized surface sheet flow and sub-surface flows from precipitation events. The wetland features on the site all sheet flow or have subsurface flows that drain into one of the multiple other water drainages on the site. These drainages all flow directly into the [Relatively Permanent Waters (RPW)], Coyote Creek

NorthStar 2012 Draft at 9–12 (citations omitted). The NorthStar report’s “significant nexus” analysis is similar to that of the Army Corps’ expert report:

The wetlands and water on-site are hydrologically connected . . . and help to moderate flood flows due to storm events, provide filtration to sediments and pollutants prior to entering Coyote Creek and are designated critical habitat and are known to support the Federally-listed vernal pool fairy shrimp and . . . tadpole shrimp.

Army Corps Expert Report at 2. The United States’ expert report shows vernal pools and swales on the property as of March 2010:

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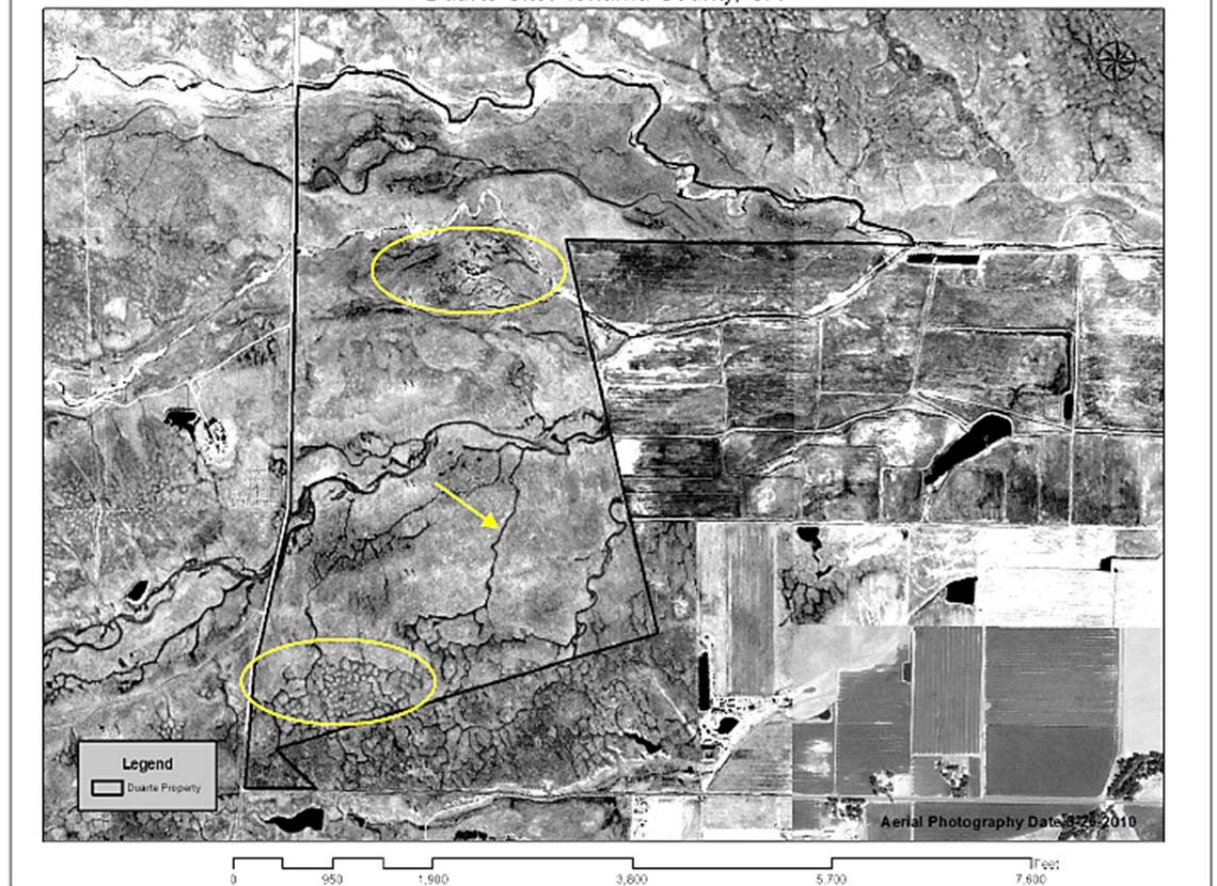


Figure 15 2010

Stokely Expert Report at 36 (in March 2010 pools and swales were still visible as highlighted by yellow circles; yellow arrow points to tributary of Coyote Creek).

In November 2012, the Nursery completed the sale of the 1,500-acre northern portion of the real estate to Goose Pond for 8.7 million dollars. NRDP No. 16. Brad Munson received compensation of \$147,000 for that sale. Munson Dep. 50:6–12. At about this time the Nursery asked Munson to arrange for farming activities on the Property. ECF No. 117-4; Munson Dep. 50:13–52:12. There had been no farming activity on the Property since 1988. Stokely Expert Report at 6, ECF No. 1224-1. Munson contacted a mill, which was a wheat buyer in Artois, California, who recommended Caleb Unruh to do the farming. Munson Dep. 51:7–52:8. Munson was familiar with Unruh, because Unruh harvested the wheat in the northern portion of the Property for the previous owner of the real estate. Unruh Dep. 45:10–46:7, ECF No. 114. Munson instructed Unruh to plant, care for, and harvest wheat on the Property, except the area south of the fence line. Munson Dep. 52:13–53:3; NRDP No. 16; DRCWA No. 21;

Unruh 62:19–64:5. Munson instructed Unruh to till the Property 12 inches or less to loosen the soil for rip penetration. Unruh Dep. 55:4–6, 13–15; *id.* 118:4–9. Rip penetration is the process of turning the garden so the soil is loosened and water, roots, and air can penetrate. *Id.* 55:22–56:7. Munson paid Unruh for the tillage with funds from the Nursery. NRDP Nos. 21, 22.

For the tillage, Unruh used a 360-horsepower International Harvester Case Quadtrac 9370 with Wilcox ripper, NSC 36-24-7, as an attachment (the Equipment). DRCWA No. 23; Unruh Dep. 93:6–94:5. The Equipment has seven 36-inch shanks, which are spaced 24 inches apart. Unruh Dep. 93:17–94:5. When used in tillage, the Equipment causes material to move horizontally, and the shanks create furrows and ridges to the left and right of the furrows. DRCWA No. 29. Unruh noted when he tilled the ground was hard from “just [sitting] there” and the shanks of the ripper were unable to penetrate more than four to six inches. Unruh Dep. 98:9-24. The Equipment did not avoid all of the wetlands delineated by NorthStar. DRCWA No. 28. The United States’ expert report includes a diagram showing the areas tilled and those not:

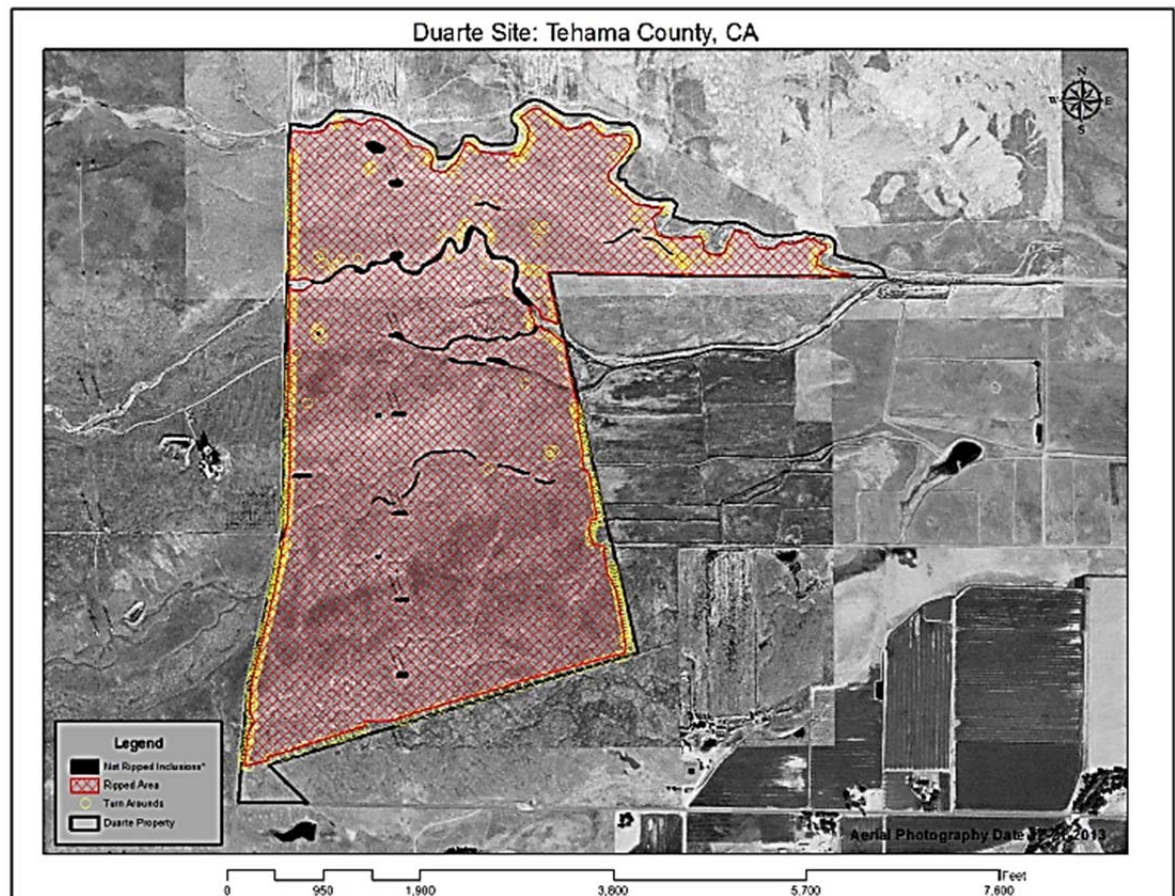


Figure 17 2013

1 Stokely Expert Report at 38 (Property outlined in black; red lines show area plowed, and yellow
2 highlights mark indentations on ground, which show the Equipment turned around on the edge of
3 the Property; black filled-in areas were not tilled).

4 On November 28, 2012, Matthew Kelley from the Army Corps' Redding office
5 drove past the Property. NRDP No. 24. Kelley observed activities and equipment on the
6 Property. He believed there were potential CWA violations and took photographs. Retaliation
7 Stmt. of Undisputed Material Facts (RSUMF) No. 5, ECF No. 158-1. On December 3, 2012,
8 Kelley communicated with state regulators regarding the potential violation as part of his
9 investigation. RSUMF No. 10. Kelley returned to the Property on December 6, 2012 and
10 observed what he believed to be ripping on the Property. RSUMF Nos. 11, 12.

11 Kelley later learned the Nursery owned the Property, RSUMF No. 16, and on
12 December 11, 2012, Kelley called John Duarte, NRDP No. 26. During the December 11, 2012
13 conversation, Kelley informed John Duarte that he observed ripping activities that required a
14 permit under the CWA. NRDP No. 27. John Duarte told Kelley "they knew where the wetlands
15 were and were staying away from them," but Kelley contended the wetlands had not been
16 avoided. NRDP No. 28. John Duarte later conceded he learned in the summer of 2014 that the
17 tillage did not avoid all of the wetlands delineated by NorthStar. NRDP No. 31. Kelley advised
18 John Duarte during the December 2012 conversation that the Army Corps would be sending a
19 formal cease and desist letter (C&D Letter) notifying the Nursery of its violations of the CWA,
20 and it should thus cease and desist any unauthorized activity in the waters of the United States.
21 RSUMF No. 20.

22 After the conversation, Kelley began working on the C&D Letter. On
23 December 17, 2012, Kelley returned to the Property and took photos of the equipment and the
24 land. NRDP No. 25. On February 19, 2013, Kelley completed an initial investigation memo
25 regarding the Nursery's activities on the Property. RSUMF No. 22. The Army Corps sent the
26 C&D Letter to the Nursery on February 25, 2013. RSUMF No. 23. The C&D Letter stated as
27 follows in pertinent part:
28

1 This letter concerns your unauthorized work in waters of the United
2 States. The work is located on or near Coyote Creek . . .

3 Based on available information we have determined that you have
4 discharged dredged or fill material into seasonal wetlands, vernal
5 pools, ve[r]nal swales, and intermittent and ephemeral drainages,
6 which are waters of the United States, without a Department of the
7 Army (DA) permit. Section 404 of the [CWA] required that a DA
8 permit be obtained prior to the discharge of dredged or fill material
9 into waters of the United States, including wetlands. Since a DA
10 permit has not been issued authorizing this discharge, the work is in
11 violation of the [CWA].

12 You are hereby directed to cease and desist all work in waters of the
13 United States until this violation is resolved. We are conducting an
14 investigation to determine the impact of this work as it relates to
15 public interest and the appropriate course of action to remedy the
16 situation. Potential enforcement actions, in addition to or in lieu of
17 fines, penalties and imprisonment, include directing removal of the
18 unauthorized work and restoration of the site Prompt
19 voluntary restoration of the site in accordance with a Corps-
20 approved plan may preclude some or all of these actions.

21 . . .

22 To ensure that all pertinent information is available for our
23 evaluation and included in the public record, you are invited to
24 provide any information which you feel should be considered.
25 Your plans for utilization of the completed work and your
26 evaluation of the need to retain this fill may be of particular
27 significance in determining what actions are to be taken.

28 C&D Letter, ECF No. 116-3. With respect to the Nursery, it was John Duarte's decision as the
Nursery's president whether to follow up with the Army Corps after Kelley's call in December
2012, and the subsequent C&D Letter. James (Jim) Duarte Dep. 154:4-7, 165:21-24, 181:6-10,
ECF No. 108. Upon receiving the Army Corps' letter, the Nursery sought counsel. NRDP
No. 42. The Nursery responded to the C&D Letter through counsel in a letter dated March 21,
2013. NRDP No. 43; *see also* March 2013 Response, ECF No. 116-4.

The March 2013 letter stated the following:

[The Army Corps] 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 . . .
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

1 information is necessary in order for me to even begin to
2 understand any aspects of [the C&D Letter].

3 Please provide, within 10 working days, all “available
4 information” you and your agency used in this matter. [Footnote
5 omitted.] In addition, . . . also provide all agency policies,
6 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 days.

7 March 2013 Response at 1. The March 2013 letter also requested that the Army Corps clarify
8 whether the C&D Letter was an enforcement action, and pointed out that § 404, codified at 33
9 U.S.C. § 1344, exempted agriculture from the § 404 permit requirement. *Id.* at 2.

10 In reply, the Army Corps provided a copy of a 1994 delineation of the property on
11 a compact disc and requested information from the Nursery in response to a series of questions.
12 April 2013 Letter, ECF No. 116-6; NRDP No. 45. The Nursery and John Duarte did not provide
13 the information requested. NRDP No. 46.

14 Within the Army Corps, the matter was then transferred from Kelley to James
15 Robb, a staff member in the Corps’ enforcement division. RSUMF No. 24. Robb believed the
16 Nursery’s activities on the Property constituted a violation of the CWA, and decided to make a
17 formal referral to the U.S. Environmental Protection Agency (EPA) for enforcement. RSUMF
18 Nos. 25, 26. On October 9, 2013, the referral package was completed and “sent for printing,”
19 e.g., the formal package was completed and waiting to be signed off by someone with authority.
20 RSUMF No. 27. Up to this point, no one at the Army Corps was aware of any lawsuit by the
21 Nursery or John Duarte. RSUMF No. 28.

