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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
10

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

12 Plaintiffs, )

13 v. )

14 UNITED STATES ARMY CORPS OF ENGINEERS; )  
15 et al., )

16 Defendants. )

No. 2:13-cv-02095-LKK-DAD

**PLAINTIFFS' COMBINED  
OPPOSITION TO FEDERAL  
DEFENDANT'S AND STATE  
DEFENDANTS' MOTIONS  
TO DISMISS COMPLAINT**

Date: February 10, 2014

Time: 10:00 a.m.

Courtroom 4

Judge: Hon. Lawrence K. Karlton

Trial Date: None Set

Action Filed: October 10, 2013

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**INTRODUCTION**

1  
2 In the Fall of 2012, Plaintiff Duarte Nursery, Inc. (Duarte Nursery), planted a winter wheat  
3 crop on a parcel of real property it owns in rural Tehama County, California (Property). Duarte  
4 Nursery’s farming of the Property is indistinguishable from that of hundreds if not thousands of  
5 other farmers in California and across the United States. In doing so, Duarte Nursery engaged in  
6 normal farming practices that Congress has expressly exempted from the ambit of the federal Clean  
7 Water Act’s prohibition on discharge of dredged or fill material in navigable waters.

8 Despite this express statutory exemption, and without a hearing, defendant United States  
9 Army Corps of Engineers (Corps) issued a Cease and Desist Order to Duarte Nursery and its  
10 president, John Duarte (collectively Duarte), finding them both in violation of the Clean Water Act  
11 for planting wheat on the Property, and ordering them to halt further farming. Two months later,  
12 again without a hearing, the board members and executive officer of the Central Valley Regional  
13 Water Quality Control Board (Water Board) issued a Notice of Violation to Duarte, for what  
14 appears to be the same supposed violation of the Clean Water Act, directing them to restore the  
15 Property.

16 The Cease and Desist Order is based on the false assertion by the Corps that Duarte deep-  
17 ripped the property, which is the only specific factual basis on which either enforcement action is  
18 based. The Property has not been deep-ripped, and if the Corps and Water Board had held  
19 constitutionally adequate hearings before issuing the Cease and Desist Order and Notice of  
20 Violation, they would have learned their error, and likely neither action would have been taken.

21 The Cease and Desist order and Notice of Violation each prevent Duarte from exercising  
22 the vested right to use the Property consistent with its current zoning, and impair the ability to  
23 alienate the Property. The Corps and the Water Board each violated Duarte’s procedural due  
24 process rights by issuing the Cease and Desist Order and Notice of Violation without affording  
25 Duarte a hearing.

26 Absent judicial review of these due process violations, Duarte can only regain these  
27 property interests by either applying for an expensive, time consuming, and onerous permit which  
28 they would then have to sue to establish they do not need, or wait in grim readiness for the

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1 Defendants to sue Duarte. That is the choice that the Defendants seek to force on Duarte by  
2 moving to dismiss this lawsuit.

3 **STATEMENT OF THE CASE**

4 Plaintiffs Duarte Nursery, Inc., and John Duarte filed their Complaint against the Corps and  
5 the Water Board Defendants on October 10, 2013. The Complaint alleges in detail the events  
6 leading up to and following the Corps' issuance of the Cease and Desist Order (Order) to Duarte  
7 in February of 2013, requiring Duarte to discontinue farming the Property, on the purported basis  
8 that said farming violates the Federal Clean Water Act. Two months later, the Water Board issued  
9 a Notice of Violation under California law to Duarte which appears to be based on the same  
10 alleged violation of the Clean Water Act. Both of these actions deprive Duarte of interests in the  
11 Property and were taken without affording Duarte a hearing. The Complaint states claims against  
12 the Corps (Claims 1 and 2) and the Water Board (Claims 3 and 4) for violation of Plaintiffs'  
13 procedural due process rights under the Fifth and Fourteenth Amendments to the United States  
14 Constitution, and an additional claim (Claim 5) for the as-applied unconstitutionality of the Corps'  
15 regulations regarding cease and desist orders.

16 The Corps and Water Board have moved separately to dismiss the Complaint under Federal  
17 Rules of Civil Procedure 12(b)(1) and 12(b)(6). Both motions argue that Duarte's case is not ripe.  
18 The Corps also argues that Duarte has not been deprived of a property or liberty interest, and  
19 therefore cannot state a due process claim. The Water Board also moves to dismiss under the  
20 Eleventh Amendment.

21 Plaintiffs file this combined opposition to both motions in the hope that this format will be  
22 most convenient for the Court and the defendants. The legal principles under which both motions  
23 are to be decided are similar, as are the facts as they pertain to Duarte. The Order and Notice of  
24 Violation also have important similarities.

25 Both motions to dismiss incorrectly treat the Complaint as seeking review of the  
26 substantive contents of the Order and Notice of Violation in this Court. It does not. Rather,  
27 Plaintiffs seek a declaratory judgment (and related injunctive relief) that the issuance of the Order  
28 and Notice of Violation, along with their underlying determinations, violate their Fifth and

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1 Fourteenth Amendment rights to procedural due process by depriving them of property without  
2 a hearing. The Order and Notice of Violation deprive Plaintiffs of interests in the Property,  
3 including but not limited to the use of the Property for the purpose for which it is zoned (*i.e.*,  
4 farming), and the ability to alienate the title or use of the property. The Corps and Water Board  
5 accept as true for purposes of these motions that they issued the Order and Notice of Violation,  
6 respectively, without any hearing. That constitutional violation is plead more than adequately in  
7 the Complaint. It is neither speculative nor contingent on future events, but has occurred, and is  
8 ongoing.

