DAMIEN M. SCHIFF, No. 235101
E-mail: dms@pacificlegal.org
ANTHONY L. FRANÇOIS, No. 184100
E-mail: alf@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

DAVID M. IVESTER, Cal. Bar No. 76863
E-mail: divester@briscoelaw.net
155 Sansome Street, Seventh Floor
San Francisco, California 94104
Telephone: (415) 402-2700

GERALD E. BRUNN, Cal. Bar No. 107004
E-mail: gbrunn@brunn-flynn.com
LAW OFFICES OF BRUNN & FLYNN
928 12th Street, Suite 200
Modesto, California 95354
Telephone: (209) 521-2133

Attorneys for Plaintiffs and Counterclaim-Defendants

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DUARTE NURSERY, INC., et al., Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS; et al., Defendants. UNITED STATES OF AMERICA, Counterclaim-Plaintiff, v. DUARTE NURSERY, INC., et al., Counterclaim-Defendants.	No. 2:13-cv-02095-KJM-DAD **PLAINTIFFS' OPPOSITION TO UNITED STATES' MOTION TO DISMISS FIRST SUPPLEMENTAL COMPLAINT** Date: November 7, 2014 Time: 10:00 a.m. Courtroom 3 Hon. Kimberly J. Mueller, Judge

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

TABLE OF CONTENTS

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

TABLE OF AUTHORITIES

Page

Cases

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

Page

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

INTRODUCTION

The Court should deny the United States' Motion to Dismiss. Sovereign immunity does not bar Duarte Nursery, Inc., and John Duarte (Duarte)'s First Amendment retaliation claim. Duarte's due process claims are not moot. Duarte's Sixth Cause of Action states a claim for First Amendment retaliation, which may proceed in this lawsuit.

STATEMENT OF THE CASE

Plaintiff Duarte Nursery, of which Plaintiff John Duarte is the President (collectively Duarte), owns 445 acres of farmland in Tehama County, California (Property). ECF 41, Suppl. Complaint ¶¶ 44-45. In November, 2012, Duarte Nursery planted a winter wheat crop on the Property. On or about February 25, 2013, the U.S. Army Corps of Engineers (Corps) ordered Duarte to cease farming the Property (Cease and Desist Order or Order), without a hearing. Suppl. Complaint ¶¶ 50, 58, 81, 85, Ex. A. The Order is based on the false allegation that Duarte "deep-ripped" the Property without a permit from the Corps, purportedly a violation of the Clean Water Act (Act). Suppl. Complaint ¶ 53. The Property has not been deep-ripped under Duarte's ownership or control. Suppl. Complaint ¶ 47.

On October 10, 2013, Duarte filed the Complaint, alleging that the Corps violated the Due Process Clause when it issued the Cease and Desist Order without prior notice or a hearing. ECF 1. The First and Second Causes of Action allege that the Corps violated the Due Process Clause by failing to provide Duarte a hearing either before or promptly after issuing the Order. The Fifth Cause of Action alleged that the Corps' enforcement regulations, at 33 C.F.R. Part 326, are unconstitutional as applied to Duarte.[1]

On December 23, 2013, the Corps moved to dismiss the Complaint, on the dual grounds that Duarte's due process claims were not ripe, and did not state a claim. ECF 10. The Court heard oral argument on February 10, 2014, and the motion was submitted. ECF 18.

[1] The Complaint also alleged two causes of action against the members and executive officer of the Central Valley Regional Water Quality Control Board (a California state regulatory agency), in their official capacities, arising out of a similar action taken by officials of the Board. These two claims were subsequently dismissed by the Court, leaving only Duarte's claims against the Corps pending in this case.

On April 23, 2014, the Court denied the Corps' motion to dismiss. *Duarte Nursery v. U.S. Army Corps of Eng'rs*, ___ F. Supp. 2d ___, 2014 WL 1647384; ECF 27 (Order Denying Corps' Motion to Dismiss). The Court held that Duarte has stated a ripe claim for violation of the Due Process Clause by the Corps. ECF 27, Order Denying Corps' Motion to Dismiss at 19-20 (Complaint adequately alleged that the Cease and Desist Order deprived Duarte of the use of the Property without a hearing); *see id*. at 13.

On May 7, the Corps filed its Answer to the Complaint, and the United States filed its Counterclaim alleging in general that Duarte violated the Act by deep-ripping jurisdictional wetlands and streams on the Property without a permit from the Corps. ECF 28.

On June 23, 2014, Duarte filed its Answer to Counterclaim, which denies violation of the Act, and that Duarte deep-ripped the Property, and alleges that Duarte's farming is subject to the Act's normal farming practices exemption. ECF 33. Duarte also moved to supplement the Complaint, to allege a new cause of action against the Corps for deciding to file the Counterclaim in retaliation against Duarte's exercise of First Amendment protected rights. ECF 34 & 35. The United States did not oppose, ECF 39, and the Court granted the motion on August 6, 2014, ECF 40.

Duarte filed the First Supplemental Complaint (Supplemental Complaint) on August 20, 2014. ECF 41. The Supplemental Complaint restates all of the allegations of the Complaint, and includes supplemental allegations that the Corps took no further enforcement action of which Duarte is aware following the Cease and Desist Order, and decided to file the Counterclaim substantially in retaliation against Duarte's filing of the Complaint and related public statements in the media. Suppl. Complaint ¶¶ 80-84. The Supplemental Sixth Cause of Action against the Corps is for retaliatory prosecution in violation of the First Amendment. Suppl. Complaint ¶¶ 114-120.

