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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant.

.

UNITED STATES OF AMERICA,

Counterclaim- Plaintiff,

v.

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

Counterclaim- Defendants.

No. 2:13−CV−02095−KJM−DAD

UNITED STATES' NOTICE OF MOTION AND MOTION TO DISMISS DUARTE'S FIRST SUPPLEMENTAL COMPLAINT

TO ALL PARTIES AND ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on October 24, 2014, at 10:00 a.m., or as soon thereafter as the Court's schedule permits, before the Honorable Kimberly J. Mueller, in Courtroom 3 of the United States District Court for the Eastern District of California, Sacramento Division, located at 501 "I" Street, Sacramento, California 95814, the United States of America ("United States") will and hereby does move to dismiss the First Supplemental Complaint, ECF No. 41.

The Motion is made pursuant to Federal Rules of Civil Procedure, Rules 12(b)(1) and 12(b)(6) on the grounds that the First Supplemental Complaint should be dismissed for lack of jurisdiction and for failure to state a claim.

Pursuant to the Court's Civil Standing Order, this Motion is made following a conference between counsel for the United States and Plaintiffs and Counterclaim-Defendants Duarte Nursery, Inc. and John Duarte. The parties were unable to resolve the issues underlying this Motion, but the parties were able to agree to a motion hearing date and have concurrently jointly moved to continue the status conference currently scheduled for October 2, 2014.

The Motion is based upon this notice of motion, this motion, the concurrently filed memorandum of points and authorities, and proposed order filed in support thereof, and all pleadings, documents, orders or rulings filed in this matter and oral argument before this Court.

Respectfully submitted,

SAM HIRSCH
Acting Assistant Attorney General

Dated: September 12, 2014

/s John Thomas H. Do
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UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS DUARTE'S FIRST SUPPLEMENTAL COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL RULES OF CIVIL PROCEDURE

STATUTES

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTER

INTRODUCTION

The United States of America ("United States") hereby moves to dismiss the "First Supplemental Complaint for Declaratory Judgment and Injunctive Relief" filed by Duarte Nursery, Inc. and John Duarte ("Plaintiffs" or "Duarte") on August 20, 2014. ECF No. 41. We refer to this pleading as the "Amended Complaint." This motion seeks dismissal of all but the Amended Complaint's third and fourth claims; the Court previously dismissed the third and fourth claims, regarding state officials, in an Order dated April 23, 2014. ECF No. 27.

The April 2014 Order also denied the United States' motion to dismiss Duarte's first, second, and fifth claims, which collectively assert a violation of the Due Process Clause of the Fifth Amendment with respect to a cease-and-desist order that the United States Army Corps of Engineers ("Corps") issued to Duarte in February 2013. The Corps' order stated that Duarte was in violation of the Clean Water Act ("CWA" or "Act") by discharging dredged or fill material into waters of the United States without a permit. The Court rejected arguments that Duarte' due process claims were not ripe and failed to state a claim.

At this time, the United States does not seek to revisit the Court's April 2014 Order. Instead, the United States seeks dismissal of Duarte's due process claims on the ground that an intervening event – specifically, the United States' May 2014 filing of a counterclaim for enforcement of the CWA – renders these claims moot. ECF No. 28. As Duarte acknowledges, the counterclaim arises "from the same alleged violation of the Clean Water Act" as the cease-and-desist order. Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion to File First Supplemental Complaint ("Duarte's Motion to Amend"), ECF No. 35, at 6 (of 8). The Court has plenary authority to adjudicate the counterclaim, and thus Duarte will receive all process that could arguably be due with respect to the underlying question of whether Duarte is in violation of the Act. With respect to due process, no meaningful relief remains for the Court to award even if Duarte were to prevail on these claims. Plaintiffs seek to be heard, and they will be heard.

The balance of this motion regards the Amended Complaint's new (sixth) claim. There, Duarte alleges that "the Corps' prosecution of the Counterclaim violates Plaintiffs['] First

Amendment rights." Am. Compl. ¶ 120. Duarte seeks, *inter alia*, "[a] prohibitory judgment preventing the Corps from prosecuting the Counterclaim . . . until the Corps can establish that it would make the same enforcement decision absent Plaintiffs' First Amendment protected activity." Am. Compl. at 20. As explained below, this attempt by Duarte to forestall or avoid the United States' counterclaim is jurisdictionally flawed and fails to state a claim upon which relief can be granted. Further, to the extent Duarte believes the United States is unlawfully enforcing the CWA – an allegation we reject – Duarte may raise these arguments in conjunction with other defenses to the counterclaim.