9 Each of Duarte’s claims is fit for judicial review, and Duarte’s due process challenge to the  
10 Order and Notice of Violation are therefore ripe. If denied judicial review, the Plaintiffs will  
11 immediately face the dilemma of disregarding the Order and Notice of Violation (at the risk of  
12 crippling fines and, as to Plaintiff John Duarte, imprisonment), or subject themselves to lengthy,  
13 expensive, and onerous permitting processes, only at the end of which may they challenge their  
14 obligation to seek such a permit in the first place.

15 The Water Board Defendants are not immune from suit under the Eleventh Amendment,  
16 because the Complaint alleges an ongoing constitutional violation by those Defendants, for which  
17 the Complaint seeks prospective relief.

18 Duarte states a cognizable claim for violation of procedural due process rights against all  
19 Defendants, the case is ripe, the Water Board Defendants are not immune from suit, and both of  
20 the motions should be denied.

## 21 LEGAL BACKGROUND

### 22 Clean Water Act Permitting Provisions

23 The Clean Water Act authorizes the Corps of Engineers to regulate certain discharges to  
24 “navigable waters” or “waters of the United States.” 33 U.S.C. §§ 1311(a) & 1362(7). Whether  
25 jurisdictional wetlands exist on any given parcel of property is not necessarily evident from the  
26 face of the Clean Water Act or its implementing regulations. Rather, in many cases, interested  
27 parties are left “to feel their way on a case-by-case basis.” *Rapanos v. United States*, 547 U.S. 715,  
28 758 (2006) (Roberts, C.J., concurring); *see also Sackett v. EPA*, 132 S. Ct. 1367, 1375-76 (2012)

1 (Alito, J., concurring) (“[M]any jurisdictional determinations concerning wetlands can only be  
2 made on a case-by-case basis by EPA field staff.”).

3 Unless exempt, a discharge of a pollutant into jurisdictional waters is prohibited without  
4 a federal permit. *See* 33 U.S.C. §§ 1251(a), 1311(a), 1362(6). The Clean Water Act expressly  
5 exempts several activities from the ban on discharging dredged and fill material and the  
6 requirement to obtain permits, including “normal farming activities.” 33 U.S.C. § 1344(f)(1)(A).<sup>1</sup>

7 **Clean Water Act Enforcement Provisions**

8 Absent such an exemption, failure to obtain a permit for such a discharge exposes the actor  
9 to severe liability. A party who discharges dredged or fill material into “navigable waters” without  
10 first obtaining a permit is subject to civil and/or criminal penalties of up to \$37,500 per day for  
11 negligent violations and up to \$50,000 per day for knowing violations, and imprisonment for up  
12 to three years. *See* 33 U.S.C. § 1319(b) - (g), *modified by* 40 C.F.R. § 19.4, 78 Fed. Reg. 66,643,  
13 66,647 (Nov. 6, 2013). Criminal liability for violation by a corporate entity extends to responsible  
14 corporate officers. *See* 33 U.S.C. § 1319(c)(6).

15 The Corps, through its district engineers, is authorized by regulation to investigate  
16 unauthorized activities that require permits, to confirm whether such actions have occurred in  
17 violation of Section 404, to notify responsible parties of violations, and to determine a course of  
18 action in resolving the violation. 33 C.F.R. § 326.3. The Corps’ regulations direct that once the  
19 district engineer has determined that a violation has occurred, the district engineer should notify  
20 the responsible parties. 33 C.F.R. § 326.3(b). In the case of a violation involving a project that  
21 is not complete, the regulations direct the district engineer to issue a cease and desist order. 33  
22 C.F.R. § 326.3(c)(1).

23 “The reach of the Clean Water Act is notoriously unclear.” *Sackett v. EPA*, 132 S. Ct. at  
24 1375 (Alito, J., concurring). The district engineer’s determination that a violation has occurred,  
25 under 33 C.F.R. § 326.3(b), is an adjudicatory action to which due process protections apply. In  
26 this case it involves the application of general principles of law to a single parcel of property, and

27 \_\_\_\_\_  
28 <sup>1</sup> The Corps is oddly silent on this aspect of the law. *See* Corps’ Points and Authorities at 2-5  
(describing dredge and fill permitting regime without reference to exempt activities).

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1 to specific acts that the Corps purportedly determined that Duarte committed. *See, e.g., Londoner*  
 2 *v. City & County of Denver*, 210 U.S. 373, 385 (1908) (property owner entitled to hearing on tax  
 3 apportionment where statute delegated power to agency of “determining whether, in what amount,  
 4 and upon whom [tax] shall be levied”); *accord Bi-Metallic Inv. Co. v. State Bd. of Equalization*,  
 5 239 U.S. 441, 445-46 (1915) (due process applies to decisions concerning “relatively small number  
 6 of persons . . . , who were exceptionally affected, in each case upon individual grounds”).

7 Cease and desist orders as such are enforceable through legal action initiated by the Corps,  
 8 regardless of whether such legal action seeks penalties in addition. 33 C.F.R. § 326.5(a) (legal  
 9 action to obtain compliance with cease and desist and other orders issued under § 326.3). The  
 10 Corps may seek civil and criminal penalties for violations of the Clean Water Act. 33 U.S.C.  
 11 § 1319(c), (d). The Corps’ regulations state that willful and/or repeated violations are appropriate  
 12 for civil or criminal action. 33 C.F.R. § 326.5(a).