On September 12, 2014, the United States moved to dismiss the Supplemental Complaint in its entirety, arguing (1) that sovereign immunity bars the Sixth Cause of Action, (2) that the Counterclaim moots Duarte's due process claims, (3) that the Sixth Cause of Action is not a *Bivens* claim, and (4) the Sixth Cause of Action cannot be maintained while the Counterclaim is pending.

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

I

STANDARD OF REVIEW

A. The United States May Move To Dismiss Under Rule 12(b)(1) for Lack of Federal Court Jurisdiction

The plaintiff has the burden of establishing federal court jurisdiction. *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 915, 927 (9th Cir. 1986)).

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. *See 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)).

A claim is no longer a "case or controversy" if it becomes moot during the litigation. *United States v. Strong*, 489 F.3d 1055, 1059 (9th Cir. 2007). The sovereign immunity of the United States forecloses federal court jurisdiction over claims against federal agencies, unless it is waived. *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

1. On a Facial Motion the Court Takes Duarte's Allegations as True and Construes Them Favorably to Duarte

If the defendant contends that the complaint's jurisdictional allegations do not demonstrate jurisdiction on their face (i.e., a facial motion to dismiss), then the court presumes the complaint's factual allegations to be true, and only grants the motion 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 James Wm. Moore, et al., *Moore's Federal Practice* ¶ 12.07, at 12.46-47 (2d ed. 1987)), *rev'd on other grounds*, 963 F.2d 229 (9th Cir. 1992). The pending motion is facial since the United States has not submitted affidavits or other evidence to controvert the factual allegations

///

of the Supplemental Complaint. *Savage v. Glendale Union High School*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003).

2. The United States Bears the Burden of Showing Mootness by Proving That the Cease and Desist Order Has "Evaporated or Disappeared"

The party arguing that a case is moot must meet a "heavy burden of establishing that there is no effective relief remaining for a court to provide." *GATX/Airlog Co. v. U.S. Dist. Court for N. Dist. of Cal.*, 192 F.3d 1304, 1306 (9th Cir. 1999). A claim for declaratory relief does not become moot unless the challenged activity has "evaporated or disappeared." *Headwaters, Inc. v. BLM*, 893 F.2d 1012, 1015 (9th Cir. 1990), as modified. "A case is not moot if a federal court can grant the parties any effective relief." *NRDC v. Jewell*, 749 F.3d 776, 782 (9th Cir. 2014) (citation omitted). A case can only become moot during litigation if "'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*) (quoting *West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 925 n.4 (9th Cir. 2000)).

3. 5 U.S.C. § 702 Broadly Waives the United States' Sovereign Immunity for Constitutional Claims Seeking Other Than Money Damages

> A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency . . . acted . . . in an official capacity . . . shall not be dismissed . . . on the ground that it is against the United States . . . .

5 U.S.C. § 702 (Section 702). Section 702's waiver of sovereign immunity is much broader than the APA definition of agency action. *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989) (waiver applies to federal agencies' investigation of church). Section 702 waives sovereign immunity for constitutional claims for other than money damages brought under the general federal question jurisdictional statute. *Id*. at 525 n.9 (citing *Beller v. Middendorf*, 632 F.2d 788, 797 (9th Cir. 1980), *overruled on other grounds by Lawrence v. Texas*, 539 U.S. 558 (2003), as recognized in *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008)).

A panel of the Ninth Circuit in *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006), did question whether this remains the rule of law in this circuit. In that decision the court

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

stated without further discussion that it could not distinguish *Presbyterian Church* from *Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194 (9th Cir. 1998). 469 F.3d at 808-09. *Gallo Cattle* involved a federal lawsuit challenging a preliminary ruling entered in an unexhausted administrative petition. 159 F.3d at 1195-96. The plaintiff argued for jurisdiction under 5 U.S.C. § 704. *Id*. at 1198. The court concluded that Section 702 does not waive sovereign immunity for claims under Section 704 absent "final agency action," which was not present. *Id*. at 1198-99. *Gallo Cattle* does not cite *Presbyterian Church*, and would not, since it involved a claim for review under the APA, rather than a constitutional challenge. *Gros Ventre Tribe* confuses the issue by not distinguishing between claims brought under Section 704, for which "final agency action" is required, and constitutional claims for which the broad waiver of sovereign immunity in Section 702 applies. *Presbyterian Church* has not been overruled and remains the law of the circuit on the scope of Section 702 for constitutional claims. "Once a [Ninth Circuit] panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001).

B. The United States Bears the Burden Under Rule 12(b)(6) of Showing That Duarte Has Failed To Allege Facts Which State a Facially Plausible Claim

The United States Supreme Court, in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), prescribes two steps for evaluating motions under Rule 12(b)(6). First step, the court identifies the complaint's non-conclusory factual allegations. Second, the court determines whether these allegations, taken as true and construed in the light most favorable to the plaintiff, " 'plausibly give rise to an entitlement to relief.' " *Falcocchia v. Saxon Mortg., Inc.*, 709 F. Supp. 2d 860, 876 (E.D. Cal. 2010) (quoting *Iqbal*, 556 U.S. at 664) (citing *Erickson v. Pardus*, 551 U.S. 89 (2007)).