STATUTORY AND REGULATORY BACKGROUND

The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant," which means "any addition of any pollutant to navigable waters from any point source," except in compliance with the Act. 33 U.S.C. §§ 1311(a), 1362(12). "Navigable waters" include streams and wetlands that have a significant nexus with traditional navigable waters. *See* 33 U.S.C. § 1362(7); 33 C.F.R. § 328.3(a)(1), (5), and (7); *Rapanos v. United States*, 547 U.S. 715, 780-81 (2006) (Kennedy, J., concurring in judgment); *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011). A "discharge of [a] pollutant" can occur if, as a pertinent example, a person "deep rips" navigable waters, i.e., uses machinery to drag long metal shanks to loosen the soil's restrictive layer. *See Borden Ranch P'ship v. United States Army Corps of Eng'rs*, 261 F.3d 810, 814-16 (9th Cir. 2001), *aff'd by an equally divided Supreme Court*, 537 U.S. 99 (2002) (*per curiam*).

Section 404 of the Act, 33 U.S.C. § 1344, establishes a permit program for deep ripping and other activities involving discharges of dredged or fill material. That provision authorizes the Corps, or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C § 1344(a) and (g)-(h).[1] The Corps and the United States Environmental Protection Agency ("EPA") share

[1] California, like most states, lacks an approved section 404 permit program.

responsibility for implementing and enforcing the CWA's section 404 permitting provisions. *See, e.g.*, 33 U.S.C. § 1344(b) and (c). The two agencies have promulgated regulations governing the Corps' processing and issuance of section 404 permits. *See* 33 C.F.R. Pts. 320-25; 40 C.F.R. Pt. 230. In addition, the Corps and EPA have issued guidance documents designed to assist persons in determining whether they may need a permit. *See, e.g.*, EPA and the Corps, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (Dec. 2, 2008), available at http://www.water.epa.gov/lawsregs/guidance/wetlands (last visited Sept. 5, 2014); Corps, *Recognizing Wetlands: An Informational Pamphlet (Wetlands)*, available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/rw_bro.pdf (last visited Sept. 11, 2014).

When (as in this case) the Corps finds that any person is in violation of sections 301(a) and 404 of the Act, the Corps may issue a formal notification to the parties responsible for a potential violation. 33 C.F.R. § 326.3(c). The notification is a "cease and desist order" for on-going projects and a general notice for completed projects. 33 C.F.R. § 326.3(c)(1), (2). The purposes of this communication include maintaining the status quo of the affected aquatic resources and providing notice of potential enforcement consequences. *See id* . § 362.3(c)(3); 51 Fed. Reg. 41,206, 41,214 (Nov. 13, 1986). The Corps may recommend a judicial enforcement action if, for example, the Corps is unable to resolve the matter administratively. *See* 33 U.S.C. §§ 1319(b) and (d), 1344(s); 33 C.F.R. § 326.5(a).

When (as in this case) the United States Department of Justice has commenced a civil enforcement action at the request of the Corps (or EPA), the United States bears the burden of proving by a preponderance of evidence that the defendants are in violation of the Act. To prevail in such an action, the United States must show that the defendant (1) discharged (2) a pollutant (3) to navigable waters (4) from a point source (5) without a permit. *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001). The defendant may raise

defenses, including any available ground that its conduct did not violate the Act.[2]

When a court finds that a defendant has violated the Act, the court must consider a number of equitable factors in determining remedy. *See* 33 U.S.C. §§ 1319(c) and (d). Here again, the defendant may raise defenses. *See, e.g., United States v. Fabian*, 522 F. Supp. 2d 1078, 1094 (N.D. Ind. 2007) (granting summary judgment with respect to liability, but denying summary judgment with respect to remedy because "not all of the facts necessary for this Court to make these determinations are before the Court").

FACTUAL AND PROCEDURAL BACKGROUND

Since at least April 2012, Duarte Nursery, Inc. has owned or controlled approximately 500 acres of real property on Paskenta Road in Tehama County, California, just south of the city of Red Bluff and approximately three miles west of Interstate 5 ("Site" or "Property"). Counterclaim, ECF No. 28, ¶¶ 24, 27, 28; Answer to Counterclaim, ECF No. 33, ¶¶ 24, 27, 28. John Duarte is the President and co-owner of Duarte Nursery, Inc. Counterclaim ¶ 29; Answer to Counterclaim ¶ 29.