22 On October 10, 2013, the Nursery filed this action against the Army Corps.
23 RSUMF No. 29; *see also* Compl., ECF No. 1. The referral package had not yet been sent to the
24 EPA when the action was filed. RSUMF No. 30. The Army Corps and the EPA met and
25 conferred after they became aware of the lawsuit. RSUMF No. 31. The EPA indicated if it
26 received the referral package, it would decline it, because the lawsuit was a “complicating factor.”
27 *Id.*

Michael Jewell, the Army Corps' regulatory division chief and second-line supervisor for the Sacramento District, stated he believed the Nursery's case was a flagrant violation of the CWA, and it would be inappropriate to walk away after EPA's refusal to take the referral. RSUMF No. 32. The Army Corps subsequently referred the matter to the Department of Justice (DOJ). RSUMF No. 33. On March 25, 2014, the Army Corps received permission from the Assistant Attorney General for the Environment and Natural Resources Division to assert an enforcement action against the Nursery and John Duarte as a counterclaim in this action. *Id.*

IV. LEGAL STANDARDS

A. Motion for Summary Judgment

A court must grant a motion for summary judgment "if the movant shows 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). A motion for summary judgment calls for 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 court does not weigh evidence or assess the credibility of witnesses; rather, it determines which facts the parties do not dispute, then draws all inferences and views all evidence in the light most favorable to the nonmoving party. *See id.* at 255; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

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 demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. If the party opposing summary judgment bears the burden of proof at trial, the moving party need only illustrate the "absence of evidence to support the non-moving party's case." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). The burden then shifts to the nonmoving party to "go beyond the pleadings" and "designate specific facts showing that there is a genuine issue for trial."

1 *Celotex*, 477 U.S. at 324 (quotation marks omitted). The non-moving party “must do more than
 2 simply show that there is some metaphysical doubt as to the material facts.” *Matsushita*, 475
 3 U.S. at 586. “Only disputes over facts that might affect the outcome of the suit under the
 4 governing law will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at
 5 248.

6 B. Law of the Case

7 This case was reassigned to the undersigned on August 27, 2014. In its motions
 8 now before the court, the United States asks the court to reconsider issues the predecessor judge
 9 previously decided, specifically the issues of sovereign immunity and deprivation with respect to
 10 the due process claims.

11 In the Ninth Circuit, the standard to apply when one judge is asked to reconsider
 12 another’s order in the same case is not entirely clear. *Baldwin v. United States*, 823 F. Supp. 2d
 13 1087, 1099 (D. N. Mar. I. 2011). In *Amarel v. Connell*, the Circuit was “confronted . . . with the
 14 difficult problem of district court judges exercising their ‘broad discretion’ over evidentiary
 15 rulings in different phases of the same case and reaching contradictory results,” 102 F.3d 1494,
 16 1515 (9th Cir. 1996). The *Amarel* court reviewed the second judge’s decision for abuse of
 17 discretion. The *Amarel* court expressly held “the interlocutory orders and rulings made pre-trial
 18 by a district judge are subject to modification by the district judge at any time prior to final
 19 judgment, and may be modified to the same extent if the case is reassigned to another judge.”
 20 *Amarel*, 102 F.3d at 1515. It found a successor judge has “no imperative duty to follow the
 21 earlier ruling—only the desirability that suitors shall, so far as possible, have reliable guidance
 22 how to conduct their affairs.” *Id.*

23 Later, in *Fairbank v. Cato Johnson*, the Ninth Circuit relied on *Castner v. First*
 24 *Nat’l Bank of Anchorage*, 278 F.2d 376, 379–80 (9th Cir. 1960), which it termed “[t]he leading
 25 Ninth Circuit case on the preclusive effect of an interlocutory holding by another court in the
 26 same case.” 212 F.3d 528, 530 (9th Cir. 2000). Quoting *Castner*, the *Fairbank* court held that a
 27 judge has discretion to set aside a predecessor’s decision if “cogent reasons” or “exceptional
 28 circumstances” so require. *Id.* (quoting 278 F.2d at 380); accord *Preaseau v. Prudential Ins. Co.*

of *Am.*, 591 F.2d 74, 79 (9th Cir. 1979). In *Fairbank*, a California Superior Court judge had denied the defendants’ motion for summary judgment. *Id.* at 530. After two individual defendants were dismissed, the action became completely diverse, and was removed to federal district court. *Id.* The defendants moved again for summary judgment, this time under the federal rule, and the federal court granted the motion. *Id.* The district court reconsidered summary judgment because it found the federal rule on summary judgment differed from that of California law. *Id.* at 532–33. The Ninth Circuit found these differences provided a “cogent reason for reconsideration of the Superior Court’s earlier decision” and affirmed. *Id.* at 532.

Following *Fairbank*, in *Delta Savings Bank v. United States*, the Ninth Circuit clarified that a second judge had discretion to review the decision of a predecessor in the same case, but that the doctrine of the law of the case limited that discretion: “The prior decision should be followed unless: (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial.” 265 F.3d 1017, 1027 (9th Cir. 2001) (quoting *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997)). In *Delta Savings Bank*, reconsideration was appropriate in light of intervening case law that called the previous judge’s decision into question; moreover, the first ruling “came in an earlier case with different parties[,] which was voluntarily dismissed without prejudice.” *Id.*

V. DISCUSSION

A. Sovereign Immunity

The judge previously assigned to this case found plaintiffs’ claims are covered by the sovereign immunity waiver of 5 U.S.C. § 702, pursuant to the Administrative Procedure Act (APA). See *Duarte Nursery, Inc. v. U.S. Army Corps of Eng’r*, 17 F. Supp. 3d 1013, 1019 (E.D. Cal. 2014). This court revisits the issue here to address the intra-circuit split raised by the parties on summary judgment.

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1 “Absent a waiver, sovereign immunity shields the Federal government and its
2 agencies from suit.” *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). Title 5 U.S.C. § 702 provides
3 a waiver of sovereign immunity in almost every circumstance to actions seeking non-monetary
4 relief based on unlawful agency action by government agencies and officials:

5 A person suffering legal wrong because of agency action, or
6 adversely affected or aggrieved by agency action within the
7 meaning of a relevant statute, is entitled to judicial review thereof.
8 An action in a court of the United States seeking relief other than
9 money damages and stating a claim that an agency or an officer or
employee thereof acted or failed to act in an official capacity or
under color of legal authority shall not be dismissed nor relief
therein be denied on the ground that it is against the United States
or that the United States is an indispensable party.

10 5 U.S.C. § 702; *see also Delano Farms Co. v. Cal. Table Grape Comm’n*, 623 F. Supp. 2d 1144,
11 1166 (E.D. Cal. 2009). Although the APA provides a valid waiver for an agency action, there is
12 conflicting Ninth Circuit authority regarding whether this waiver is limited by § 704. Section 704
13 states, in pertinent part, that only “[a]gency action made reviewable by statute and final agency
14 action for which there is no other adequate remedy in a court, are subject to judicial review.” 5
15 U.S.C. § 704.

16 This court’s predecessor previously found the C&D Letter to be an “agency
17 action” within the meaning of § 702, thus waiving the United States’ sovereign immunity.
18 *Duarte Nursery*, 17 F. Supp. 3d at 1020 n.10. The United States argues this decision was
19 erroneous, because § 702 requires the agency action at issue to be a final agency action without
20 any adequate remedy in court. ECF No. 138-1 at 10, 13 n.3. Plaintiffs on the other hand contend
21 the Ninth Circuit recognizes a waiver of immunity under § 702 with mere “agency action” when
22 claims at issue are constitutional claims and do not seek monetary damages. ECF No. 153 at 7.