"Plausibility" does not mean the likelihood that the plaintiff will prove the allegations, but rather whether the non-conclusory allegations, taken as true, "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Champlaie v. BAC Home Loans Servicing, LP*, 706 F. Supp. 2d 1029, 1037-38 (E.D. Cal. 2009) (quoting *Iqbal*, 556

///

U.S. at 663). The complaint need not recite "detailed factual allegations" but must contain more than unadorned accusation. *Id*. (citing *Iqbal*, 556 U.S. at 678).

II

LEGAL BACKGROUND

A. The Due Process Clause Usually Requires a Pre-deprivation Hearing Before the Government May Deprive a Person of Property or Liberty

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

"[E]ven the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991); *Tri-State Dev. v. Johnston*, 160 F.3d 528, 531 (9th Cir. 1998) (Washington attachment statute was subject to due process scrutiny because, inter alia, it " 'impairs the ability to sell or otherwise alienate the property.' ") (quoting *Doehr*, 501 U.S. at 11).

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The Due Process Clause ordinarily requires a hearing before property is actually seized. *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972). A post-deprivation hearing only satisfies the Due Process Clause in the limited case where the government must act quickly, or where it would be impractical to provide a pre-

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

deprivation hearing, "'accompanied by a substantial assurance that the deprivation is not baseless.'" *Gilbert v. Homar*, 520 U.S. 924, 930-31 (1997) (quoting *FDIC v. Mallen*, 486 U.S. 230, 240 (1988) (suspension of indicted bank employee without prior hearing); *see also United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (Due Process Clause only tolerates post-deprivation hearing in extraordinary situations.).

A post-deprivation hearing must be prompt to be constitutionally adequate, *Gilbert v. Homar*, 520 U.S. at 932, 935, and must provide for an impartial decision maker, *Mackey v. Montrym*, 443 U.S. 1, 29 (1979). Whether a post-deprivation hearing is prompt depends on the importance of and harm to the private interest, the Government's justification for delay, and the likelihood of mistake in the deprivation. *FDIC v. Mallen*, 486 U.S. at 242.

B. The Corps' Enforcement Regulations Include No Due Process Protections Before or After Issuance of Cease and Desist Orders

The Act authorizes the Corps to regulate certain discharges to "waters of the United States." 33 U.S.C. §§ 1311(a) & 1362(7). Unless exempt, discharging a pollutant to jurisdictional waters requires a federal permit. *See* 33 U.S.C. §§ 1251(a), 1311(a), 1362(6). The Act expressly exempts "normal farming activities" from both the discharge ban and the permit requirement. 33 U.S.C. § 1344(f)(1)(A).

Absent such an exemption, discharging without a permit exposes the actor to severe liability: civil and/or criminal penalties of up to $37,500 per day for negligent violations and up to $50,000 per day for knowing violations, and imprisonment for up to three years. *See* 33 U.S.C. § 1319(b)-(g), *modified by* 40 C.F.R. § 19.4, 78 Fed. Reg. 66,643, 66,647 (Nov. 6, 2013).

The Corps' regulations authorize district engineers to investigate unauthorized activities that require permits, to confirm whether violations have occurred, to notify responsible parties of violations, and to determine a course of action to resolve alleged violations. 33 C.F.R. § 326.3. After determining that a violation has occurred, the district engineer should notify the responsible parties. 33 C.F.R. § 326.3(b). The regulations direct the district engineer to issue a cease and desist order against a project that is not complete. 33 C.F.R. § 326.3(c)(1).

///

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

The Corps' regulations describe additional steps for district engineers to take following issuance of cease and desist orders. The district engineer may impose initial corrective measures after consideration of "whether serious jeopardy to life, property, or important public resources may be reasonably anticipated to occur during the period required for the ultimate resolution of the violation." 33 C.F.R. § 326.3(d)(1) (citation omitted). An order for initial corrective measures must specify the work required and time limit for completing the work. *Id.* "Following the completion of any required initial corrective measures," the district engineer may accept an after-fact-permit application, except in certain circumstances, including "where the district engineer determines that legal action is appropriate." 33 C.F.R. § 326.3(e)(1), (e)(1)(ii). The district engineer may grant or deny an after-the-fact permit, and in cases of denial may impose final corrective measures. 33 C.F.R. § 326.3(e)(2). While the regulations do not prohibit streamlining, this list of procedural steps is in the normal sequence. 33 C.F.R. § 326.3(f).

None of these procedures require or even suggest that the district engineer consult with the potentially responsible party, let alone grant a hearing either before or following issuance of a cease and desist order.

The district engineer may recommend prosecution of civil actions in appropriate cases, which include willful, repeated, or flagrant violations, or those with substantial impact. 33 C.F.R. § 326.5(a). The first step in this process is to prepare a joint report with the local U.S. Attorney, 33 C.F.R. § 326.5(b), to whom the district engineer can refer the case directly, 33 C.F.R. § 326.5(c). Where the U.S. Attorney declines to file a case, or where various other conditions exist, the district engineer may forward case recommendations to the Chief of Engineers for potential referral to the Department of Justice. 33 C.F.R. § 326.5(d)-(e).