The Site contains aquatic resources. In its counterclaim, the United States alleges that Coyote Creek – a tributary of the traditionally navigable Sacramento River and a habitat for federally-protected fish – traverses the northern part of the Site. Counterclaim ¶¶ 30-59; *see also* Counterclaim Ex. 1 (map illustrating flow path from the Site to the Sacramento River). Also, as alleged in the counterclaim, "the Site contains – or contained prior to the discharges of pollutants alleged . . . – at least two additional streams" contributing flow to Coyote Creek. Counterclaim ¶¶ 61, 67. Moreover, the United States alleges that the Site contains "wetlands" that are adjacent to one or more of the Site's streams and provide habitat for federally-protected shrimp. Counterclaim ¶¶ 70-77. *See also* Counterclaim ¶¶ 84, 86-87 (alleging that Coyote Creek and the

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[2] For example, the defendant might argue that the waters are not covered by the Act; that its activities did not result in the discharge of a pollutant; or that its activities are exempt. *See, e.g., Borden Ranch*, 261 F.3d at 814-16 (rejecting the defendant's contention that its deep ripping activities either did not result in the discharge of a pollutant in the first place or, if they did, were exempt under the limited "normal farming" exemption set forth in CWA section 404(f)(1)(A), 33 U.S.C. § 1344(f)(1)(A)).

Site's streams and wetlands have a significant nexus with the Sacramento River).[3]

Beginning in fall 2012, Duarte used machinery at the Site. While the parties agree that "[a]t no time did Duarte . . . apply for, secure, and comply with a CWA section 404 permit to discharge pollutants at the Site," Counterclaim ¶ 101; Answer to Counterclaim ¶ 101, the parties describe these activities differently. The United States' counterclaim alleges the activities included deep ripping or other earthmoving activities in streams or wetlands, Counterclaim ¶¶ 93-97, 101, and "resulted in the 'discharge of any pollutant' within the meaning of 33 U.S.C. § 1311(a)." Counterclaim ¶ 99. Duarte's Amended Complaint, on the other hand, alleges that Duarte "planted a winter wheat crop on the Property, using a tractor to plough and plant." Am. Compl. ¶ 47. Further, according to the Amended Complaint, "Duarte . . . marked off all wetlands . . . and ensured that [they] were avoided by farming equipment, with an appropriate set back." *Id.* Duarte denies that any deep ripping occurred. *Id.*

In February 2013, the Corps issued a cease-and-desist order to Duarte. Am. Compl., Ex. A. The cease-and-desist states: "[Y]ou have discharged dredged or fill material into . . . waters of the United States, without a . . . permit." *Id.* As noted in the Court's April 2014 Order, "[t]he Corps went on to warn plaintiffs of the '[p]otential enforcement actions' that could ensue." April 2014 Order at 2 (quoting cease-and-desist order). The cease-and-desist order invited Duarte to provide relevant information, a request that the Corps repeated in April 2013. Am. Compl. ¶ 53.

Instead of providing information to the Corps, Duarte sued. Compl., ECF No. 1. As summarized by the Court, Plaintiffs claimed in the first, second and fifth claims that the cease-and-desist order "deprived them of property or property rights protected by the Due Process clauses of the Fifth . . . Amendment[.]" Order at 4. "For remedies, plaintiffs ask for (1) declaratory judgments that the failure to provide hearings is unconstitutional, (2) an injunction against further enforcement proceedings based upon the [cease-and-desist order], (3) an injunction requiring [the Corps] to notify those to whom the [cease-and-desist order was] sent, that [it is] invalid, and (4) a declaratory judgment that the regulations at 33 C.F.R. Part 326 are

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[3] Duarte acknowledges the existence of wetlands on the Site. Am. Compl. ¶ 47.

unconstitutional," April 2014 Order at 5, "as applied to Plaintiffs in this case." Compl. ¶ 1. The Corps moved to dismiss the due process claims on the grounds that: (1) they are not ripe for judicial review; and (2) they fail to state a claim. *See* ECF No. 10.