### 13 State Certification Requirements and Enforcement

14 Section 401 of the Clean Water Act, 33 U.S.C. § 1341, requires applicants for a dredge and  
 15 fill permit under Section 404 to also obtain a state water quality certification from the applicable  
 16 state agency. The State Water Resources Control Board is authorized to issue state water quality  
 17 certifications in connection with Corps Section 404 permits under California Water Code sections  
 18 13160, 13376, and 13377. The Water Board has the responsibility for overseeing and  
 19 implementing the enforcement program of the Central Valley Regional Water Quality Control  
 20 Board, and issues notices of violation under the State Water Board’s Enforcement Policy. The  
 21 Enforcement Policy directs the Water Board to bring “actual, threatened, or potential” violations  
 22 to a discharger’s attention, in order “to give the discharger an opportunity to return to compliance  
 23 as soon as possible.” Exhibit A to Water Board’s Request for Judicial Notice at 32.

24 The Water Board may impose administrative civil liability for violations of the above-cited  
 25 California Water Code sections, under California Water Code section 13320. Among the factors  
 26 in determining the amount of such liability are “voluntary cleanup efforts undertaken” and “prior  
 27 history of violations.” Cal. Water Code § 13327.

28 ///

**FACTS ALLEGED IN THE COMPLAINT**

Both motions to dismiss are facial attacks on the Complaint. The Corps takes the factual allegations of the Complaint as true for purposes of the motion. Corps’ Points and Authorities at 5:22. Likewise, the Water Board only cites to the Complaint (including Exhibit B thereto) for the recitation of facts in its motion. Water Board Points and Authorities at 5. The Complaint alleges the following facts, which establish federal court jurisdiction in this case:

**Duarte and the Property**

Duarte Nursery, of which John Duarte is the President, owns real property in Tehama County, California (Property), which it acquired in 2012 in order to farm. The Property is zoned for agricultural use by Tehama County, and has historically been used for wheat farming. Complaint ¶¶ 44-45. In late 2012, Duarte Nursery planted a winter wheat crop on the Property, at a minimum cost of \$50,000. No deep-ripping has taken place on the Property while it has been owned by Duarte Nursery or under the control of John Duarte. Complaint ¶ 47.

**The Corps Cease and Desist Order**

On February 25, 2013, the Corps issued the Order to Duarte Nursery and John Duarte. The Order “determine[s] that [Plaintiffs] have discharged dredged or fill material into . . . waters of the United States, without a . . . permit . . . in violation of the Clean Water Act.” The Order further states: “You are hereby directed to cease and desist all work in waters of the United States until this violation is resolved.” Complaint ¶ 50, Exhibit A.

Duarte responded by requesting that the Corps provide the factual basis for the Order and an explanation of available administrative remedies, and reserving all defenses. Complaint ¶ 52. On April 18, 2013, the Corps partially responded, alleging (incorrectly) that the Property had been deep-ripped while under John Duarte’s control, and stating that any farming to have taken place on the Property was not eligible for the normal farming practices exemption from permitting. Complaint ¶ 53.

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**The Water Board Notice of Violation**

1  
2 Five days later, the Water Board issued the Notice of Violation to Duarte, stating Plaintiffs  
3 are in violation of the Clean Water Act for failing to obtain a permit from the Corps and a State  
4 Water Quality Certification under Sections 401 and 404 of the Act, and directing Plaintiffs to  
5 submit a plan for mitigating the impacts of unauthorized fill. The Notice of Violation also  
6 threatens Plaintiffs with additional enforcement action, including daily fines of up to \$10,000.  
7 Complaint ¶¶ 55-56, Exhibit B.

**Corps and Water Board Due Process  
Violations and Consequences for Duarte**

8  
9  
10 Neither the Corps nor the Water Board provided Duarte any hearing prior to or since  
11 issuing the Order and Notice of Violation respectively. Complaint ¶¶ 58, 81, 85.

12 If afforded a hearing prior or subsequent to the issuance of the Order and/or Notice of  
13 Violation, Duarte would have presented evidence that the Property has not been deep-ripped during  
14 Duarte Nursery’s ownership of it, and that Duarte Nursery avoided any wetlands on the Property.  
15 Duarte would also have presented evidence and argument that all of their wheat farming  
16 constituted normal farming practices, and therefore was exempt from permitting requirements  
17 under Section 404(f)(1)(A) of the Clean Water Act. Complaint ¶¶ 54, 59.

18 Given the nonspecific and therefore unlimited scope of the Order and Notice of Violation,  
19 Complaint ¶ 62, and of the potential legal implications of defying them, Duarte left the wheat crop  
20 untended, resulting in its total loss, at a cost to Duarte Nursery of at least \$50,000 in planting costs.  
21 Duarte was also unable to make necessary preparations for farming the Property in the Fall of  
22 2013, and hence lost another year’s opportunity to grow and harvest a crop. Complaint ¶¶ 63-64.

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**STANDARD OF REVIEW**

**FRCP 12(b)(1)**

A plaintiff who invokes the jurisdiction of a federal court has the burden of establishing that jurisdiction exists. *Westlands Water Dist. Distribution Dist. v. Natural Res. Def. Council, Inc.*, 276 F. Supp. 2d 1046, 1049 (E.D. Cal. 2003) (citing *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936), and *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986)).