C. The First Amendment Prohibits Federal Agencies from Retaliation Against Regulated Parties for Suing the Agency or Speaking Publicly About the Case

"The Government is prohibited from retaliating for the lawful exercise of constitutional rights." *Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc.*, 842 F. Supp. 1243, 1256 (E.D. Cal. 1994) (citing cases). A plaintiff states a claim for First Amendment retaliation by pleading three elements: (1) plaintiff's protected conduct, (2) defendant's actions chilling "a person of

ordinary firmness" from continuing the protected conduct, and (3) the protected conduct as a substantial motivation for defendant's chilling action. *Schneider v. County of Sacramento*, No. S-12-2457-KJM-KJN, 2014 WL 4187364, at *8-9 (E.D. Cal. Aug. 21, 2014) (miners state claim against county's consultant for retaliating against miners' suit against county). The First Amendment protects the right to petition the government for redress of grievances, including suing government agencies and publicly criticizing them. *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989).

III

ARGUMENT

A. 5 U.S.C. § 702 Waives the United States' Sovereign Immunity for Duarte's First Amendment Retaliation Claim

1. Duarte's Sixth Cause of Action Is a Constitutional Claim Brought Under the General Federal Question Jurisdictional Statute, for Which 5 U.S.C. § 702 Waives the United States' Sovereign Immunity

Duarte's retaliation claim is a constitutional claim under the First Amendment, brought under 28 U.S.C. § 1331, and does not seek money damages. Suppl. Complaint ¶¶ 1, 114-120, Prayer for Relief at 19-20, ¶¶ 1-11. Under *Presbyterian Church (U.S.A.)*, 870 F.2d at 525 n.9, and *Beller v. Middendorf*, 632 F.2d at 797, Section 702 waives sovereign immunity for Duarte's retaliation claim. The Ninth Circuit has stated that the 1976 amendment to Section 702, from which the current text of the statute derives, "is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable." *Presbyterian Church (U.S.A.)*, 870 F.2d at 525 (footnote omitted). Further, "[n]othing in [Section 702] suggests that the waiver of sovereign immunity is limited to claims challenging conduct falling in the narrow definition of 'agency action.'" *Id*. "Thus, on its face, the 1976 amendment to § 702 waives sovereign immunity in all actions seeking relief from official misconduct except for money damages." *Id*.

The United States does not address these authorities, and offers no analysis that would distinguish them. Duarte's First Amendment retaliation claim clearly falls within the Ninth Circuit's broad reading of Section 702's waiver of sovereign immunity: it is a constitutional claim

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

under the general federal question jurisdictional statute which does not seek money damages. Sovereign immunity does not bar Duarte's Sixth Cause of Action or divest the Court of jurisdiction over it.

Even absent the Ninth Circuit's wide reading of Section 702, the Corps' decision to prosecute the Counterclaim is within the definition of "agency action" under 5 U.S.C. § 551(13). The decision to refer Duarte's alleged violations of the Act for civil prosecution is a "sanction" or "form of relief" which fall within the APA's definition of "agency action." *See* 33 C.F.R. § 326.5 (providing criteria for district engineer to refer violations for prosecution, and process for same).

2. The United States Relies on Cases Addressing Review Under Section 704, Not the Scope of Section 702's Waiver of Sovereign Immunity

The United States cites several cases on whether an action may proceed in federal court under 5 U.S.C. § 704, rather than the scope of Section 702's waiver: *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014), *Heckler v. Chaney*, 470 U.S. 821 (1985), *Buntrock v. S.E.C.*, 347 F.3d 995 (7th Cir. 2003), and *City of Oakland v. Holder*, 901 F. Supp. 2d 1188 (N.D. Cal. 2013).

Belle Co. decided a challenge under Section 704 to a Corps jurisdictional determination, not to an enforcement action. 761 F.3d at 387-88. The Fifth Circuit held that the determination was not final agency action under Section 704, and did not clearly address whether sovereign immunity was waived under Section 702. *Id.* at 395-96. *Belle Co.* is not an enforcement case, and is factually distinct from all of Duarte's constitutional claims. To the extent this decision conflicts with the Ninth Circuit authorities cited above on the scope of Section 702's waiver of sovereign immunity, *Presbyterian Church (U.S.A.)* controls.

Heckler v. Chaney resolved several death row inmates' challenges under Section 704 to the Food and Drug Administration's refusal to act against states' use of FDA regulated drugs "off label" to execute condemned prisoners. 470 U.S. at 823, 825. The Supreme Court's holding that FDA's inaction was not reviewable turned on the interpretation of the phrase "agency action is committed to agency discretion by law" in 5 U.S.C. § 701(a)(2), since such decisions are not subject to judicial review under Section 704. 470 U.S. at 828. The Supreme Court read this phrase

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

as limited to those cases where decision making is committed "to the agency's judgment absolutely." *Id*. at 830. The Supreme Court then held that decisions not to prosecute are presumptively non-reviewable under Section 704, *id.* at 831, but distinguished government decisions *to* enforce, which involve the "exercise [of] its *coercive* power over an individual's liberty or property rights," which are "areas that [the] courts often are called upon to protect," *id.* at 832.

