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15 UNITED STATES DISTRICT COURT

16 FOR THE EASTERN DISTRICT OF CALIFORNIA

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

18 Plaintiffs,)

19 v.)

20 UNITED STATES ARMY CORPS OF ENGINEERS;)
21 THE UNITED STATES OF AMERICA; KARL E.)
LONGLEY, an individual in his official capacity as a)
22 member of the Central Valley Regional Water Quality)
Control Board; JENNIFER LESTER MOFFITT, an)
23 individual in her official capacity as a member of the)
Central Valley Regional Water Quality Control Board;)
24 JON COSTANTINO, an individual in his official capacity)
as a member of the Central Valley Regional Water Quality)
25 Control Board; SANDRA O. MERAZ, an individual in)
her official capacity as a member of the Central Valley)
26 Regional Water Quality Control Board; CARMEN)
RAMIREZ, an individual in her official capacity as a)
27 member of the Central Valley Regional Water Quality)
Control Board; ROBERT SCHNEIDER, an individual in)
28 his official capacity as a member of the Central Valley)

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

**[PROPOSED] SECOND
AMENDED COMPLAINT
FOR DECLARATORY
JUDGMENT AND
INJUNCTIVE RELIEF**

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1 Regional Water Quality Control Board; PAMELA)
2 CREEDON, an individual in her official capacity as)
3 Executive Officer of the Central Valley Regional Water)
4 Quality Control Board,)
5 Defendants.)
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JURISDICTION

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2 1. This Court has jurisdiction in this action pursuant to 5 U.S.C. § 702 (judicial review
3 of agency action); 28 U.S.C. § 1331 (civil action arising under the laws of the United States),
4 § 2201 (declaratory relief) and § 2202 (injunctive relief).

INTRODUCTION

5
6 2. In the Fall of 2102, plaintiff Duarte Nursery, Inc, through a contractor, planted a
7 winter wheat crop on a parcel of real property it owns on Paskenta Road in rural Tehama County,
8 a few miles south of the city of Red Bluff. Plaintiff’s farming of this property is indistinguishable
9 from that of hundreds if not thousands of other wheat farmers in California and across the United
10 States. In doing so, Plaintiff engaged in normal farming practices that Congress has expressly
11 exempted from the ambit of the federal Clean Water Act’s prohibition on discharge of dredged or
12 fill material in navigable waters.

13 3. On February 25, 2013, defendant United States Army Corps of Engineers (Corps)
14 issued a Cease and Desist Order (CDO) (attached as Exhibit A) to Plaintiffs which states that the
15 Corps “determined that [Plaintiffs] discharged dredged or fill material into . . . waters of the United
16 States” on the above referenced property, without a permit issued under the federal Clean Water
17 Act. The Corps made the determination and issued the CDO without providing Plaintiffs any
18 hearing on the subject, either before or after the determination or issuance of the CDO. The
19 determination and CDO purport to hold Plaintiffs in violation of federal law, deprive Plaintiffs of
20 the ability to productively use or transact the property, and impair their reputations.

21 4. On April 23, 2013, officials of the Central Valley Regional Water Quality Control
22 Board (collectively Water Board) issued a Notice of Violation (NOV) (attached as Exhibit B) to
23 Plaintiffs in which the Water Board asserted that Plaintiffs “are in violation of federal Clean Water
24 Act (CWA) section 301 for discharging dredged or fill materials without complying with CWA
25 sections 404 and 401, . . . and CWA section 402 and California Water Code (Water Code) section
26 13376 for discharging pollutants to Coyote Creek without a permit.” The Water Board issued the
27 NOV without providing Plaintiffs a hearing. The NOV purports to hold Plaintiffs in violation of
28 state and federal law, deprives Plaintiffs of the ability to productively use or transact the property,

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1 imposes affirmative obligations on Plaintiffs to mitigate alleged impacts, threatens significant
2 fines, and impairs their reputations.