If the defendant contends that the allegations of jurisdiction contained in the complaint are insufficient on their face to demonstrate the existence of jurisdiction, *i.e.*, a facial attack, then the factual allegations of the complaint are presumed to be true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction. *Cervantez v. Sullivan*, 719 F. Supp. 899, 903 (E.D. Cal. 1989) (citing 2A J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice*, para. 12.07, at 12.46-47 (2d ed. 1987)), *reversed on other grounds*, *Cervantez v. Sullivan*, 963 F.2d 229 (9th Cir. 1992).

A complaint alleging federal question jurisdiction will only be dismissed for lack of subject matter jurisdiction in one of three cases: (1) the cause does not “arise under” the United States Constitution or any federal statute or regulation, (2) there is no case or controversy as required by Article III of the U.S. Constitution, or (3) the cause is not described by any jurisdictional statute. *Sullivan By and Through Sullivan v. Vallejo City Unified School Dist.*, 731 F. Supp. 947, 949 (E.D. Cal. 1990) (citing *Baker v. Carr*, 369 U.S. 186, 198 (1962)).

**FRCP 12(b)(6)**

The United States Supreme Court, in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007), has prescribed a two-step process for evaluating motions to dismiss under Rule 12(b)(6). In the first step, the court identifies the nonconclusory allegations of fact in the complaint, and in the second step the court determines whether these allegations, which the court takes as true and construes in the light most favorable to the plaintiff, “plausibly give rise to an entitlement to relief.” *Falcochia v. Saxon Mortg., Inc.*, 709 F. Supp. 2d 873, 876 (E.D. Cal. 2010) (citing *Erickson v. Pardus*, 551 U.S. 89 (2007)).

///

1 “Plausibility” does not mean the likelihood that the plaintiff will prove the allegations, but  
2 rather whether the nonconclusory allegations, taken as true, “ ‘allow [ ] the court to draw the  
3 reasonable inference that the defendant is liable for the misconduct alleged.’” *Champlaiie v. BAC*  
4 *Home Loans Servicing, LP*, 706 F. Supp. 2d 1029, 1037-38 (E.D. Cal. 2009) (quoting *Iqbal*, 556  
5 U.S. at 678). Nonconclusory allegations need not be “‘detailed factual allegations’” but must be  
6 more than mere unadorned accusation. *Champlaiie*, 706 F. Supp. 2d at 1037-38 (citing *Iqbal*, 556  
7 U.S. at 678).

8 **ARGUMENT**

9 **I**

10 **THE COMPLAINT STATES VALID CLAIMS**  
11 **AGAINST THE CORPS FOR VIOLATION OF**  
12 **DUARTE’S PROCEDURAL DUE PROCESS RIGHTS**

13 “No person shall be . . . deprived of life, liberty, or property, without due process of law[.]”  
14 U.S. Const. amend. V. “Procedural due process imposes constraints on governmental decisions  
15 which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process  
16 Clause of the Fifth or Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).  
17 “When protected interests are implicated, the right to some kind of prior hearing is paramount.”  
18 *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70 & n.7 (1972). “A protected  
19 property interest is present where an individual has a reasonable expectation of entitlement  
20 deriving from existing rules or understandings that stem from an independent source such as state  
21 law.” *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994)  
22 (internal quotations omitted) (quoting *Roth*, 408 U.S. at 577). A real property owner in California  
23 has a vested right to continue uses of the property that conform to the zoning in place at the time  
24 of acquisition. *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 516 (1975).

25 The existence of the Order and Notice of Violation are a material fact that affect the value  
26 of the property that Duarte would be required to disclose to a perspective lessor or purchaser. “A  
27 seller of real property . . . is under a legal duty to the buyer to disclose facts that materially affect  
28 the value or desirability of the property that are known . . . to the seller . . . and cannot be  
discovered by the diligent attention and observation of the buyer.” *Miller & Starr*, 1 Cal. Real Est.

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1 | § 1:140 (3d ed.) (citing cases; footnote omitted); *see, e.g., Dyke v. Zaiser*, 80 Cal. App. 2d 639,  
 2 | 642, 653-54 (1947) (lessor liable for fraud for failing to disclose to lessee that police would shut  
 3 | down business located on premises). “[E]ven the temporary or partial impairments to property  
 4 | rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process  
 5 | protection.” *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991); *Tri-State Dev. v. Johnston*, 160 F.3d  
 6 | 528, 531 (9th Cir. 1998) (Washington attachment statute was subject to due process scrutiny  
 7 | because, inter alia, it “impairs the ability to sell or otherwise alienate the property.”) (citing *Doehr*,  
 8 | 501 U.S. at 11).

9 | **A. Duarte States Valid Claims Against the Corps That the**  
 10 | **Order Deprives Duarte of Property Without a Hearing**

11 | “To establish a procedural due process claim, Plaintiffs must first show the deprivation of  
 12 | a liberty or property interest protected by the Due Process Clause.” *R.J. Reynolds Tobacco Co.*  
 13 | *v. Bonta*, 272 F. Supp. 2d 1085, 1111 (E.D. Cal. 2003) (citing *Roth*, 408 U.S. 564). Duarte  
 14 | Nursery owns the Property, which is zoned for agricultural use by Tehama County and which has  
 15 | historically been used for growing wheat. Complaint ¶¶ 44-45. Duarte Nursery has a vested right  
 16 | under California law to farm wheat on the Property, since that use is consistent with the current  
 17 | zoning. *HFH, Ltd. v. Superior Court*, 15 Cal. 3d at 516.