Heckler appears to have only involved APA "arbitrary and capricious" review, not a constitutional claim against the FDA. 470 U.S. at 823 ("[T]he Court of Appeals . . . held the FDA's refusal to take enforcement action . . . an abuse of discretion . . . ."). Its inquiry is limited to whether non-enforcement is reviewable under Section 704. This is not the question presented in the United States' motion. The decisive question in *Heckler* was whether a decision not to enforce was committed "to the agency's judgment absolutely." *Id.* at 830. But, the Corps' decision to refer an alleged violation for civil prosecution is not committed to its absolute judgment. The Corps' regulations limit the district engineer's discretion, focusing it on cases of willful, repeated, flagrant violations, or those with substantial impact. 33 C.F.R. § 326.5(a). *Heckler*'s reasoning supports denying the United States' motion. The Supplemental Complaint is the type of challenge to a "coercive" enforcement action which the Supreme Court stated is outside the ambit of *Heckler*'s holding. 470 U.S. at 832.

Buntrock v. S.E.C. is an unusual case in which a corporate executive filed a pre-emptive suit against the SEC for its decision to sue him, on the grounds that SEC's enforcement decision was not impartial and violated federal regulations. 347 F.3d at 996. The Seventh Circuit held that the plaintiff could not bring a separate suit to state an affirmative defense where the only purpose was to avoid the interlocutory nature of a ruling on that defense in the SEC's case. *Id*. at 997.[2]

Buntrock does not apply to the Supplemental Complaint. The Sixth Cause of Action is not a pre-emptive strike against the Counterclaim in a separate lawsuit. It is a new claim for relief in

///

[2] The court also rejected SEC's argument that its decision to file suit was not "final agency action." *Id*. at 997-98.

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

Duarte's case against the Corps, based on the Corps' actions since Duarte filed the Complaint.[3] Judge Posner's disapproval of Mr. Buntrock's tactic focused on his desire to directly appeal from a ruling in his lawsuit, rather than having to await final judgment in the SEC's case. 347 F.3d at 997. That is not an issue for the Sixth Cause of Action; it and the Counterclaim are part of one action and both are subject to the same appealability rules.

City of Oakland v. Holder also involves two parallel lawsuits. After the United States brought an *in rem* action for civil forfeiture of the property in which a medical marijuana dispensary operated, the City brought a separate action in federal court challenging the United States' authority to take the property. 901 F. Supp. 2d at 1191. The United States moved to dismiss Oakland's suit under Rule 12(b)(1), arguing that the *in rem* suit was not "final agency action" under Section 704, and therefore there was no waiver of sovereign immunity for the suit. *Id*. at 1192. The district court started its analysis with the proposition that Section 702's waiver only applies to actions reviewable under Section 704. *Id*. The court then held that the *in rem* action was not reviewable under Section 704, on the independent grounds that the federal civil forfeiture statute adequate remedy precluded APA review, *id*. at 1193-94, and that the *in rem* suit was not "final agency action" as that term is used in Section 704, *id*. at 1196. In arriving at this holding, the district court stated summarily that "the filing of a civil action does not fit within the APA's definition of agency action." *Id*. at 1195.

City of Oakland v. Holder is pending on appeal in the Ninth Circuit, case no. 13-15391. *See City of Oakland v. Holder*, 961 F. Supp. 2d 1005, 1009 (N.D. Cal. 2013) (order staying United States' *in rem* action pending Oakland's appeal of the dismissal of its separate suit challenging the

[3] Duarte's retaliation claim is not an affirmative defense to the Counterclaim. It challenges the Corps' retaliatory decision to refer the alleged violation for prosecution, and seeks to bar the Corps from further support of the Counterclaim until the Corps meets the burden of showing that it would have sought civil enforcement absent Duarte's First Amendment-protected actions. Duarte can prevail on its retaliation claim even if the United States could prevail on the underlying merits of the Counterclaim. *Mt. Healthy*, 429 U.S. 274, 283-84 (1977) (school could fire at-will employee for no reason, but not for retaliatory reason). And, a similar claim would lie against the Corps if, for example, it had "merely" imposed initial corrective measures under 33 C.F.R. § 326.3(d) in retaliation for Duarte's Complaint and related public statements against the Corps. *See, e.g.*, *Schneider v. County of Sacramento*, 2014 WL 4187364, at *8-9 (plaintiff mine operators stated a claim for First Amendment retaliation against county's consultant for recommending increase in mine's financial assurances following plaintiffs' suit against county).

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

seizure). *City of Oakland*'s statement, that Section 702's waiver is limited to cases for which Section 704 provides judicial review, is incorrect under *Presbyterian Church (U.S.A.)*, as well as this Court's prior ruling in this case analyzing Section 702 with reference to 5 U.S.C. § 551(13)'s definition of "agency action," which is broader than Section 704's term "final agency action." ECF 27, Order Denying Corps' Motion to Dismiss at 11 n.10. The United States is not seeking to revisit this ruling, ECF 46, U.S. Memo. in Support of Motion to Dismiss (U.S. Memo.) at 1:15. *City of Oakland*'s narrow reading of Section 702's waiver is neither controlling nor persuasive.