23 As noted, the Ninth Circuit has yet to resolve whether final agency action is
24 required to seek review under § 702 of the APA. *See Delano Farms Co.*, 623 F. Supp. 2d at
25 1166. In *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989), which
26 involved a suit seeking injunctive relief brought against the Immigration and Naturalization
27 Service for violation of First and Fourteenth Amendment rights, the Ninth Circuit did not limit §
28 702’s sovereign immunity waiver to “agency action” as defined in 5 U.S.C. § 551(13). Shortly

1 after *Presbyterian Church* was decided, the Supreme Court decided *Lujan v. Nat'l Wildlife*
 2 *Federation*, 497 U.S. 871, 882 (1990), which held that § 702 requires an “agency action” and
 3 looked to 5 U.S.C. § 551, which defines the phrase as “an agency rule, order, license, sanction,
 4 relief, or the equipment or denial thereof, or failure to act.” 5 U.S.C. § 551(13). With the
 5 definition of “agency action” established, the Supreme Court then went on to explain that:

6 [T]he person claiming a right to sue [under § 702] must identify
 7 some “agency action” that affects him in the specified fashion
 8 When . . . review is sought not pursuant to specific authorization in
 9 the substantive statute but only under the general provisions of the
 APA, the “agency action” in question must be “final agency
 action.”

10 *Id.* at 882. In *Gallo Cattle Co. v. U.S. Dep’t of Agriculture*, 159, F.3d 1194, 1198 (9th Cir. 1998),
 11 the Ninth Circuit, though not discussing directly *Lujan*, noted that an agency action is reviewable
 12 if “it constitutes ‘final agency action’ for which there is no other adequate remedy in a court.”

13 Later cases decided by the Ninth Circuit after *Presbyterian Church*, *Lujan*, and
 14 *Gallo Cattle* do not clarify whether, if at all, *Presbyterian Church*’s holding survives *Lujan* and
 15 related Ninth Circuit precedent. In *San Carlos Apache Tribe v. United States*, 417 F.3d 1091,
 16 1096 (9th Cir. 2005), the Ninth Circuit considered hypotheticals in which the two lines of
 17 opinions could be reconciled in practice but ultimately sidestepped the issue. There, the San
 18 Carlos Apache Tribe sought to maintain certain water levels in a reservoir in Arizona. *Id.* at
 19 1092. The Tribe brought suit against various federal agency defendants under, among other
 20 things, the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 *et seq.*, which requires
 21 federal agencies to “take into account the effect of the[ir] undertaking[s] on any district, site,
 22 building, structure, or object that is included or eligible for inclusion in the national Register.”
 23 *San Carlos*, 417 F.3d at 1092–93. The Tribe argued that its suit was properly brought as a private
 24 action directly under the NHPA rather than under the APA. *Id.* at 1093. The Ninth Circuit
 25 quoted *Presbyterian Church* for the general proposition that “in enacting the APA ‘Congress was
 26 quite explicit about its goals of eliminating sovereign immunity as an obstacle in securing judicial
 27 review of the federal official conduct.’” *Id.* at 1096 (quoting *Presbyterian Church*, 870 at 524).

1 However, it then went on to find the case could not proceed directly under the NHPA, because
2 that would allow the San Carlos Apache Tribe to bypass the requirement of administrative review
3 under the APA, including that the agency action be final. *Id.* Importantly, the Circuit noted that
4 the NHPA does not create a private right of action, and absent that private right of action, a
5 plaintiff may not bypass the APA's procedural requirement even though § 702 may waive
6 sovereign immunity. *Id.* at 1098–99.

7 The Ninth Circuit followed the same line of reasoning in *Gros Ventre Tribe v.*
8 *United States*, 469 F.3d 801, 808–09 (9th Cir. 2006). In that case, the plaintiffs, a handful of
9 Indian tribes, alleged federal agencies violated their obligations to protect tribal trust resources
10 when the agencies authorized and planned to expand two gold mines located upriver from the
11 tribes' lands. *Id.* at 803. The plaintiffs argued they did not need to satisfy the “final agency
12 action” requirement under the APA, § 704. *Id.* at 808. The Circuit recognized the conflict
13 between *Presbyterian Church*, 870 F.2d at 518, which held that § 702's waiver of sovereign
14 immunity is not limited to only “agency actions,” and *Gallo Cattle*, 159 F.3d at 1194, which
15 stated instead that the APA's waiver of sovereign immunity is limited by, among other things,
16 § 704's “final agency action” requirement. *See Gros Ventre*, 469 F.3d at 808–09. The *Gros*
17 *Ventre* decision declined to reconcile the conflict, however, because it found the tribes in that case
18 “did not have a common law cause of action for breach of trust” and “the statutes that the Tribes
19 cite authorize no private right of action.” *Id.* at 809. Therefore, the tribes had to “state their
20 claims within the confines of the APA.” *Id.* To do so, they had to challenge a “final agency
21 action.” *See id.* at 814. The Ninth Circuit reiterated the same reasoning in *Rattlesnake Coalition*
22 *v. EPA* but also did not directly address or resolve the conflict. *See* 509 F.3d 1095, 1103 (9th Cir.
23 2007) (explaining that “[w]hen a claim is brought pursuant to the APA, the agency action must be
24 a ‘final agency action for which there is no other adequate remedy in court.’ 5 U.S.C. § 704.”).

25 As related to this case, none of the Ninth Circuit cases reviewed above addresses
26 whether a “final agency action” is still required if a plaintiff is raising constitutional challenges to
27 an agency action, and whether that agency would be subject to § 702's waiver of sovereign
28

immunity. In the absence of clarification from the Circuit, a majority of district courts have pointed to *Presbyterian Church* to reconcile the conflicting lines of opinions.

For example, in *Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1027–28 (E.D. Cal. 2012), the court found that constitutional challenges to agency action fell within § 702’s waiver of sovereign immunity and did not require “final agency action.” In doing so, the court relied on *Presbyterian Church*, 870 F.2d at 525, but found that unlike the plaintiffs in *Presbyterian Church* who raised constitutional challenges to unlawful agency actions, the gravamen of the claims plaintiffs raised in *Robinson* concerned defendant’s “non-action or failure to act in accordance[] with his administrative duties.” *Robinson*, 885 F. Supp. 2d at 1028. “The[se] claims [raised] issues within the realm of [Department of Interior] administrative duties of defendant Salazar.” *Id.* The court thus found the government’s sovereign immunity was not waived under the APA, and the court had no subject matter jurisdiction.

Similarly, the court in *Valentini v. Shinseki*, 860 F. Supp. 2d 1079, 1101 (C.D. Cal. 2012), held where the claims alleged arise not under the APA, but instead concern agency actions that violate another law, a “final agency action” is not required. The court looked first at the text of the statute, and found that § 702 does not limit the waiver of sovereign immunity to only “final agency action.” *Id.* at 1100. Rather, the plain language of the text “waives sovereign immunity for any action alleging injury as a result of agency action (or inaction), so long as the suit does not seek any money damages.” *Id.* The court in *Valentini* then went on to reconcile *Presbyterian Church and Gallo Cattle*. It found that “[w]here the allegation is that the agency action violates another—be it statutory, constitutional, or common law—the waiver of sovereign immunity is not so limited” by the “final agency action” requirements under § 704, “but rather it is the broad, unqualified waiver described in *Presbyterian Church* and suggested in the plain language of the statute.” *Id.* at 1101. Other courts have followed the same line of reasoning as the courts in *Robinson* and *Valentini*. See, e.g., *Baxter v. United States*, No. 15-2138, 2016 WL 467499, at *2 n.1 (N.D. Cal. Feb. 8, 2016); *Cal. Sportfishing Protection Alliance v. U.S. Bureau of Reclamation*, No. 15-00912, 2015 WL 6167521, at *8–9 (E.D. Cal. Oct. 20, 2015); but see *Veterans for Common Sense v. Nicholson*, No. 07-3758, 2008 WL 114919, at *5 (N.D. Cal. Jan.