In February 2014, following the hearing on its motion to dismiss, the United States advised Duarte, consistent with the cease-and-desist order, that it was considering commencing a CWA enforcement action based on the violations underlying the cease-and-desist order. *See* Am. Compl. ¶ 83 & Ex. A. Similarly, in a March 2014 status report, the United States advised that it is "currently considering whether to file a counterclaim on behalf of the Corps alleging that Plaintiffs violated the Clean Water Act as a result of the deep ripping activities that are the subject of this litigation." ECF No. 22 at 2. Likewise, Duartes' March 2014 status report acknowledged that "[a]ny compulsory counterclaim by the Army Corps against Plaintiffs or either of them would ordinarily be filed at the same time as the Army Corps' answer to Duarte's Complaint." ECF No. 20, at 2.

In April 2014, the Court issued its Order denying the Corps' motion to dismiss. Although the Court agreed that "the Corps needs the flexibility to 'notify' landowners that they are in violation of the law, without having to go to court first," the Court expressed concern that Duarte lacked "any ability to challenge this command, either before or after [its] issuance." April 2014 Order at 18. *See also id.* at 18-19 ("[P]laintiffs are being deprived now of the right to farm their land for an indefinite period, with no assurance that an enforcement action will ever be filed[.]"). Similarly, in concluding that Duarte had stated a due process claim, the Court reasoned that "[f]orcing plaintiffs to wait idly about while the Corps decides whether to bring an enforcement action has the effect of continuing to deprive plaintiffs of the use of their property, without end." April 2014 Order at 20.

In May 2014, the United States answered Duarte's complaint and, in addition, asserted a CWA counterclaim for enforcement. *See* Fed. R. Civ. P. 13(a) ("A pleading must state as a counterclaim any claim that . . . the pleader has against an opposing party if the claim . . . arises out of the transaction or occurrence that is the subject of the opposing party's claim[.]"). The counterclaim asserts a single claim, alleging that Plaintiffs are in violation of the CWA based on

their deep ripping or other earthmoving moving activities in streams and wetlands protected by the Act. *See* Counterclaim ¶¶ 59, 67, 69, 73, 74, 79, 86, 87. The counterclaim does not assert a claim based upon a violation of the Corps' cease-and-desist order.

In June 2014, Duarte answered the United States' counterclaim. In addition to denying the alleged violations, Duarte asserted a host of defenses. Duarte contends, for example, that "[t]he United states should recover nothing, or less than its demand, for equitable reasons, including but not limited to . . . its own conduct[.]" Answer to Counterclaim at 5.

In August 2014, Duarte filed the Amended Complaint at issue. In addition to reasserting claims one, two, and five (i.e., the due process claims), and claims three and four (i.e., the claims against state officials that the Court previously dismissed), Duarte alleges – in claim six – that Duarte's decision to sue the Corps and make statements to the media were "substantial" or "motivating factors" behind the United States' decision to file the counterclaim. Am. Compl. ¶84. Duarte characterizes this new claim as "Retaliatory Prosecution." Am. Compl. at 19. The relief Duarte seeks is non-monetary; rather, Plaintiffs seek "[a] prohibitory injunction preventing the Corps from prosecuting the Counterclaim and taking other enforcement action . . . until the Corps can establish that it would make the same enforcement decisions absent Plaintiffs' First Amendment protected activity." Am. Compl. at 20.

STANDARD OF REVIEW

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a party to move to dismiss a pleading for lack of subject matter jurisdiction. *See Jamul Action Comm. v. Steven*, No. 2:13-cv-1920-KJM-KJN, 2014 WL 3853148, at *10 (E.D. Cal. Aug. 5, 2014). "Mootness is a jurisdictional issue." *United States v. Strong*, 489 F.3d 1055, 1059 (9th Cir. 2007). So too is sovereign immunity; "the United States may not be sued without its consent and . . . the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to dismiss a pleading for failure to state a claim upon which relief can be granted. *See Hurtado v. County of Sacramento*, No. 2:14-cv-323-KJM-KJN, 2014 WL 4109624, at *2 (E.D. Cal. Aug.

19, 2014). Such motion may be granted "based on the lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Ballistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Moreover, "a complaint must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). Although a plaintiff's well-pled allegations of fact may be accepted as true for purposes of assessing the motion, "conclusory allegations of law and unwarranted inferences are insufficient to avoid[] dismissal." *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009) (citation omitted); *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

ARGUMENT

This motion is not about whether the Duarte plaintiffs will be heard regarding whether they are in violation of the Clean Water Act. They will be heard. At the same time, however, Plaintiffs do not have the right to maintain moot claims or, moreover, to prevent the United States from being heard as to whether Duarte is in violation of the Act as alleged in its counterclaim.