The United States' authorities deal with the immaterial question of judicial review under Section 704, and fail to address *Presbyterian Church (U.S.A.)*'s broad reading of Section 702's waiver of the United States' sovereign immunity. Duarte's First Amendment retaliation claim for other than money damages is not barred by sovereign immunity, and this Court has jurisdiction over it. The Court should deny the motion.

B. Duarte's Due Process Claims Are Not Moot Because the Cease and Desist Order Still Deprives Duarte of the Use of the Property Without a Hearing

The United States has not born its "heavy" burden of showing that this case is moot. *GATX/Airlog Co.*, 192 F.3d at 1306. Duarte's due process claims challenge the Cease and Desist Order, which is still in effect; Duarte has still not been given a hearing on it. No facts or circumstances have changed; the Court can grant relief in the form of a declaratory judgment that the Cease and Desist Order violates Duarte's constitutional rights under the Due Process Clause. *NRDC v. Jewell*, 749 F.3d at 782.

1. The Cease and Desist Order Remains in Place Without a Hearing, Which Is the Same Case or Controversy That Existed When Duarte Filed the Complaint

The Court has already held that the due process allegations of the Supplemental Complaint state a ripe claim for relief against the Corps. The United States' argument now is that these claims are moot because it has filed the Counterclaim for the alleged violations of the Act on which the Cease and Desist Order is purportedly based. This confuses two separate controversies. Duarte's due process claims do not address whether farming the Property violated the Act. Duarte's claims contend that the Corps violated the Due Process Clause when it ordered Duarte to halt farming the

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

Property without a hearing, whether or not the District Engineer's underlying determination of a violation was correct. The Counterclaim will litigate that underlying allegation, but it will not address any factual or legal questions material to the due process claims. The United States lists the elements that it must prove in its Counterclaim. U.S. Memo. at 3. None of the elements relate to whether Duarte owns property that is protected by the Due Process Clause, whether the Cease and Desist Order deprives Duarte of that property, and whether the Corps afforded Duarte an adequate hearing.

Nor does the Counterclaim raise any issue related to the Cease and Desist Order in which the constitutionality of the Order would be material. U.S. Memo. at 7:2-3 ("The counterclaim does not assert a claim based upon violation of the Corps' cease-and-desist order."). Litigation of the Counterclaim will not resolve any of the factual or legal issues that are material to Duarte's due process claims against the Cease and Desist Order. The filing of the Counterclaim does not withdraw the Cease and Desist Order, which remains in place and causes the same harm as it did before: it deprives Duarte of property without due process.

The only changed circumstance on which the United States bases its mootness argument is the filing of the Counterclaim. But the Counterclaim has not "evaporated" the Cease and Desist Order or made it "disappear." *Headwaters, Inc. v. BLM*, 893 F.2d at 1015. The Order is in place and still depriving Duarte of property without a hearing. The Counterclaim has not " 'forestalled any occasion for meaningful relief,' " *Gator.com Corp.*, 398 F.3d at 1129 (quoting *West*, 206 F.3d at 925 n.4), and thus the Court can grant effective relief by granting declaratory relief that the Corps violated the Due Process Clause when it issued the Cease and Desist Order, *NRDC v. Jewell*, 749 F.3d at 782.

2. The United States Wrongly Assumes That the Counterclaim Satisfies Duarte's Due Process Rights as a Matter of Law

Duarte's First Cause of Action is that the Corps violated the Due Process Clause by not providing a hearing before issuing the Cease and Desist Order. Suppl. Complaint ¶¶ 93-96. The United States assumes that this claim is moot because the Counterclaim is an adequate post-deprivation hearing. This is non-sequitur. A post-deprivation hearing cannot "cure" a Due Process

Clause violation where a pre-deprivation hearing is required. *Tri-State Dev. v. Johnston*, 160 F.3d at 531 (citing *Connecticut v. Doehr*, 501 U.S. at 15) (Washington pre-judgment attachment statute violated Due Process Clause despite early post attachment hearing).

Duarte's Second Cause of Action is for failure to provide a post-deprivation hearing. Suppl. Complaint ¶¶ 97-100. The United States assumes that filing the Counterclaim moots this cause of action, but this is also incorrect. The Counterclaim is pending, but Duarte has still had no hearing on the Cease and Desist Order. The United States concedes that to deprive Duarte of the use the Property under the Counterclaim (as the Corps accomplished with the Cease and Desist Order), it must move for a preliminary injunction. U.S. Memo. at 9:23-27. The United States has made no such motion. Holding that the Counterclaim moots the Second Cause of Action would improperly convert the Cease and Desist Order into an extra-judicial provisional remedy to which the Corps can help itself with no process at all. *See Fuentes v. Shevin*, 407 U.S. at 83 (striking replevin statutes allowing plaintiffs to obtain writs through summary ex parte application).

The United States also assumes far to much in suggesting that it could obtain a preliminary injunction that would bar Duarte from farming the *entire* Property, as the Cease and Desist Order currently does. The United States would have to show the scope of waters of the United States (if any) on the Property, and would have to establish which if any of Duarte's farming practices are outside the scope of the statutory exemption for normal farming activities. The Corps made either of these demonstrations with the Cease and Desist Order. It is implausible to imply that the Court would enjoin Duarte from farming *any* of the 445-acre Property in order to avoid un-permitted non-exempt discharges to the 15 acres of jurisdictional wetlands which the United States *alleges* exist on the Property. It is even more tenuous to propose that Duarte's due process claims are moot on the basis of such a thin reed.