10, 2008) (finding generally that § 704 applies to § 702 without distinguishing constitutional challenges to agency action).

The court here finds the reasoning in *Robinson* and *Valentini* persuasive, because the plain language of the statute does not limit § 702’s waiver of sovereign immunity in the way United States argues. The court concludes that where a party raises constitutional challenges to agency action the action at issue does not need to be “final agency action.” Here, plaintiffs raise Due Process challenges under the Fifth Amendment to the Army Corps’ action, specifically by challenging the C&D Letter. Given the nature of this challenge, § 704 “final agency action” is not required. However, even if the waiver of sovereign immunity in § 702 applied only to the extent that the agency action complained of was “final” under § 704, plaintiffs in this case have shown there was a final agency action. The Supreme Court, in a per curiam decision, has found cease and desist orders issued under the CWA to be sufficiently final to trigger APA review. *See Sackett v. Env’tl. Protection Agency*, 132 S. Ct. 1367, 1374 (2012).

Accordingly, the court has subject matter jurisdiction over the Due Process claims. This decision does not alter the prior order in this case. The court turns next to the merits of the claims.

B. Due Process

A procedural due process claim under the Fifth Amendment of the Constitution has two distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections. *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998); *see also Arnett v. Kennedy*, 416 U.S. 134, 207 (1974). The court first examines whether plaintiffs were deprived of a constitutionally protected liberty or property interest.

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1 Plaintiffs argue they had an interest in their land and its use for wheat farming.
2 ECF No. 136-1 at 2. The United States argues the C&D Letter did not effect a deprivation under
3 the Fifth Amendment:

4 '[C]ease and desist' are not magic words that render an otherwise
5 unenforceable document a deprivation under the Fifth Amendment,
6 and a document that merely announces an agency's view that there
has been a violation of law and the possibility that a deprivation
may occur at a later date does not take away anything.

7 ECF No. 138-1 at 14.

8 The court's predecessor found *Guatay Christian Fellowship v. Cty. of San Diego*,
9 670 F.3d 957 (9th Cir. 2011) did not control the result in this case, because the facts in *Guatay*
10 are distinguishable. Specifically, the prior judge found *Guatay* not controlling in his discussion
11 of "ripeness," which also touched on due process. *Duarte Nursery*, 17 F. Supp. 3d at 1022. His
12 order stated, in relevant part:

13 Plaintiffs [in *Guatay*] could have sought a permit allowing them to
14 keep their church where it was, and (2) they had available an
administrative appeal of the cease and desist order.

15 *Id.* In contrast, plaintiffs in this case had no opportunity to challenge the C&D Letter, which
16 deprived them of their right to farm the Property. *Id.* This court disagrees and finds *Guatay*
17 controlling. Any factual distinctions are irrelevant because plaintiffs have not suffered a
18 deprivation to begin with.

19 In *Guatay*, the county defendant issued a notice of violation (NOV) to the plaintiff,
20 advising the use of the building at issue could not be changed without a modification of use
21 permit (MOU), and ordering the plaintiff to cease using the building within thirty (30) days of
22 notice. The NOV also warned the use of the property could result in penalties of up to \$2,500 per
23 day for each day after the 30-day period. 670 F.3d at 964. A subsequent letter from the county
24 defendant again asked the plaintiff to cease conducting religious assemblies on the property until
25 a permit was granted. *Id.* at 965.

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1 Here, the C&D Letter similarly advised plaintiffs their activity, conducted without
2 a permit, was in violation of the CWA. Specifically, the letter provided,

3 You are hereby directed to cease and desist all work in waters of the
4 United States until this violation is resolved. We are conducting an
5 investigation to determine the impact of this work as it relates to
6 public interest and the appropriate course of action to remedy the
7 situation. Potential enforcement actions, in addition to or in lieu of
8 fines, penalties and imprisonment, include directing removal of the
9 unauthorized work and restoration of the site Prompt
10 voluntary restoration of the site in accordance with a Corps-
11 approved plan may preclude some or all of these actions.

12 C&D Letter at 1. There is no doubt the C&D Letter is strongly worded. However, strong words
13 alone do not amount to a distinct deprivation of a constitutionally protected liberty or property
14 interest, particularly where as here they point to the possibility of “potential future enforcement.”
15 *See Guatay*, 670 F.3d at 983–84. As the Ninth Circuit in *Guatay* pointed out, the county
16 defendant there would have had to bring an enforcement action in court to actually enforce the
17 zoning regulation. The facts of this case are analogous. The Army Corps would have had to
18 request the EPA or the DOJ bring an enforcement action to actually enforce the CWA. The Army
19 Corps has sought enforcement now by filing its counterclaim to this action. However,
20 enforcement had not occurred at the time plaintiffs received the C&D Letter. The court finds that
21 while plaintiffs’ reaction to the Army Corps’ communication in the form of the C&D Letter
22 assumed enforcement was forthcoming, such a reaction does not convert the threatened
23 enforcement to a deprivation of a liberty or property interest cognizable under the Due Process
24 Clause. *Id.* at 984. Without a deprivation of a protected interest there can be no procedural due
25 process claims based on the C&D Letter, because plaintiffs’ procedural due process rights cannot
26 have been violated at the time the letter was received. *Id.*

27 The court finds the prior decision in this respect clearly erroneous such that to let it
28 stand would work a manifest injustice. The court GRANTS the United States’ motion for
summary judgment on plaintiffs’ Due Process claims.

C. Clean Water Act (CWA)

The court next considers the United States' counterclaim, which alleges plaintiffs violated the CWA. The CWA is a strict liability statute. *Waterkeepers N. Cal. v. Ag Indus. Mfg., Inc.*, No. 00-1967, 2005 WL 2001037, at *13 (E.D. Cal. Aug. 19, 2005). It generally prohibits the discharge of pollutants by any person into "navigable waters" or "waters of the United States" without a National Pollution Discharge Elimination System (NPDES) permit.⁵ 33 U.S.C. §§ 1311(a), 1362(7); see *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 530 (9th Cir. 2001). The NPDES permit program allows a polluter with a permit to discharge a specified amount of pollutant. *Id.* at § 1342; *Headwaters*, 243 F.3d at 530. Thus to establish a violation of the CWA's NPDES permit requirement, the United States must show plaintiffs/counter-defendants (1) discharged (2) a pollutant (3) to navigable waters (4) from a point source without a permit. See *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993). It is not disputed here that there was no permit. The United States thus need only establish plaintiffs discharged a pollutant to navigable waters from a point source.

The court first addresses whether John Duarte can be held individually liable for violation of the CWA.

1. Individual Liability

Plaintiffs do not contest that the Nursery was responsible for the activities underlying the counterclaim. However, plaintiffs argue John Duarte cannot be held individually liable because he did not personally conduct the tillage that allegedly violated the CWA. Plaintiffs argue the statutory language in the CWA provides specifically that "the discharge of any pollutant by any person shall be unlawful," but John Duarte did not personally discharge any pollutant. Plaintiffs further contend that though under the CWA a "person" includes a

⁵ The CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). And the EPA has defined "waters of the United States" to include: "all other waters such as . . . rivers, streams (including intermittent streams) . . . [and] tributaries of [those] waters." 40 C.F.R. § 122.2; see also *United States v. Phillips*, 367 F.3d 846, 851–52, 855–56 (9th Cir. 2004) (CWA jurisdiction could be exercised over a creek emptying into a larger creek, which in turn flowed into a navigable river).