I. PLAINTIFFS' DUE PROCESS CLAIMS ARE MOOT

"It is not enough that a case presents a live controversy when it is filed; an actual controversy must exist at all stages of federal court proceedings." *Natural Resources Defense Council v. Jewell*, 749 F.3d 776, 782 (9th Cir. 2014). A controversy becomes moot when "changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005) (*en banc*) (citations omitted). That standard is met here; the Amended Complaint's first, second, and fifth claims should be dismissed as moot pursuant to Fed. R. Civ. P. 12(b)(1).

Since Plaintiffs sought to challenge the cease-and-desist order, the United States has asserted a counterclaim for enforcement of the Act. There is no dispute that the cease-and-desist order and the counterclaim allege "similar violations of the Clean Water Act by Duarte at the Property." Duarte's Motion to Amend at 5 (of 8). Similarly, it is indisputable that the Court has authority to adjudicate the counterclaim. *See supra* pp. 3-4. Indeed, in an enforcement action,

the United States must prove its allegations by a preponderance of the evidence. Thus, Plaintiffs will be fully heard with respect to whether they are in violation of the CWA and, if so, what remedies are appropriate.

The robust process that Duarte will receive through adjudication of the enforcement counterclaim will fully addresses the due process concerns expressed by the Court in its April 2014 Order. *See* April 2014 Order at 18 (Duarte should be heard "either before or after [the] issuance" of the cease-and-desist order); *id.* at 19 (Duarte has "no assurance that an enforcement action will ever be filed"); *id.* at 20 (Duarte should not have to "wait idly about while the Corps decides whether to bring an enforcement action"). Plaintiffs will now clearly have their day in court.

Plaintiffs' access to an adversarial process also addresses the crux of their due process claims. Duarte's position is that the Constitution requires "a hearing either before or after the Corps determines that a responsible party has violated federal law." Am. Compl. ¶ 5. Now that Duarte will have the chance to be heard, the proposition asserted by Duarte regarding what is required by the Constitution is a moot point. Similarly, whether the Due Process Clause would be violated if Duarte had *never* received a hearing is now academic. *See Wolfson v. Brammer*, 616 F.3d 1045, 1054 (9th Cir. 2010) ("We lack jurisdiction to decide moot questions or abstract propositions, because moot questions require no answers.") (quotations and citations omitted).

The limitations of the cease-and-desist order further show that the Court's plenary review of the merits forestalls any occasion for meaningful relief on Duarte's due process claims. Although the Court has accepted Duarte's assertion that the cease-and-desist order can cause injury, *see* April 2014 Order at 13, it is undisputed that the order carries "no legal consequences." April 2014 Order at 2 n.2. To stop Duarte from deep ripping or operating other earthmoving equipment in or near aquatic resources protected by the Act, the United States would have to seek and obtain from the Court a temporary restraining order or preliminary injunction. This proceeding would of course be adversarial; Duarte would have full and fair opportunity to raise defenses.

Although the Court need not resolve the validity of Duarte's due process claims to

dismiss them as moot, it is noteworthy that at least two circuits have found that CWA compliance orders do not violate due process. *See S. Pines Assoc. by Goldmeier v. United States*, 912 F.2d 713, 717 (4th Cir. 1990); *Hoffman Grp., Inc. v. EPA*, 902 F.2d 567, 570 (7th Cir. 1990). These courts of appeals have determined that due process is satisfied because a district court may award relief only after plenary review of underlying alleged violation of the CWA. Although these cases involved compliance orders issued by EPA, their due process holdings do not lose salience with respect to a cease-and-desist order issued by the Corps. *Compare Sackett v. EPA*, 132 S. Ct. 1367, 1370 (2012) (EPA compliance order has legal consequences) *with* April 2014 Order at 2 n.2. (cease-and-desist order lacks legal consequences).

Thus, Duarte's due process claims are moot, and claims one, two, and five should be dismissed.