Even if the United States were to seek such an injunction, it would not moot Duarte's claim that there has been no post-deprivation hearing in which to challenge the issuance of the Cease and Desist Order. The Cease and Desist Order far exceeds the relief that the United States could obtain

///

///

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

in a preliminary injunction. The Counterclaim alone does not moot Duarte's Second Cause of Action, nor would a hearing on a motion for preliminary injunction.

Finally, Duarte's Second Cause of Action claims that the Corps has not provided an adequate post-deprivation hearing. For any post-deprivation hearing to be adequate, it must be prompt. *Gilbert v. Homar*, 520 U.S. at 932, 935. Whether any given post-deprivation process is adequate, and particularly whether it is adequately prompt, is at least a mixed question of fact and law, if not primarily a question of fact. *Morrissey v. Brewer*, 408 U.S. at 481. The United States' motion presumes that the Counterclaim provides a prompt post-deprivation hearing as a matter of law. But the critical question of promptness cannot be resolved as a matter of law, in the perfunctory manner asserted. Even with the Counterclaim pending, the Court can provide declaratory relief on whether the Corps provided Duarte with an adequately prompt post-deprivation hearing.[4] The Counterclaim does not moot the Second Cause of Action.

Duarte's Fifth Cause of Action seeks declaratory judgment that the Corps' enforcement regulations are unconstitutional as applied to Duarte for failure to afford either a pre-deprivation hearing or an adequate post-deprivation hearing. Since this cause of action applies the same analysis of the Corps' actions, under the First and Second Causes of Action, to the Corps' regulations, it is no more moot than Duarte's other causes of action. The Counterclaim does not moot the Fifth Cause of Action.

3. The United States Ignores a Controlling Supreme Court Decision and This Court's Prior Ruling That Duarte Has Stated a Ripe Due Process Claim

The United States generally asserts that (1) similar orders issued by the Environmental Protection Agency have been found not to violate the Due Process Clause, and (2) the Corps' cease and desist order lacks legal consequences. U.S. Memo. at 9-10. These points are erroneous and misplaced.

[4] Duarte requested a hearing less than a month after the Corps issued the Order. Suppl. Complaint ¶ 52. The United States offers no argument or authority for why the Counterclaim would have been "prompt" several months later, when Duarte filed the Complaint in October, 2013, much less how it can be prompt more than a year after the Corps issued the Order, and three seasons of winter wheat crops are lost or imminently lost.

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

The United States cites *S. Pines Assoc. by Goldmeier v. United States*, 912 F.2d 713 (4th Cir. 1990), and *Hoffman Grp., Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990), for the proposition that EPA enforcement orders do not violate the Due Process Clause. *S. Pines Assoc.* followed *Hoffman* in holding that the Act precludes pre-enforcement judicial review, and that EPA compliance orders do not violate due process because there are no subject to penalties until and unless the agency brings an enforcement action. 912 F.2d at 714-15 (citing *Hoffman*). But *Sackett v. EPA*, 132 S. Ct. 1367 (2012), holds that the Act does *not* preclude pre-enforcement judicial review of compliance orders. *Id.* at 1374. This Court has already held that the First, Second, and Fifth Causes of Action in the Supplemental Complaint state a ripe claim that the Cease and Desist Order violated the Due Process Clause. Order Denying Corps' Motion to Dismiss at 19-20.

The Supreme Court's holding in *Sackett* supersedes the cases cited by the United States. This Court's prior ruling forecloses the United States' argument that Corps cease and desist orders cannot violate the Due Process Clause, and the United States concedes that it is not seeking to revisit that ruling. U.S. Memo. at 1:15. Duarte's First, Second, and Fifth Causes of Action are not moot, and the Court should deny the United States' motion to dismiss them.

C. First Amendment Retaliation Is a Well Recognized Constitutional Claim That May Be Raised Against Federal Defendants in a Non-*Bivens* Action

The United States argues under Rule 12(b)(6) that Duarte fails to state a claim for relief because the Sixth Cause of Action is not brought as a *Bivens* action for money damages. U.S. Memo. at 13. But First Amendment retaliation claims against federal agencies have been recognized outside of *Bivens* claims in this Court. *Louisiana-Pacific Corp. v. Beazer Materials & Services, Inc.*, 842 F. Supp. at 1256 (retaliation as defense to CERCLA cost recovery action, alleging that EPA inflated investigation costs in retaliation for retaining right to judicial review of costs).

The United States argues that, as a matter of law, a retaliation claim cannot be brought against the filing of a counterclaim in civil litigation where the government's counterclaim is potentially compulsory. U.S. Memo. at 14. In the United States' view, allowing such a claim would render every public agency's compulsory counterclaims retaliatory. But this is not Duarte's

argument or claim. The Sixth Cause of Action would not bar the Counterclaim outright. If Duarte satisfies the initial burden of showing that the Complaint and related public statements were a substantial or motivating factor in the Corps' decision to refer the Counterclaim for prosecution, the retaliation claim would then shift the burden to the Corps to show that it would have referred the Counterclaim absent Duarte's protected actions. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). The United States overstates the consequences of the claim as "barring" every compulsory counterclaim.