3 5. If the Corps and Water Board had provided Plaintiffs with a hearing before issuing
4 the orders and notices holding them to be in violation of federal and state clean water provisions,
5 Plaintiffs are informed and believe that they would have been able to rebut the allegations that they
6 violated the law. By way of this complaint, Plaintiffs seek a declaration that the Corps and the
7 Water Board violated Plaintiffs' procedural due process rights by failing to provide Plaintiffs a
8 hearing before or after issuance of the CDO and NOV. Plaintiffs further seek a declaration that
9 the CDO and NOV are void because the Corps and Board violated Plaintiffs' procedural due
10 process rights when issuing them. Plaintiffs also seek an injunction enjoining Defendants from
11 enforcing the CDO and NOV, and from engaging in further enforcement actions against Plaintiffs
12 in violation of Plaintiffs' procedural due process rights. Plaintiffs also seek an order declaring that
13 the Corps' enforcement regulations at 33 C.F.R. Part 326 are unconstitutional as applied to
14 Plaintiffs because, in violation of the Fifth Amendment to the United States Constitution, they do
15 not provide potentially responsible parties with a hearing either before or after the Corps
16 determines that a responsible party has violated federal law.

17 **VENUE**

18 6. Venue in this district is proper under 28 U.S.C. § 1391(e)(1) because a substantial
19 part of the events or omissions giving rise to the claims occurred in this district, the property which
20 is the subject of the CDO and the NOV is located in this district, and because Plaintiffs maintain
21 a place of business in this district.

22 **PARTIES**

23 **Plaintiffs**

24 7. Plaintiff Duarte Nursery, Inc. (Duarte Nursery), owns the property that is the
25 subject of this action. Duarte Nursery is a California corporation headquartered in Modesto,
26 California. Duarte Nursery is engaged in the business of growing and selling nursery stock for
27 orchard trees and grape vines to farmers and other businesses throughout California. Duarte
28 Nursery is a family-owned and operated business that was founded 24 years ago and has been built

1 from nothing into a successful enterprise that employs hundreds of Californians and assists
2 California farmers in their mission to feed the state, the nation, and the world.

3 8. Plaintiff John Duarte is the President of Duarte Nursery, a co-owner, and one of the
4 founders of Duarte Nursery. He is responsible for all sales and marketing for Duarte Nursery.

5 **Defendants**

6 9. Defendant United States Army Corps of Engineers (Corps) is a branch of the
7 United States Army and an agency of the United States. The Corps is authorized under Section
8 404 of the Clean Water Act to issue permits for the discharge of dredged and fill material into
9 “navigable waters.” 33 U.S.C. § 1344(a). The Corps’s applicable district engineer is authorized
10 by regulation to investigate unauthorized activities that require permits, to confirm whether such
11 actions have occurred in violation of Section 404, to notify responsible parties of violations, and
12 to determine a course of action in resolving the violation. 33 C.F.R. ¶ 326.3.

13 10. Defendant the United States of America (United States) is the counterclaim-
14 plaintiff in this action. The United States is sued to ensure that the Court can provide effective
15 relief in this action.

16 11. Defendant Karl E. Longley is an individual. He is sued in his official capacity as
17 a board member of the Central Valley Regional Water Quality Control Board, which is an agency
18 of the State of California and is authorized to issue State Water Quality Certifications in
19 connection with dredge and fill permits issued by the Corps, under the Porter-Cologne Act,
20 California Water Code sections 13160, 13376 and 13377, and to issue cease and desist orders
21 under California Water Code section 13301. Defendant Longley is sued in federal court under the
22 doctrine set forth in *Ex parte Young*, 209 U.S. 123 (1908); *see also Cardenas v. Anzai*, 311 F.3d
23 929, 934-38 (9th Cir. 2002).

24 12. Defendant Jennifer Lester Moffitt is an individual. She is sued in her official
25 capacity as a board member of the Central Valley Regional Water Quality Control Board, and is
26 sued in federal court under the doctrine set forth in *Ex parte Young*, 209 U.S. 123 (1908); *see also*
27 *Cardenas v. Anzai*, 311 F.3d 929, 934-38 (9th Cir. 2002).

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1 13. Defendant Jon Costantino is an individual. He is sued in his capacity as a board
2 member of the Central Valley Regional Water Quality Control Board, and is sued in federal court
3 under the doctrine set forth in *Ex parte Young*, 209 U.S. 123 (1908); *see also Cardenas v. Anzai*,
4 311 F.3d 929, 934-38 (9th Cir. 2002).

5 14. Defendant Sandra O. Meraz is an individual. She is sued in her capacity as a board
6 member of the Central Valley Regional Water Quality Control Board, and is sued in federal court
7 under the doctrine set forth in *Ex parte Young*, 209 U.S. 123 (1908); *see also Cardenas v. Anzai*,
8 311 F.3d 929, 934-38 (9th Cir. 2002).