II. PLAINTIFFS' RETALIATORY PROSECUTION CLAIM FALLS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT'S WAIVER OF SOVEREIGN IMMUNITY

The Amended Complaint's sixth claim, alleging retaliatory prosecution, should also be dismissed for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1). As this Court explained in its April 2014 Order, "[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." Order at 10-11 (quoting *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999)) (additional citations omitted). Here, the only waiver of sovereign immunity the Amended Complaint cites is 5 U.S.C. § 702, part of the Administrative Procedure Act ("APA"). *See* Am. Compl. ¶ 1; *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1103 (9th Cir. 2007). This waiver has limits, however. *See Belle Co. v. U.S. Army Corps of Eng'rs*, No. 13-30262, 2014 WL 3746464, at *8-9 (5th Cir. July 30, 2014) (holding that the APA did not waive sovereign immunity to allow a due process challenge to the Corps' determination that "navigable waters" existed on a site).

Relevant here, the APA waiver does not allow judicial review "to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This limitation applies in two circumstances. "The first of these circumstances is that in which a court would

have no meaningful standard against which to judge the agency's exercise of discretion and there thus is no law to apply." *Ctr. for Policy Analysis on Trade and Health v. Office of the United States Trade Rep.*, 540 F.3d 940, 944 (9th Cir. 2008) (citation omitted). "The second such circumstance is that in which the agency's action requires a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise, including the prioritization of agency resources, likelihood of success in fulfilling the agency's statutory mandate, and compatibility with the agency's overall policies." *Id.* Both circumstances apply to Duarte's request for injunctive and other non-monetary relief against the United States.

The United States' decision to enforce the Act through a counterclaim is committed to its discretion by law. *See Heckler v. Chaney*, 470 U.S. 821 (1985). In that seminal decision, the Supreme Court held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion" and therefore "general[ly] unsuitable for judicial review." 470 U.S. at 831. The Court found lacking any "meaningful standard" "against which to judge the agency's exercise of discretion." *Id.* at 831. Furthermore, as the Court explained, an enforcement decision "often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.* The Court observed that "the agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.* at 831-32.

Heckler v. Chaney requires dismissal of Duarte's new claim. A decision to enforce, like a decision not to enforce, is discretionary and involves the balancing of a number of factors. As the Supreme Court explained in *Heckler*: "[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." 470 U.S. at 831. Materially similar considerations apply to decisions to enforce, making them ill-suited to judicial review.

Buntrock v. SEC, 347 F.3d 995 (7th Cir. 2003) (Posner, J.), is instructive. There, the Seventh Circuit affirmed the dismissal for want of jurisdiction of a civil defendant's "attempt to

derail the [Securities and Exchange Commission's] suit by filing his own suit against the SEC rather than seeking relief in that suit." 347 F.3d at 997. The court found "no basis in law or common sense" to support the defendant's affirmative claim and held that the "frivolous suit does not engage the jurisdiction of the district court." *Id.* Moreover, the court explained that even if civil defendant's allegation of impropriety by the enforcement agency was true and would be a bar to the SEC's enforcement suit, "there would be no justification for [the civil defendant's] suing the Commission rather than urging the impropriety as a defense in the SEC's suit." *Id.* [4]

Similarly, here, Duarte cannot invoke the Court's jurisdiction by seeking to enjoin the counterclaim through a claim of impropriety. To the extent that Duarte has evidence of impropriety (and, to be clear, the United States rejects any assertion that it has done anything unconstitutional in this case), Duarte has an adequate remedy. As explained *supra* pp.3-4, courts may consider equitable factors in its CWA remedial decisions. Thus, Plaintiffs have ample ability to defend themselves in the enforcement action. In fact, Plaintiffs have already asserted, in their answer to the counterclaim, that "[t]he United States should recover nothing, or less than its demand, for equitable reasons, including but not limited to . . . its own conduct[.]" Answer to Counterclaim at 5. That is where any such argument belongs.[5]

Duarte's retaliatory prosecution claim is jurisdictionally flawed for an additional reason. As the Court explained in its April 2004 Order, "plaintiffs must be challenging 'agency action'

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[4] As Judge Posner further explained:

> If A knows that B is about to sue him and thinks that B's suit is barred by the statute of limitations, A cannot file suit against B asking that B be enjoined from bringing his suit on the ground that A has a good defense to it. The "reason" that the cases give for this result is that A has an adequate remedy at law—to interpose the statute of limitations as a defense in the case brought by B—and lack of an adequate remedy at law is a prerequisite to obtaining equitable relief.