18 | The Order, addressed to both Plaintiffs, states: “You are hereby directed to cease and desist  
 19 | all work within waters of the United States until this violation is resolved.” Complaint, Exhibit A.  
 20 | The Order, with which Duarte has complied, Complaint ¶¶ 63-64, deprives Duarte Nursery of its  
 21 | vested right to use the Property consistent with its zoning. The Order, and the Corps’  
 22 | determination that growing wheat on the Property violates the Clean Water Act, are material facts  
 23 | that affect the value of the property, by preventing the Property’s use for purposes for which it is  
 24 | zoned. Duarte would also be obligated to disclose the Order to any prospective purchaser, lessor,  
 25 | and perhaps even any contractor who would farm the property. *Dyke v. Zaiser*, 80 Cal. App. 2d  
 26 | at 653-54. As a result, the Order deprives Duarte of the ability to freely alienate the Property.  
 27 | *Doehr*, 501 U.S. at 11; *Tri-State Dev. v. Johnston*, 160 F.3d at 531.

28 | ///



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1 The Corps regulations provide no time limit within which the Corps is required to “resolve  
2 the violation.” 33 C.F.R. § 326.3. As a result, the deprivation will continue until such time as the  
3 Corps decides to take further action, if it ever does.<sup>2</sup>

4 The Order was issued to Duarte without either a pre-deprivation or a post-deprivation  
5 hearing. Complaint ¶¶ 61, 72, 81, 85. A hearing would have afforded Duarte an opportunity to  
6 refute the factual and legal basis of the Order. In particular, Duarte would have been able to rebut  
7 the assertion that the Property was deep-ripped, which was the only factual basis offered by the  
8 Corps for issuing the Order.<sup>3</sup> Complaint ¶¶ 53-54. Such deprivation, without a hearing, violates  
9 Duarte’s rights to procedural due process. *Roth*, 408 U.S. at 569-70 & n.7.

10 Duarte states valid claims against the Corps for violation of procedural due process rights,  
11 and the Corps’ motion should be denied.

12 **B. Duarte States Valid Claims Against the Water Board That the Notice  
13 of Violation Deprives Duarte of Property Without a Hearing**

14 Similarly, the Notice of Violation states the Water Board’s completed determination that  
15 plaintiffs “are in violation of [the] federal Clean Water Act (CWA) section 301 for discharging  
16 dredged or fill materials without complying with CWA sections 404 and 401” and directs Duarte  
17 to “submit to this office a plan for mitigating the impacts of your unauthorized fill, including  
18 protecting remaining wetland areas on the property.” The Notice of Violation requires that such  
19 plan be prepared by an appropriate professional, and must have the concurrence of the California  
20 Department of Fish and Wildlife. Complaint, Exhibit B.

21 The Notice of Violation clearly addresses what the Water Board considers to be an actual,  
22 as opposed to threatened or potential, violation. Since the only use that Duarte has made of the

23 \_\_\_\_\_  
24 <sup>2</sup> The Corps’ Points and Authorities at 13:1 (“assuming such a future enforcement act is brought  
25 against Plaintiffs”), holds out the possibility that the Corps may never act on the Order, leaving it  
in place permanently.

26 <sup>3</sup> It is ironic that the Corps has invoked the pleading requirements necessary to state a claim in  
27 federal court. The Order itself discloses exactly no facts from which Duarte or any other  
28 reasonable reader could discern what the Corps actually thinks was done to violate the Clean Water  
Act. Other than identifying the Property, the Order is a masterpiece of boilerplate conclusory  
assertions and legal conclusions. Complaint, Exhibit A.

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1 | Property is farming wheat, the Notice of Violation clearly adjudicates Duarte’s farming to be in  
2 | violation of the Clean Water Act absent a Corps permit and state water quality certification, thus  
3 | depriving Duarte of the vested right to use the Property in accordance with its zoning, in the same  
4 | manner as the Order does as described above. To reinforce the logical result (*i.e.*, that Duarte  
5 | cease farming the Property), the Notice of Violation threatens \$10,000 per day fines for the  
6 | purported violation.

7 |         The Notice of Violation also imposes the affirmative obligation to submit a plan for  
8 | restoration of the Property, and to implement that plan upon the concurrence of the Department  
9 | of Fish and Wildlife. Complaint, Exhibit B. Restoration of the Property to a nonfarmed condition  
10 | would clearly preclude further farming of the Property, and hence deprives Duarte of the same  
11 | property interests as described above with reference to the Order.

12 |         Similarly to the Order, the Water Board issued the Notice of Violation without a hearing,  
13 | and if afforded a hearing Duarte would have been able to present evidence and argument that  
14 | would have rebutted the factual and legal bases for the issuance of the Notice of Violation.  
15 | Complaint ¶¶ 58-59.

16 |         Duarte states valid claims against the Water Board for violation of procedural due process  
17 | rights, and the Water Board’s motion should be denied.