9 15. Defendant Carmen Ramirez is an individual. She is sued in her capacity as a board
10 member of the Central Valley Regional Water Quality Control Board, and is sued in federal court
11 under the doctrine set forth in *Ex parte Young*, 209 U.S. 123 (1908); *see also Cardenas v. Anzai*,
12 311 F.3d 929, 934-38 (9th Cir. 2002).

13 16. Defendant Robert Schneider is an individual. He is sued in his capacity as a board
14 member of the Central Valley Regional Water Quality Control Board, and is sued in federal court
15 under the doctrine set forth in *Ex parte Young*, 209 U.S. 123 (1908); *see also Cardenas v. Anzai*,
16 311 F.3d 929, 934-38 (9th Cir. 2002).

17 17. Defendant Pamela C. Creedon is an individual. She is sued in her capacity as the
18 Executive Officer of the Central Valley Regional Water Quality Control Board, and is sued in
19 federal court under the doctrine set forth in *Ex parte Young*, 209 U.S. 123 (1908); *see also*
20 *Cardenas v. Anzai*, 311 F.3d 929, 934-38 (9th Cir. 2002).

21 LEGAL BACKGROUND

22 Corps of Engineers - Regulatory Authority 23 over Discharges to Waters of the United States

24 18. In 1972, Congress enacted the Clean Water Act, 33 U.S.C. § 1251, *et seq.* (CWA)
25 to regulate “navigable waters.”

26 19. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army,
27 through the Corps, to issue permits for the discharge of dredged and fill material into “navigable
28 waters.”

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1 20. Section 301(a) of the CWA, *id.* § 1311(a), prohibits the unpermitted discharge of
2 dredged and fill material into “navigable waters.” Section 404(f)(1) exempts several activities
3 from the ban on discharging dredged and fill material and the requirement to obtain permits,
4 including “normal farming activities.” 33 U.S.C. § 1344(f)(1)(A).

5 21. Section 502(7) of the CWA, *id.* § 1362(7) defines “navigable waters” to mean the
6 “waters of the United States, including the territorial seas.”

7 22. By regulation, the Corps may determine whether a particular parcel of property
8 contains “waters of the United States” by issuing an Approved Jurisdictional Determination. 33
9 C.F.R. §§ 320.1(a)(6), 331.2.

10 23. In 1986, the Corps promulgated regulations defining “waters of the United States,”
11 and in 1993 amended those regulations. *Id.* pt. 328.

12 24. Under those regulations, navigable waters, interstate waters, intrastate waters with
13 uses that could affect interstate or foreign commerce, impoundments of waters, tributaries of
14 waters, territorial seas, and wetlands adjacent to other waters that are not themselves wetlands, are
15 considered “waters of the United States.” *See id.* § 328.3.

16 25. In 2001, the United States Supreme Court, in *Solid Waste Agency of Northern Cook*
17 *County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), held that
18 isolated, intrastate, non-navigable bodies of water are not “waters of the United States.”

19 26. Notwithstanding *SWANCC*, the Corps and EPA continued to interpret their
20 authority under the CWA to extend to waterbodies and wetlands so long as these features had at
21 least a “hydrological connection” to navigable-in-fact waterbodies. *See, e.g., United States v.*
22 *Rapanos*, 376 F.3d 629, 638 (6th Cir. 2004), *vacated, remanded by Rapanos v. United States*, 547
23 U.S. 715 (2006).

24 27. In *Rapanos v. United States*, the Supreme Court rejected the agencies’ hydrological
25 connection theory of CWA jurisdiction. *See* 547 U.S. at 739 (plurality opinion); *id.* at 780-82
26 (Kennedy, J., concurring in the judgment).

27 28. In that decision, Justice Scalia authored a plurality opinion, joined by three other
28 Justices, which concluded that the Corps’ jurisdiction over non-navigable waters only extends to

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1 “relatively permanent, standing or continuously flowing bodies of water” that are “connected to
2 traditional interstate navigable waters.” *Id.* at 739, 742 (plurality opinion).

3 29. Justice Kennedy concurred in the judgment but adopted a broader interpretation of
4 the Corps’ jurisdiction over non-navigable waters, finding them jurisdictional if they “possess a
5 ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so
6 made.” *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment). According to Justice
7 Kennedy, a significant nexus exists where non-navigable waters, either alone or in combination
8 with similarly situated waterbodies, “significantly affect the chemical, physical, and biological
9 integrity” of navigable-in-fact waters (also known as “traditional navigable waters”). *Id.* at 780.