1 corporation, John Duarte nevertheless cannot be held liable as an individual because the United
2 States did not plead reliance on the Responsible Corporate Officer Doctrine (RCOD). Even if
3 pled, the RCOD does not apply in a civil enforcement action based on the CWA. Finally, should
4 the RCOD apply, plaintiffs argue John Duarte had no knowing intent as required.

5 As noted, the CWA prohibits discharge of pollutants into the waters of the United
6 States by any “person” without a permit. The term “person” is defined to mean “an individual,
7 corporation, partnership, association, State, municipality, commission, or political subdivision of
8 a State, or any interstate body.” 33 U.S.C. § 1362(5). While in the context of criminal
9 enforcement, the term “person” includes any responsible corporate officer, *id.* § 1319(c)(6), the
10 CWA’s civil enforcement provision does not expressly reference responsible corporate officers.
11 Compare *id.* § 1362(5) with § 1319(c)(6). Although the Ninth Circuit has yet to decide the issue,
12 other courts have found the RCOD applies in both criminal and civil actions, *see, e.g., United*
13 *States v. Hodges X-Ray, Inc.*, 759 F.2d 557 (6th Cir. 1985), and in particular civil CWA actions,
14 *United States v. Osborne*, No. 11-1029, 2012 WL 1096087, at *3 (N.D. Ohio Mar. 30, 2012).

15 And the RCOD has been applied in both criminal and civil CWA cases by district
16 courts within this Circuit. In *Ag Indus. Mfg., Inc.*, 2005 WL 2001037, at *13, the court
17 considered the Ninth Circuit’s application of the responsible corporate officer doctrine in the
18 context of a criminal CWA case. In *United States v. Iverson*, the case considered by that court,
19 the defendant was the president of a company that manufactured chemical products. *Id.* at *12.
20 The defendant faced criminal charges under the CWA for personally ordering the discharge of
21 wastewater residue. Importantly, the *Ag* court noted that criminal liability can attach to all parties
22 who share responsibility in “the furtherance of the transaction which the statute outlaws.” *Id.*
23 (citing *United States v. Dotterweich*, 320 U.S. 277, 284 (1943)). It held that while *Iverson* was a
24 criminal action “with facts more egregious than those of the case at bar,” the RCOD nonetheless
25 applies in both criminal and civil cases. Following the same line of reasoning, the court in
26 *Humboldt Baykeeper v. Simpson Timber Co.*, also applied RCOD to a civil CWA action. *See* No.
27 06-04188, 2006 WL 3545014, at *4 (N.D. Cal. Dec. 8, 2006). Also citing *Iverson*, it similarly
28 found that “individuals whose acts or omissions have led to such pollution may be held

1 responsible individually, notwithstanding the fact that they may have been acting in their capacity
2 as an employee or officer of a company or entity that owns the property in question or conducts
3 business on it.” *Id.* In *N. Cal. River Watch v. Oakland Maritime Support Servs., Inc.*, a civil
4 action, the court cited *Humboldt Baykeeper* and found that “under the Clean Water Act, penalties
5 may be imposed against individuals who are in positions of authority at polluting companies.”
6 No. 10-03912, 2011 WL 566838, at *4 (N.D. Cal. Feb. 14, 2011). The court finds persuasive the
7 rationale for consistent application of the RCOD in civil CWA cases, and agrees that a corporate
8 officer with authority over the activities underlying alleged violations should not escape liability
9 by virtue of having delegated certain implementing tasks. *See Ag Indus. Mf., Inc.*, 2005 WL
10 2001037, at *12–13. The court finds the RCOD applicable here.

11 The question then is whether John Duarte is a responsible corporate officer. The
12 Ninth Circuit has held that a person is a responsible corporate officer if he or she has authority to
13 exercise control over the corporation’s activity that is causing discharges. *Iverson*, 162 F.3d at
14 1022–26. It is undisputed John Duarte was the president of the Nursery when it purchased the
15 2,000 acres of real estate in Tehama County, California. NRDP No. 4; John Duarte Dep.
16 21:11-13, 22–24. And in 2012 he had significant input into the activities conducted on and
17 precautions taken with respect to the real estate. John Duarte Dep. 23:7–15. It was also his
18 decision whether to follow up with the Army Corps after Kelley’s call in December 2012 and
19 again after the Nursery received the subsequent C&D Letter. James Duarte Dep. 154:4–7,
20 165:21–24, 181:6–10. John Duarte authorized and controlled the Nursery’s activity on the
21 Property, including the tillage by Unruh. *See* John Duarte Dep. 21:11–25:11. Under the RCOD,
22 it is sufficient for John Duarte to have authority over the tillage operations without actually
23 operating the equipment. *See Iverson*, 162 F.3d at 1022–26. Accordingly, John Duarte is a
24 responsible corporate officer.

25 Finally, the CWA is a strict liability statute, thus whether John Duarte had intent or
26 not is irrelevant under the CWA. And the United States’ counterclaim pleads John Duarte was
27 the President and co-owner of the Nursery, Countercl. ¶ 29, a “person” under the CWA, *id.* ¶ 90,
28 who carried out deep ripping activities, *id.* ¶ 100, and who is jointly and severally responsible for

CWA violations by the Nursery, *id.* ¶ 105. Plaintiffs were sufficiently put on notice of the counterclaim against John Duarte; the United States has not raised a new theory that it did not plead.

The court finds John Duarte can be held individually liable. It next turns to whether summary judgment is warranted on the CWA counterclaim.

2. Discharge of Pollutant

As noted, the United States must show there is no material dispute that plaintiffs/counter-defendants (1) discharged (2) a pollutant (3) to navigable waters (4) from a point source, with the lack of a permit undisputed. *See Comm. to Save Mokelumne River*, 13 F.3d at 308. For the purposes of this order, the first two elements can be merged. The question the court must answer is whether the addition of soil to land, as here, is considered a discharge of pollutant. The CWA defines the “discharge of pollutant” as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362. Under the CWA, “pollutant” includes “dredged spoil,” “biological materials,” “rock,” “sand,” and “cellar dirt.” *Id.* § 1362(6). Courts have also looked to the CWA regulations, which identify additional categories of pollutants. In *Avoyelles Sportsmen League, Inc. v. March*, the Fifth Circuit noted that “fill material” can also constitute a pollutant under § 1362, with reference to 33 C.F.R. § 323.2(e) (previously 33 C.F.R. § 323.2(m)). 715 F.2d 897, 922–24 (5th Cir. 1983). This regulation defines fill material to mean,

(e)(1) . . . material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay . . . overburden from mining or other excavation activities

33 C.F.R. § 323.2(e). The regulations thus explicitly provide that fill material can include “soil.” The regulations go on to explain that,

The term discharge of fill material means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses

33 C.F.R. § 323.2(f). Discharge of fill material, however, does not include “plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products” *Id.*

In *Avoyelles*, the Fifth Circuit also considered the regulations’ definition of “dredged material,” or “dredged spoils,” which provided that “dredged material” is “material that is excavated or dredged from the waters of the United States.” 33 C.F.R. § 323.2(c). Although the term was not disputed in *Avoyelles*, the court nevertheless noted that activities such as “digging of ditches and holes” would constitute “dredging.” *Avoyelles*, 715 F.2d at 925. Specifically, § 323.2(d)(1) explains that “the term discharge of dredged material means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States.” 33 C.F.R. § 323.2(d)(1). “Discharge of dredged material” includes,

(i) The addition of dredged material to a specific discharge site located in waters of the United States;

. . .

(iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

33 C.F.R. § 323.2(d)(1)(i), (iii). As with discharge of filled material, discharge of dredged material also allows for a farming exemption. *Id.* § 323.2(d)(3)(iii). The court discusses both exemptions below.