18 | **C. Duarte Has Been Deprived of Property Interests**

19 |         The Corps argues that no deprivation has occurred because the Order is not the “legal”  
20 | cause of Duarte’s crop losses or a basis for restriction in use of the Property, merely because  
21 | Duarte could ignore the Order and continue to farm the Property. Corps’ Points and Authorities  
22 | at 11-12.<sup>4</sup>

23 |         It strains credulity for the Corps to argue that an order on federal agency letterhead, sent  
24 | by certified mail, stating: “You are hereby directed to cease and desist all work in waters of the  
25 | \_\_\_\_\_

26 | <sup>4</sup> The Corps makes the odd statement that Plaintiffs are confused as to the scope of the Order  
27 | because they failed to communicate with the Corps. As the Complaint clearly alleges, Duarte  
28 | attempted to communicate with the Corps, seeking the basis on which the Order had been issued.  
The Corps’ incomplete response made the factually incorrect assertion that Duarte had deep-ripped  
the Property, and provided a two decade old delineation purportedly showing wetlands throughout  
the Property. Complaint ¶¶ 52-53. This did nothing the clarify or narrow the scope of the Order.

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1 United States until this violation is resolved” and attaching excerpts of 33 U.S.C. § 1319(c)(2),  
2 threatening \$50,000 per day fines and imprisonment for knowing violations of the Clean Water  
3 Act, is not the factual and legal reason that Duarte ceased farming the Property. It is evident from  
4 the allegations of the Complaint and the text of the Order that the receipt of this document caused  
5 Duarte to abandon the wheat crop and their farming activities on the Property, depriving them of  
6 their property interests as a result.

7 As set forth above, the Order can be enforced through a civil action in federal court to  
8 compel compliance. 33 C.F.R. § 326.5(a). Given that willful and/or repeated violations of the Act  
9 are bases for seeking civil and criminal penalties as well, *id.*, Duarte may not “simply decline to  
10 comply with the letter’s direction and go forward with their farming activities” without taking the  
11 significant risk that such action will lead the Corps to seek civil and criminal penalties for what  
12 the Corps would consider willful and/or repeated violations. Ignoring a cease and desist order  
13 from the Corps can carry serious consequences. *See generally United States v. Appel*, No. 98-  
14 55727, 2000 WL 27878 (9th Cir. Jan. 11, 2000) (Pregerson, J., dissenting) (describing the sequence  
15 of actions leading from defendant ignoring cease and desist order to criminal prosecution).<sup>5</sup>

16 In this context, it is a pointless tautology to describe Duarte as “choosing to abstain from  
17 farming,” not far removed from describing a prisoner as “choosing to be imprisoned” based on  
18 reporting to prison rather than fleeing the jurisdiction. Duarte has complied with the Order; the  
19 Order deprives Duarte of the property interests described above.

20 Nor do the authorities that the Corps cites, at page 12, have any bearing on Duarte’s due  
21 process claims. As set forth above, Duarte has a vested interest in use of the property consistent  
22 with its existing zoning. It is not seeking a use that is barred by the existing zoning, or would  
23 require rezoning or even a conditional use permit. Similarly, Duarte Nursery is the owner of the  
24 Property, not a prospective purchaser who holds a contract rather than a property interest. The  
25

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26  
27 <sup>5</sup> This case is unpublished. It is cited in good faith for factual purposes under Circuit Rule 36-  
28 3(c)(ii) to show that the Corps is aware that a private citizen ignores a cease and desist order at  
great peril, and to show factually that it is reasonable for Duarte to treat the Order seriously, and  
comply with it until administrative or judicial relief can be obtained.

1 Order does not prevent an expected future use of the Property; it stops an actual use to which  
2 Duarte holds a vested right.

3 **II**

4 **DUARTE’S DUE PROCESS CHALLENGES TO**  
5 **THE ORDER AND NOTICE OF VIOLATION ARE RIPE**

6 The ripeness inquiry prevents the courts from entangling themselves in abstract  
7 disagreements over administrative policies, by avoiding premature adjudication, as well as  
8 “protect[ing] the agencies from judicial interference until an administrative decision has been  
9 formalized and its effects felt in a concrete way by the challenging parties.” *Abbot Labs. v.*  
10 *Gardner*, 387 U.S. 136, 148-49 (1967), *abrogated on other grounds by Califano v. Sanders*, 430  
11 U.S. 99 (1977). “The ‘central concern [of the ripeness inquiry] is whether the case involves  
12 uncertain or contingent future events that may not occur as anticipated, or indeed may not occur  
13 at all.’” *Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1160 (9th Cir. 1997) (quoting  
14 13A Wright & Miller, *Federal Practice and Procedure* § 3532, at 112 (2d ed. 1984)). Under  
15 *Abbot Laboratories*, courts first evaluate the fitness of the issues for judicial decision, and then any  
16 hardship to the parties of withholding court consideration. 387 U.S. at 149; *Oklevueha Native*  
17 *American Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 837 (9th Cir. 2012). Issues are fit for  
18 judicial decision when the law has been applied to a particular set of facts. *See id.* at 837-39  
19 (challenge under Religious Freedom Restoration Act to seizure of marijuana held fit for judicial  
20 decision). Where the court finds that the issues are fit for judicial decision, the hardship to the  
21 parties in delaying review is not relevant, since hardship is “a counterbalance to any interest the  
22 judiciary has in delaying consideration of a case.” *Id.* at 838-39 (citing *Colwell v. Dep’t of Health*  
23 *& Human Servs.*, 558 F.3d 1112, 1129 (9th Cir. 2009)).