10 30. After *Rapanos*, the Corps, in conjunction with EPA, issued two separate non-
11 binding guidance documents, in 2008 and 2011, in each of which the Corps and EPA generally
12 state their intention to continue to assert jurisdiction over “waters of the United States” that satisfy
13 either the Scalia or the Kennedy test. In September of 2013, the EPA withdrew the 2011 guidance
14 document, and submitted a new draft rule to the Office of Management and Budget that will revise
15 33 C.F.R. pt. 328.

16 31. The result of the above history is that the Corps’ regulations defining the scope of
17 waters of the United States, under which the Corps determines whether a permit is required for
18 dredge and fill activities, continue to define such waters expansively in a manner rejected by two
19 subsequent United States Supreme Court decisions.

20 **Corps of Engineers - Enforcement Procedures**

21 32. The Corps, through its district engineers, is authorized by regulation to investigate
22 unauthorized activities that require permits, to confirm whether such actions have occurred in
23 violation of Section 404, to notify responsible parties of violations, and to determine a course of
24 action in resolving the violation. 33 C.F.R. ¶ 326.3.

25 33. A district engineer’s determination under 33 C.F.R. ¶ 326.3(b) that a violation has
26 occurred and the identity of the responsible party is final agency action.

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1 34. The Corps' regulations do not require that the Corps notify persons suspected of
2 unauthorized activities, or require that such persons be given a hearing, prior to the district
3 engineer making a determination that a violation has occurred. 33 C.F.R. ¶ 326.3(a)-(b).

4 35. The Corps' regulations direct that once the district engineer has determined that a
5 violation has occurred, the district engineer should notify the responsible parties. 33 C.F.R.
6 ¶ 326.3(b). In the case of a violation involving a project that is not complete, the regulations direct
7 the district engineer to issue a cease and desist order. 33 C.F.R. ¶ 326.3(c)(1).

8 36. The Corps' regulations do not require or provide for a potentially responsible party
9 who is not a permittee to be given a hearing on a suspected violation, either before or after the
10 district engineer's determination under 33 C.F.R. ¶ 326.3(b), or before or after the issuance of a
11 cease and desist order. The Corps' regulations do not provide an administrative appeal process
12 to challenge a determination that a violation has occurred.

13 **Central Valley Regional Water Quality Control Board**

14 37. Section 401 of the Clean Water Act, 33 U.S.C. § 1341, requires applicants for a
15 dredge and fill permit under Section 404 to also obtain a state water quality certification from the
16 applicable state agency.

17 38. The State Water Resources Control Board is authorized to issue state water quality
18 certifications in connection with Corps Section 404 permits under California Water Code sections
19 13160, 13376, and 13377.

20 39. The Central Valley Regional Water Quality Control Board is authorized to issue
21 cease and desist orders under California Water Code section 13301 for violations of the Water
22 Code, and Defendants collectively referred to above as Water Board have the responsibility for
23 overseeing and implementing the enforcement program of the Central Valley Regional Water
24 Quality Control Board.

25 **Constitutional Procedural Due Process Requirements**

26 40. The Fifth Amendment to the Constitution of the United States prohibits agencies
27 of the United States from depriving citizens of life, liberty, or property without due process of law.

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1 41. The Fourteenth Amendment to the Constitution of the United States applies these
2 requirements to the State of California and its agencies and officers.

3 42. The Fifth Amendment requires that agencies of government afford private parties
4 a hearing before depriving them of liberty or property, although in limited circumstances a post-
5 deprivation hearing is constitutionally sufficient. A post deprivation hearing is only adequate in
6 those cases where the agency can make the injured party whole by restoring money or other
7 benefits wrongfully withheld in the underlying decision. A post-deprivation hearing is not
8 generally adequate where the underlying decision is that the private party has violated the law.

9 43. The elements of a hearing that are necessary to meet constitutional procedural due
10 process requirements generally include notice of the subject matter and issues in the case, a
11 reasonable opportunity to present evidence (testimonial and documentary) and argument, the
12 opportunity to rebut adverse evidence through cross-examination of witnesses and other
13 appropriate means, to appear with counsel, and to have the decision based solely on the record of
14 evidence introduced at the hearing. Bernard Schwartz, *Administrative Law* § 5.1, p. 203 (2d ed.
15 1984).