Buntrock, 347 F.3d at 997.

[5] But Duarte should not have "false hopes" about prevailing on such argument. *See Buntrock*, 347 F.3d at 998. *See also, e.g., Pauly v. United States Dep't of Agric.*, 348 F.3d 1143, 1149 (9th Cir. 2003) (party seeking to estop the United States must show, *inter alia*, that "the government has engaged in affirmative misconduct going beyond mere negligence").

for their claim to be within the waiver of sovereign immunity ." Order at 11 (citation omitted). "Agency action" means "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). The United States' enforcement counterclaim is none of these things. *See City of Oakland v. Holder*, 901 F. Supp. 2d 1188, 1195 (N.D. Cal. 2013) ("[T]he filing of a civil action does not fit within the APA's definition of agency action.").

Thus, the United States has not waived its sovereign immunity under the APA to be sued for "Retaliatory Prosecution."

III. PLAINTIFFS' RETALIATORY PROSECUTION CLAIM IS NOT A CLAIM AT ALL

The Amended Complaint's sixth claim should be dismissed under Fed. R. Civ. P 12(b)(6) for the additional reason that it fails to state a claim upon which relief can be granted. "Retaliatory Prosecution," as Duarte has pled it, is simply not a claim. As far as we have been able to glean, there is no reported federal judicial decision allowing a claim similar to that pled by Duarte.

Instead, our research indicates that claims alleging First Amendment retaliatory prosecution have been brought against state actors, usually under 42 U.S.C. § 1983, which applies to persons acting under the color of state law, or under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), which applies to federal employees. *See, e.g., Chizmar v. Borough of Trafford*, Civ. No. 09-188, 2011 WL 1200100, at *16-17 (W.D. Pa. Mar. 29, 2011) *aff'd*, 454 Fed. App'x 100 (3d Cir. 2011) (retaliatory prosecution claim against state actors under § 1983); *George v. Rehiel*, 738 F.3d 562, 586 (3d Cir. 2013) (retaliatory prosecution claim against federal officials under *Bivens*). In fact, the "precedent" that Plaintiffs cited in their motion for leave to file the Amended Complaint involves First Amendment claims brought against state actors or under *Bivens*. *See* Duarte's Motion to Amend at 4 (citing *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989); *Denney v. Drug Enforcement Admin.*, 508 F. Supp. 2d 815, 831 (E.D. Cal. 2007)).

More specifically, no court has recognized a First Amendment retaliatory prosecution claim where the adverse action complained of concerns an enforcement action brought as a counterclaim, let alone a potentially *compulsory* counterclaim like the United States' enforcement action here. *See* Fed. R. Civ. P. 13(a) ("A pleading must state as a counterclaim any claim that . . . the pleader has against an opposing party if the claim . . . arises out of the transaction or occurrence that is the subject of the opposing party's claim[.]"). Having put the United States in a position where it must pursue its civil enforcement action as a counterclaim or risk having a future enforcement action barred under Rule 13(a), Duarte cannot now claim that the counterclaim is improper and should be barred. Under Duarte's warped reasoning *every* potentially compulsory counterclaim brought by the United States would constitute "retaliatory prosecution." In short, the United States should not and cannot be enjoined from pursuing a properly initiated civil action, an enforcement action that Plaintiffs were given advance notice of (*see supra* p.6), on the account that the Plaintiffs brought suit first. *See Tahraoui v. Brown*, C11-5901BHS, 2012 WL 472898, at *2 (W.D. Wash. Feb. 13, 2012) (dismissing retaliatory prosecution claim when First Amendment activities occurred after investigation of a theft charge had already began), *aff'd*, 539 Fed. App'x 734 (9th Cir. 2013).

Further, in considering whether a constitutional tort has been sufficiently pled, "the [Supreme] Court held in *Iqbal*, as it had in *Twombly*, that courts may infer from the factual allegations in the complaint 'obvious alternative explanation[s]', which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." *George*, 738 F.3d at 586. The Court here can certainly infer from the pleadings that the United States brought the counterclaim to enforce the CWA, rather than postulate unlawful animus. *See* Am. Compl. Ex. A at 1. Regardless, even if Duarte's unspecified First Amendment activities played a role in the United States' decision to file a counterclaim, as the Amended Complaint alleges, such motivation does not give rise to a legally cognizable claim because an "action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." *Hartman v. Moore*, 547 U.S. 250, 260 (2006).