24 **A. Duarte’s Due Process Claims Are Fit for Judicial Decision**

25 This is not a pre-enforcement challenge to a regulatory or permitting scheme. In this case,  
26 the Corps and the Water Board have both purportedly applied the Clean Water Act and its  
27 regulations to a specific parcel of property and to Duarte’s particular actions to adjudicate Duarte  
28 to be in violation of the Clean Water Act, and issued the Order and Notice of Violation,

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1 | respectively, each of which deprives Duarte of interests in the Property, all as set forth above. This  
 2 | case does not involve “uncertain or contingent future events that may not occur as anticipated, or  
 3 | indeed may not occur at all” and the issues are fit for judicial decision. *Richardson v. City &*  
 4 | *County of Honolulu*, 124 F.3d at 1160.

5 |         The Water Board argues that the issues are not fit for decision because further factual  
 6 | development is necessary to determine the Water Board’s ultimate enforcement outcome. But that  
 7 | argument mischaracterizes Duarte’s Complaint. As stated previously, the Complaint does not seek  
 8 | substantive review of the Notice of Violation by the court. It seeks judicial review of the Water  
 9 | Board’s procedural due process violation in issuing the Notice of Violation. The facts relative to  
 10 | that claim do not require further development, because they have already occurred and their effects  
 11 | are ongoing. As set forth above, Duarte owns interests in the Property which warrant  
 12 | constitutional due process protections. The Notice of Violation deprives Duarte of these interests,  
 13 | namely, the ability to use the Property consistent with its zoning and to freely alienate it, and the  
 14 | Water Board did not and still has not afforded Duarte a hearing. There are no additional facts that  
 15 | need to occur for liability to attach to the Water Board, and no further factual development  
 16 | necessary for the court to consider the issues.

17 | **B. The Corps Fails To Provide Sound Authority To Support the Argument**  
 18 | **That Duarte’s Due Process Claims Are Not Fit for Judicial Decision**

19 |         The Corps cites several inapplicable trial court decisions from other circuits to try to  
 20 | support its argument that Duarte’s due process challenge to the Order is not ripe. For example, in  
 21 | *Route 26 Land Development Ass’n v. U.S. Government*, 753 F. Supp. 532 (D. Del. 1990), the  
 22 | plaintiff sought declaratory relief as to the Corps’ jurisdiction, whether the Corps had abused its  
 23 | discretion, and whether the Corps had taken the property. *Id.* at 535. The plaintiff actually had  
 24 | a permit application pending before the Corps when the complaint was filed, *id.* at 534, and the  
 25 | Court considered the challenge to the Corps’ jurisdiction odd, since the plaintiff had submitted to  
 26 | Corps’ jurisdiction by applying for an after-the-fact permit. *Id.* at 535 n.7. The plaintiff in *Banks*  
 27 | *v. Page*, 768 F. Supp. 809, 811 (S.D. Fla. 1991), *vacated, appeal dismissed* 963 F.2d 385 (11th Cir.

28 | ///

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1 | 1992), sought substantive review of the Corps’ jurisdiction and a declaratory judgment that a  
2 | permit was not required. And the plaintiff in *Howell v. U.S. Army Corps of Eng’rs*, 794 F. Supp.  
3 | 1072, 1074 (D.N.M. 1992), sought a declaratory judgment that the property did not contain  
4 | jurisdictional wetlands and reversal of the cease and desist order.

5 |         Each of these cases sought substantive review by the court of whether there were  
6 | jurisdictional wetlands on the property, as well as substantive review of the cease and desist orders.  
7 | These facts distinguish all three of these cases from Duarte’s due process challenge. Duarte does  
8 | not seek this court’s substantive review of the Order as such. Rather, Duarte seeks judicial review  
9 | of the Corps’ due process violation in the course of issuing the Order.

10 |         Nor is *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586 (9th Cir.  
11 | 2008), applicable to this case. As with the three prior cases, *Fairbanks N. Star Borough* was a  
12 | substantive challenge to a jurisdictional determination, which the Ninth Circuit found to be  
13 | ineligible for judicial review. *Id.* at 594. The Order which Duarte is challenging involves far more  
14 | than simply a jurisdictional determination. It also adjudicates Duarte’s actions to be violative of  
15 | the Clean Water Act, and concludes that those actions are not exempt as normal farming practices.  
16 | Neither of those determinations arises from the face of the Clean Water Act, and the rationale of  
17 | *Fairbanks N. Star Borough* is inapposite.

18 |         The Corps also argues that the Order is “merely a mechanism to notify an alleged violator  
19 | of the legal obligations imposed by the [Act]” and that because the Order purportedly imposes no  
20 | legal obligations or liability on its own, Plaintiffs have not suffered any injury as a result of the  
21 | Order. Corps’ Points and Authorities at 8:16-21. However, the Order is enforceable through a  
22 | civil action against Duarte, 33 C.F.R. § 326.5(a), and on its face directs Duarte to cease and desist  
23 | farming the Property, Complaint, Exhibit A. The Complaint spells out in detail the injuries

24 | ///  
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1 | suffered by Duarte as a result of the Order, including deprivation of interests in property without  
 2 | a hearing.<sup>6</sup>