The Ninth Circuit has agreed with *Avoyelles* regarding the definition of both the discharge of fill and dredged material, and has further clarified the definition of “discharge of dredged material.” *Borden Ranch P’ship v. U.S. Army Corps of Eng’r*, 261 F.3d 810, 814 (9th

1 Cir. 2001) (citing *United States v. Deaton*, 209 F.3d 331, 335–36 (4th Cir. 2000)). In so doing,
 2 the Ninth Circuit has observed, “It is of no consequence that what is now dredged spoil was
 3 previously present on the same property What is important is that once that material was
 4 excavated from the wetland, its redeposit in that same wetland *added* a pollutant where none had
 5 been before.” *Borden Ranch*, 261 F.3d at 814 (citing *Deaton*, 209 F.3d at 335–36 (emphasis in
 6 the original)). Echoing both the Fourth and Fifth Circuits, the Ninth Circuit is clear that “soil” is
 7 a pollutant: “Plain dirt, once excavated from waters of the United States, could not be
 8 redeposited into those waters without causing harm to the environment.” *Borden Ranch*,
 9 261 F.3d at 814 (citing *Deaton*, 209 F.3d at 336).

10 The two cases cited by plaintiffs are inapposite because they concern redepositing
 11 water and not soil. *See Los Angeles Cnty. Flood Control Dist. v. Natural Res. Defense Council,*
 12 *Inc.*, 133 S. Ct. 710, 712 (2013); *S. Fla. Water Mgmt. Dist. v. Miccosuke Tribe of Indians*, 541
 13 U.S. 95, 106 (2004).

14 In sum, soil is a pollutant. And here, plaintiffs instructed Unruh to till and loosen
 15 the soil on the Property. Unruh Dep. 55:4–6, 13–15, 118:4–9. The equipment Unruh used caused
 16 the material, in this case soil, to move horizontally, creating furrows and ridges. DRCWA No.
 17 29. This movement of the soil resulted in its being redeposited into waters of the United States, at
 18 least in areas of the wetlands as delineated by NorthStar on the Property. *See* DRCWA Nos. 28–
 19 29. Thus, the Nursery’s activities discharged a pollutant.

20 3. Navigable Waters

21 The court next considers whether the waters on the Property were indisputably
 22 “navigable waters” under the CWA. While a majority of the Supreme Court has yet to agree on
 23 an explanation of when wetlands are sufficiently adjacent to navigable waters to confer CWA
 24 protection, the narrowest grounds of agreement among members of the Court were established in
 25 *Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos*, a 4-4-1 plurality opinion, the
 26 Supreme Court considered the definition of “navigable waters” under the CWA. Justice
 27 Kennedy, casting the fifth vote for reversal along with four other Justices, concurred only in the
 28 judgment. His concurrence provides the narrowest ground on which a majority of Justices would

1 agree if required to choose, in almost all cases. *See N. Cal. River Watch v. City of Healdsburg*,
 2 496 F.3d 993, 999 (2007) (“to qualify as a regulable water under the CWA, the body of water
 3 itself need not be continuously flowing, but that there must be a “significant nexus” to a waterway
 4 that is in fact navigable.”). Following Justice Kennedy’s concurrence, the Ninth Circuit adopted
 5 his “substantial nexus” test:

6 [A] “mere hydrologic connection should not suffice in all cases; the
 7 connection may be too insubstantial for the hydrologic linkage to
 8 establish the required nexus with navigable waters as traditionally
 9 understood.” Rather, the “required nexus must be assessed in terms
 of the statute’s goals and purposes,” which are to “restore and
 maintain the chemical, physical, and biological integrity of the
 Nation’s waters.”

10 *City of Healdsburg*, 496 F.3d at 1000 (citing *Rapanos*, 547 U.S. at 784–85; citations omitted).

11 The Ninth Circuit directs courts deciding whether there is a hydrological linkage to look for a
 12 “reasonable inference of ecological interconnection.” *Id.* A “significant nexus” exists where
 13 wetlands have a significant effect on the chemical, physical, and biological integrity of the nearby
 14 navigable waters. 496 F.3d at 1001.

15 Here, in its July 2012 Delineation, NorthStar noted:

16 Wetlands within the [Property] hold floodwaters and intercept sheet
 17 flow from uplands, releasing water in a more consistent manner.
 18 These wetlands collect and hold water during significant rain events
 acting as a biological filter collecting the first flush prior to filtering
 into [downstream waters].

19 NorthStar 2012 Draft at 11. The Army Corps’ investigation report also noted that

20 The wetlands and water on-site are hydrologically connected . . .
 21 and help to moderate flood flows due to storm events, provide
 22 filtration to sediments and pollutants prior to entering Coyote Creek
 and are designated critical habitat and are known to support the
 Federally-listed vernal pool fairy shrimp and . . . tadpole shrimp.

23 Army Corps Expert Report at 2. The wetlands within the Property thus have physical
 24 connections to Coyote Creek, a tributary of the traditional navigable waters of the Sacramento
 25 River. *See City of Healdsburg*, 496 F.3d at 1000. In addition, the United States’ expert report
 26 provides that the dissolved and particulate organic carbon and dissolved nutrients on the Property
 27 are related to the Coyote Creek/Oak Creek system, which flows to the Sacramento River. ECF
 28 No. 87-3 at 151. Plaintiffs do not point to any “specific facts showing that there is a genuine

issue for trial.” *Celotex*, 477 U.S. at 324. The court thus finds that the wetlands on the Property have a “significant nexus” with the Sacramento River, which is a traditionally navigable waterway.

4. Point Source

Next, the court considers whether the Equipment qualifies as a “point source” under the CWA. The CWA defines the term “point source” to mean, “[a]ny discernible, confined and discrete conveyance, including but not limited to any . . . conduit. . . , [or] container. . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Under the broad statutory language, courts have found “bulldozers and backhoes” to be “point sources” under the CWA, because they collect and pile material that may eventually find its way into the waters of the United States. *Borden Ranch*, 261 F.3d at 815 (citing *Avoyelles*, 715 F.2d at 922); *see also United States v. Akers*, 785 F.2d 814, 817–20 (9th Cir. 1986) (grader, tractor pulling discs, and a ripper are point sources); *Deaton*, 209 F.3d at 333 (sidecasting, whereby excavated dirt is piled on either side of a ditch, through the use of a backhoe, front-end loader, and bulldozer is a point source).

Here, Unruh used the Equipment, a 360-horsepower International Harvester Case Quadtrac 9370 with Wilcox ripper, NSC 36-24-7, as an attachment for tilling. DRCWA No. 23; Unruh Dep. 93:6–94:5. The Equipment has seven shanks with 24-inch spacing in between the shanks, and each shank is 36 inches long. Unruh Dep. 93:17–94:5. Material moved horizontally, and the shanks created furrows and ridges to the left and right of each furrow. DRCWA No. 29. The Equipment did not have to be an immobile “container,” but could be any means of transport in which a pollutant is carried by a “discernible, confided, and discrete conveyance” into the waters of the United States. *See S. Fla. Water Mgmt. Dist. V. Miccosukee Tribe*, 541 U.S. 95, 105 (2004). The Equipment loosened and moved the soil horizontally, pulling the dirt out of the wetlands and redepositing it there as well. *See Deaton*, 209 F.3d at 335. The Equipment, with the ripper attachment, is a “point source” under the CWA.