Thus, as an additional or alternative ground to dismissal under Fed. R. Civ. P. 12(b)(1),

the Amended Complaint's sixth claim should be dismissed under Fed. R. Civ. P. 12(b)(6).

IV. PLAINTIFFS CANNOT PURSUE THEIR RETALIATORY PROSECUTION CLAIM WHILE THE UNITED STATES' ENFORCEMENT ACTION IS PENDING

Even if there were a waiver of sovereign immunity and Plaintiffs had asserted and could assert a claim for retaliatory prosecution under § 1983 or *Bivens*, they could not state a claim at this time. *See Haagensen v. Penn. State Police*, No. 08–727, 2009 WL 790355, at *4 (W.D. Pa. Mar. 25, 2009) (concluding that "First Amendment retaliatory prosecution claim did not accrue until the charges against her had been dismissed"); *Tangert v. Crossan*, 1:11-CV-2395, 2014 WL 47557, at *5-6 (M.D. Pa. Jan. 7, 2014). Although the Ninth Circuit has not expressly addressed this issue, it is well settled law in this Circuit that a malicious prosecution claim regarding criminal proceedings does not accrue until the underlying prosecution has terminated in favor of the person charged (i.e., the civil plaintiff). *Cabrera v. City of Huntington Park*, 159 F.3d 374, 382 (9th Cir. 1998); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1060 n.11 (9th Cir. 2002); *see also Simon v. Navon*, 71 F.3d 9, 17 (1st Cir. 1995) (stating that plaintiff's claim for malicious prosecution would remain premature as a matter of law until the prior lawsuit ended). This same requirement should apply here. *See Hartman*, 547 U.S. at 260 (discussing borrowing from common law torts when considering elements of constitutional violations); *Donahoe v. Arpaio*, 986 F. Supp. 2d 1091, 1137 (D. Ariz. 2013).

Indeed, the Supreme Court has recognized that retaliatory prosecution is a "close cousin of malicious prosecution claims." *Hartman*, 547 U.S. at 258. Thus, if the Court has to reach this question (and it need not, if it dismisses Duarte's claim for lack of jurisdiction or failure to state any claim at all), Duarte must first prevail in the United States' counterclaim for enforcement prior to pursuing any retaliation claim. If the counterclaim proves meritorious, then any claim of retaliatory prosecution claim necessarily becomes moot because it is clear that the United States had sufficient basis to enforce the CWA: Plaintiffs are in violation of the CWA. *See Hartman*, 547 U.S. at 260 ("If there is a finding that retaliation was not the but-for cause of the discharge, the claim fails for lack of causal connection between unconstitutional motive and resulting harm,

despite proof of some retaliatory animus."); *Dietrich v. John Ascua's Nugget*, 548 F.3d 892, 901-02 (9th Cir. 2008).

CONCLUSION

For the forgoing reasons, the Court should dismiss Duarte's "First Supplemental Complaint for Declaratory Judgment and Injunctive Relief." ECF No. 41.

Respectfully submitted,

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Dated: September 12, 2014

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant

.

UNITED STATES OF AMERICA,

Counterclaim- Plaintiff,

v.

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

Counterclaim- Defendants.

No. 2:13−CV−02095−KJM−DAD

[PROPOSED] ORDER DISMISSING FIRST SUPPLEMENTAL COMPLAINT

Before the Court is the United States' Motion to Dismiss Duarte's First Supplemental Complaint. Upon due consideration of the motion, any response or argument, pertinent portions of the record, and being otherwise fully advised, the Court hereby GRANTS the motion. The Court previously dismissed the third and fourth claims of the Complaint. ECF No. 27. The Court now disposes of the remaining first, second, fifth and sixth claims for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Plaintiffs' due process claims (the first, second, and fifth claims) are dismissed as now being moot. Plaintiffs' supplemental retaliatory

prosecution claim (the sixth claim) is barred by sovereign immunity. Additionally or alternatively, the sixth claim is not a claim at all and, even if it were, is premature and thus fails to state a claim upon which relief may be granted and is dismissed under Fed. R. Civ. P. 12(b)(6). Because no amendment can cure these defects, the First Supplemental Complaint is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED:

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KIMBERLY J. MUELLER

UNITED STATES DISTRICT JUDGE

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