3 | **C. Duarte Would Suffer Hardship from Delayed Judicial Consideration**

4 |       Because the issues are fit for judicial decision, Ninth Circuit authority holds that hardship  
 5 | to the parties is not relevant, as hardship is a counterbalance in cases where the issues are not fit  
 6 | for judicial decision. *Oklevueha Native American Church of Hawaii*, 676 F.3d at 838-39.  
 7 | Nevertheless, Duarte has demonstrated the hardship that would ensue if judicial consideration of  
 8 | the Defendants' due process violations is delayed. Hardship in the ripeness context means  
 9 | "hardship of a legal kind, or something that imposes a significant practical harm on the plaintiff."  
 10 | *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d at 1128 (quoting *Natural Res. Def. Council*  
 11 | *v. Abraham*, 388 F.3d 701, 706 (9th Cir. 2004)). Delaying judicial review of the Corps and Water  
 12 | Board due process violations against Duarte would leave Duarte with the significant practical harm  
 13 | of being unable to use an existing property interest because the Order, and the Notice of Violation  
 14 | with its restoration obligation, would remain in place. In order to regain the use and free  
 15 | alienability of the Property, Duarte would be forced to submit to a lengthy, expensive, and onerous  
 16 | permitting process in order to have the subsequent opportunity to challenge whether such a permit  
 17 | is even necessary in the first place.<sup>7</sup> And if Duarte does not apply for a permit, then the Corps and  
 18 | Water Board could simply take no action, effectively leaving the Order and Notice of Violation  
 19 | in force permanently. Accordingly, Duarte would suffer significant hardship from delayed judicial  
 20 | consideration.

21 | ///

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23 | <sup>6</sup> Both motions make passing reference to Plaintiffs' standing to bring the present action. The  
 24 | above discussion of Duarte's due process claims clearly shows that the Complaint adequately  
 25 | alleges that Duarte has suffered a concrete and particularized injury (inability to farm the  
 26 | Property), which is actual rather than hypothetical, for which the defendants are directly  
 27 | responsible and which will likely be redressed by the sought-after relief (invalidation of the Order  
 28 | and Notice of Violation). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

<sup>7</sup> According to the Supreme Court, the "average applicant for an individual permit spends 788 days  
 and \$271,596 in completing the process, and the average applicant for a nationwide [more general]  
 permit spends 313 days and \$28,915—not counting costs of mitigation or design changes."  
*Rapanos*, 547 U.S. at 721.

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**III**

**THE ELEVENTH AMENDMENT DOES NOT BAR  
DUARTE’S SUIT AGAINST THE WATER BOARD,  
BECAUSE THE COMPLAINT SEEKS PROSPECTIVE  
RELIEF FOR AN ONGOING CONSTITUTIONAL VIOLATION**

The Water Board argues that the *Ex parte Young*, 209 U.S. 123 (1908), does not apply to this case, because the Water Board’s alleged violation of Duarte’s due process rights has occurred in the past, and therefore the Complaint does not seek prospective relief under *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261 (1997). However, the Water Board concedes that the Complaint seeks prospective relief in the form of a prohibitory injunction against enforcing the Notice of Violation, and a mandatory injunction requiring the Water Board to “recall” the Notice of Violation from other agencies to which it has been disseminated. Water Board Points and Authorities at 18:21-23. While the Water Board argues that these forms of relief will not have any legal effect, Duarte has demonstrated above that the Notice of Violation deprives Duarte of interests in property without a hearing, and the prospective relief sought would cure that deprivation by requiring the Water Board to afford Duarte a hearing on whether the Clean Water Act was violated before taking further action to enforce against any such violation.

Further, the Water Board does not address the fact that the Fourth Cause of Action of the Complaint states a claim against the Water Board for failure to provide a post-deprivation hearing. Complaint ¶¶ 91-94. As stated above, the Complaint clearly alleges that the Water Board has not afforded Duarte any hearing, and that this violation of the right to a post-deprivation hearing is ongoing, not retrospective. These claims are squarely within the *Ex parte Young* doctrine, and the Eleventh Amendment does not bar Duarte’s claims against the Water Board.

**CONCLUSION**

The Cease and Desist Order and Notice of Violation each deprive Plaintiffs of interests in the Property without a hearing. They do so on the factually false premise that Duarte deep-ripped the Property, which error a constitutionally adequate hearing would have disclosed. The position the Corps and the Water Board take now is worthy of Kafka: they argue, in moving to dismiss, that everyone is obliged to live with the error, and Duarte is obliged to go without its property





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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

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

Plaintiffs, )

v. )

UNITED STATES ARMY CORPS OF ENGINEERS; )  
et al., )

Defendants. )

No. 2:13-cv-02095-LKK-DAD

**[PROPOSED] ORDER DENYING  
FEDERAL DEFENDANT'S AND  
WATER BOARD DEFENDANTS'  
MOTIONS TO DISMISS**

Date: February 10, 2014  
Time: 10:00 am  
Before the Honorable Lawrence K.  
Karlton, Courtroom 4

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Upon consideration of the motions to dismiss brought by the United States Army Corps of Engineers, and collectively by Karl E. Longley, Jennifer Lester Moffitt, Jon Costantino, Sandra O. Meraz, Carmen Ramirez, Robert Schneider, and Pamela Creedon, and the papers related thereto, arguments of counsel, all pleadings and documents appended to the pleadings, and orders on file in the matter, and good cause appearing,

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1 IT IS HEREBY ORDERED that both motions to dismiss are DENIED. Defendants, and  
2 all of them, shall file responsive pleadings within \_\_\_\_\_ days of the entry of this order.

3 Dated this \_\_\_ of \_\_\_\_\_, 2014.

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HON. LAWRENCE K. KARLTON  
Senior Judge  
United States District Court