Nor is it material whether the Counterclaim is compulsory or not.[5] The First Amendment prohibits official action in retaliation for the exercise of protected rights, including filing suits against and publicly criticizing federal agencies. *Soranno's Gasco*, 874 F.2d at 1314. The Corps has *some* discretion in referring alleged violations for prosecution, *see* 33 C.F.R. § 326.5(a), but it may not do so in retaliation for being sued or publicly criticized. *See Mt. Healthy*, 429 U.S. at 283-84 (school district could dismiss teacher for "any reason whatsoever" but not in retaliation for teacher's criticism of school).

The United States does not identify any inadequacy of Duarte's supplemental allegations, and describes them inaccurately as "unspecified" and as claiming only that the Counterclaim is "improper." U.S. Memo. at 14. But the Supplemental Complaint alleges straightforwardly that after issuing the Cease and Desist Order, the Corps took no further enforcement action of which Duarte is aware until after Duarte filed the Complaint, spoke publicly about the case, and the Court heard oral argument on the Corps' motion to dismiss. Suppl. Complaint ¶¶ 80-84. The allegations in paragraph 80 of the Supplemental Complaint that John Duarte participated in "a short video about the case, a press release, blog posts and other internet based communications, . . . numerous radio and print media interviews" and "appeared on a nationally broadcast television program to discuss the case against the Corps" are hardly conclusory or unspecified.

[5] The evidence, and issues of fact and law, which will resolve whether Duarte violated the Act are different from those which will resolve whether the Corps violated Duarte's Due Process and First Amendment rights by issuing the Cease and Desist Order and prosecuting the Counterclaim. Not arising out of the same transaction or occurrence, the Counterclaim is not compulsory. Fed. R. Civ. P. 13(a)(1)(A); *Pochiro v. Prudential Ins. Co. of America*, 827 F.2d 1246, 1249 (9th Cir. 1987).

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

When the Corps previously moved to dismiss, it argued that Duarte did not have a ripe claim because an after-the-fact permit could be applied for. ECF 10-1, Memorandum of Points and Authorities in Support of Federal Defendant's Motion to Dismiss Complaint at 10 (Cease and Desist Order "may ultimately result in issuance of an ATF permit"), *id.* ("[N]othing prevents Plaintiffs from engaging with the Corps . . . and ultimately seeking an after-the-fact permit."). Since the district engineer may not accept an application for an after-the-fact permit if it has been determined that legal action is appropriate, 33 C.F.R. § 326.3(e)(1)(ii), the Court should infer that as of December 23, 2013, when the Corps filed these statements, it had not yet determined that legal action was appropriate.

Being sued by the United States is certainly the type of government action that would make the person of "ordinary firmness" think twice about whether it is a good idea to sue the United States Army Corps of Engineers and criticize its policies and actions publicly. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006) (criminal prosecution). The Court, taking the above allegations as true, can easily infer that once the Corps issued the Cease and Desist Order, preventing Duarte from farming or otherwise using the Property, it had accomplished its purpose and had no further enforcement plans related to Duarte's supposed violation of the Act. The Court can also easily infer that being sued and publicly criticized was a substantial or motivating reason why the Corps changed course and decided that Duarte's alleged violations deserved referral to the Justice Department.

The Supplemental Complaint adequately alleges a First Amendment retaliation claim against the Corps for referring the alleged violations of the Act for prosecution, and for supporting and maintaining the prosecution of the Counterclaim. The Court should deny the United States' motion to dismiss for failure to state a claim.[6]

///

///

[6] Duarte is prepared to amend the Supplemental Complaint in the event the Court concludes that the Sixth Cause of Action is not adequately plead, or to cure any other deficiency in the Supplemental Complaint.

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

D. Duarte's First Amendment Retaliation Claim Can Proceed in This Lawsuit Since Duarte Is Not Bringing a Malicious Prosecution Claim

The United States finally argues that Duarte cannot maintain the Sixth Cause of Action while the Counterclaim is pending, analogizing the retaliation claim to malicious prosecution. U.S. Memo. at 15. But *Hartman v. Moore* rejects the approach of using common law torts, and malicious prosecution in particular, as "prefabricated components of *Bivens* torts." 547 U.S. at 258 (citations omitted). The United States offers no reason why First Amendment retaliation claims should not be litigated during an ongoing agency violation of a plaintiff's rights. And there is a good reason to allow Duarte's Sixth Cause of Action to proceed: if the Corps is retaliating as Duarte alleges, litigating the retaliation claim now will put a stop to it. This Court has allowed a doctor's First Amendment retaliation claim to proceed against the Drug Enforcement Agency while the agency was in the midst of an allegedly retaliatory investigation of the plaintiff. *Denney v. DEA*, 508 F. Supp. 2d 815 (E.D. Cal. 2007). There is no reason not to apply the same rule in this case. The Court should deny the motion.

CONCLUSION

The Court should deny the United States' motion to dismiss.

DATED: October 17, 2014.

Respectfully submitted,

DAMIEN M. SCHIFF
ANTHONY L. FRANÇOIS
DAVID M. IVESTER
GERALD E. BRUNN

By /s/ Anthony L. François
ANTHONY L. FRANÇOIS

Attorneys for Plaintiffs and Counterclaim-Defendants Duarte Nursery, Inc., et al.