5. Exemption

Plaintiffs/counter-defendants bear the burden of proving whether their discharge falls under any statutory exemption. *City of Healdsburg*, 496 F.3d at 1001. Here, plaintiffs claim their activities on the Property were exempted as “part of an established (i.e., on-going) farming . . . operation” under 33 U.S.C. § 1344(f)(1) and 33 C.F.R. § 323.4(a)(1)(i)–(ii). They also argue their discharge was “recaptured” under 33 U.S.C. § 1344(f)(2). The court first considers the farming exemption.

a) 33 U.S.C. § 1344(f)(1)

As previously mentioned, certain activities are exempt from the definition of discharge of fill or dredged material. Specifically § 1344(f)(1) exempts certain activities in connection with farming, silviculture and ranching from the NPDES permitting requirement. The exemption provides in detail as follows:

(a) General. Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:

(1)(i) Normal farming . . . activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming . . . operation and must be in accordance with definitions in § 323.4(a)(1)(iii). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming . . . are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming . . . operation.

...

(B) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or

ranch land, but does not include the construction of farm, forest, or ranch roads.

...

(D) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, disking, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

(E) Seeding means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

...

(c) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a)(1) through (6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A conversion of a section 404 wetland to a non-wetland is a change in use of an area of waters of the United States. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.

33 C.F.R. § 323.4(a), (c). In sum, while § 1344(f)(1) provides a farming exemption, to fall under the exemption, the farming activities must be “established and ongoing.” A farming operation ceases to be established when the area has been converted to another use, or modifications to the

“hydrological regime” are necessary for continue the farming operations. 33 C.F.R. § 323.4(a)(1)(ii). In addition, even if the farming activities are established and ongoing, if they convert waters of the United States into a new use to which they were not previously subjected, or impair the flow or circulation of waters of the United States, then a permit is required. *Id.* § 323.4(c).

Here, there is no evidence the Property supported farming activity between 1988 and the summer of 2012. Stokely Expert Report at 6–7. Unruh, who performed the tillage service for the Nursery and John Duarte in 2012, stated the ground on the Property was hard and difficult to penetrate from the grazing activities. Unruh Dep. 98:9–24. Plaintiffs have provided no support to show grazing is analogous to the farming activity they conducted beginning in 2012. The court is not persuaded that, after nearly twenty-four years of no activity that meets the applicable definition of farming, the tillage and planting of wheat by plaintiffs can be considered a continuation of established and ongoing farming activities.

Moreover, the aerial photos provided in the Stokely Expert Report show a substantial amount of wetlands impacted by the tillage and planting activities. Stokely Expert Report at 7–8, 22–55. The photos demonstrate substantial changes in the hydrological regime, which are prohibited if a party is to benefit from the farming exemption under § 1344(f)(1). *Cf. Akers*, 785 F.2d at 819–20 (court rejects the exemption for the wetland portion of the subject farm because of substantial hydrological alteration).

b) 33 U.S.C. 1344(f)(2)

Notwithstanding its conclusion above, the court also considers the recapture provision of 33 U.S.C. § 1344(f)(2), which provides:

Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2). The statutory provision expressly notes that “any” discharge of dredge or fill material into the navigable waters requires a permit. Thus, plaintiffs’ argument that all the

existing wetlands on the Property still exist, and no waters of the United States have been converted to dryland, ECF No. 128, ignores not only the statute but also the purpose of the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA does not simply prohibit the complete conversion of waters of the United States. Even under the farming exemption, a discharge of dredged or fill material incidental to the farming activities that impairs the flow of the waters of the United States still requires a permit, because it changes the chemical, physical and biological integrity of the waters. 33 C.F.R. § 323.4(c); 33 U.S.C. § 1344(f)(2).

6. Summary

The Nursery and John Duarte, through Munson, hired Unruh to till the Property, with the exception of the southwest corner, which was cordoned off by a fence. Unruh Dep. 55:22–56:7. The Equipment did not avoid all of the wetlands delineated by NorthStar in 2012. DRCWA No. 28; NRDP No. 31. The Equipment moved dirt from around and in the wetlands before redepositing it back into the wetlands on the Property. The wetlands on the Property have a “significant nexus” to Coyote Creek, which is a tributary of the Sacramento River, a traditionally navigable waterway. The tillage was not part of an established and ongoing farming activity.

Accordingly, the United States has established each element of a violation and plaintiffs have not established an exemption applies. The court GRANTS the United States’ motion for summary judgment on its CWA counterclaim.

D. Retaliation

Plaintiffs allege in the complaint that the United States violated the First Amendment by retaliatory prosecution.⁷ SAC ¶¶ 115–121. Specifically, plaintiffs allege that public statements show the United States filed the counterclaim because plaintiffs filed their complaint. SAC ¶¶ 118–120. The United States contends: (1) the claim should be dismissed because the court does not have subject matter jurisdiction over this claim because there has been

⁷ The Second Amended Complaint also asserts the retaliatory prosecution claim against Bostick and Lynch, but does not clarify who they are.

no waiver of sovereign immunity; or (2) the court should grant summary judgment because there is a lack of evidence, and (3) plaintiffs have not suffered an injury. *See generally* ECF No. 134-1. The court first looks at whether it has subject matter jurisdiction over plaintiffs' retaliatory prosecution claim.

Where a party raises constitutional challenges to agency action as here, and as decided above, the action at issue does not need to be "final agency action." Thus, the issue here is whether a civil enforcement action by the DOJ, after accepting referral from the Army Corps, is "agency action" within the meaning of § 702.

The party claiming the right to sue under § 702 must identify an "agency action" that affects him or her. 5 U.S.C. § 702; *see also Lujan*, 497 U.S. at 882. Again, "agency action" includes: an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. 5 U.S.C. § 551. As a threshold matter, the APA does not apply if the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (2); *see also Merrill Ditch-Liners, Inc. v. Pablo*, 670 F.2d 139, 140 (9th Cir. 1982). And the Ninth Circuit has held, "litigation decisions are generally committed to agency discretion by law, and are not subject to judicial review under the APA." *Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1339 (9th Cir. 1992) (citing *Heckler v. Chaney*, 470 U.S. 821, 832–33 (1985)); *see also City of Oakland v. Holder*, 901 F. Supp. 2d 1188, 1195 (N.D. Cal. 2013), *aff'd sub nom. City of Oakland v. Lynch*, 798 F.3d 1159 (9th Cir. 2015) ("[F]iling of a civil action does not fit within the APA's definition of agency action.").

Plaintiffs have the burden to show the United States has waived its sovereign immunity. *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2008). They have not met this burden in this respect as they have not shown that the counterclaim falls under § 702 or why it should not be barred by § 701(a)(1). The cases cited by plaintiffs are inapposite as they deal with whether an administrative complaint is a "final agency action," *see, e.g., F.T.C. v. Standard Oil of Cal.*, 449 U.S. 232 (1980), and adverse publicity, *see, e.g., Indus. Safety Equipment Ass'n, Inc. v. E.P.A.*, 837 F.2d 1115, 1119 (D.C. Cir. 1988). ECF No. 154 at 10.

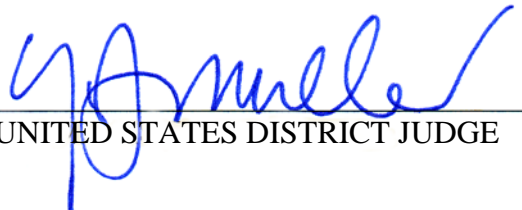
1 The court finds the United States has not waived sovereign immunity as to
2 plaintiffs' retaliatory prosecution claim, and the claim must be DISMISSED against the Army
3 Corps and the United States. The court need not reach the merits of the claim.

4 VI. CONCLUSION

5 The court GRANTS the United States' motion for summary judgment on
6 plaintiffs' Due Process claims. The court also GRANTS the United States' motion for summary
7 judgment on its CWA counterclaim. The court GRANTS the United States' motion to dismiss on
8 plaintiffs' retaliatory prosecution claim WITHOUT LEAVE TO AMEND.

9 IT IS SO ORDERED.

10 DATED: June 10, 2016

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14 UNITED STATES DISTRICT JUDGE
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