16 44. Judicial review of agency action does not satisfy the constitutional requirements
17 of procedural due process unless judicial review is de novo. Judicial review also does not satisfy
18 constitutional procedural due process requirements if review is limited to the record before the
19 agency if the agency did not afford the complaining party the opportunity to submit evidence on
20 the record or rebut the agency's evidence. Schwartz, *Administrative Law* § 5.9, p. 221 (citing *Goss*
21 *v. Lopez*, 419 U.S. 565, 581 n.10 (1975)).

22 **FACTUAL ALLEGATIONS**

23 **The Property and Duarte Nursery's Farming**

24 45. Plaintiff Duarte Nursery owns approximately 445 acres of property located on
25 Paskenta Road in rural Tehama County, roughly 8 miles south of the City of Red Bluff and
26 roughly 3 miles west of Interstate 5, Tehama County, California, APN 037-070-351 and 037-070-
27 371 (Property). The Property is zoned A2 (agricultural use) by the County of Tehama.

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1 46. Plaintiff Duarte Nursery acquired the Property in 2012 for the purpose of farming
2 it. The Property has historically been used for wheat farming, and is assigned approximately
3 430.7 acres of “wheat base” by the United States Department of Agriculture, Farm Service
4 Agency, for the purpose of determining eligibility for federal farm assistance.

5 47. Subsequent to acquiring the Property, Duarte Nursery retained an environmental
6 consultant to perform a wetlands delineation for the Property (2012 Delineation), to determine the
7 scope of any wetlands on the Property.

8 48. In November of 2012, through a contractor, Duarte Nursery planted a winter wheat
9 crop on the Property, using a tractor to plough. The cost of planting this crop was a minimum of
10 \$50,000.00. Relying on the advice of its environmental consultant, Duarte Nursery took steps to
11 ensure that all wetlands that were delineated on the Property in the 2012 Delineation be marked
12 off and avoided by farming equipment, with an appropriate set back. No deep ripping has taken
13 place on the Property while it has been owned by Duarte Nursery or under the control of John
14 Duarte.

15 **The Corps Determination and Cease and Desist Order**

16 49. In November of 2012, staff of the Corps contacted Plaintiff John Duarte by
17 telephone and inquired about the intended use of the Property. John Duarte explained that Duarte
18 Nursery intended to farm the Property, denied any knowledge of discharges to wetlands on the
19 Property, and offered to meet at the Property to further discuss the matter.

20 50. At no time during this conversation did staff of the Corps state that the intended use
21 of the property would require a permit from the Corps, that farming the Property would result in
22 a determination that the Clean Water Act had been violated, that Plaintiffs or either of them were
23 suspected of violating the Clean Water Act, or that Plaintiffs or either of them had the opportunity
24 to submit information on the subject of whether any such violation existed.

25 51. On February 25, 2013, the Corps issued the CDO to Duarte Nursery and John
26 Duarte. The CDO “determines that [Plaintiffs] have discharged dredged or fill material into
27 seasonal wetlands, vernal pools, vernal swales, and intermittent and ephemeral drainages, which
28 are waters of the United States, without a . . . permit. . . . Since a DA permit has not been issued

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1 authorizing this discharge, the work is in violation of the Clean Water Act.” The CDO directs
2 Plaintiffs “to cease and desist all work in waters of the United States.”

3 52. The CDO fails to specify the extent of the Property that the Corps considers to be
4 waters of the United States, or what action the Corps claims violated the Clean Water Act. The
5 CDO also fails to identify the Property by legal description, street address, or assessor’s parcel
6 number, identifying the location only by latitude and longitude.

7 53. On March 21, 2013, through counsel, Plaintiffs responded to the CDO by
8 requesting the factual basis on which the Corps made the determination reported in the CDO,
9 requesting an explanation of any available administrative procedures or remedies, and reserving
10 all defenses to the claims made in the CDO.

11 54. On April 18, 2013, the Corps provided a partial response to the requests for
12 information made in Plaintiffs’ March 21, 2013 letter, to wit:

13 a. The Corps stated that it is relying on a 1994 wetlands delineation of the
14 Property (1994 Delineation), which purportedly depicts wetlands “scattered throughout the
15 property.” The Corps provided an electronic copy of the 1994 delineation.

16 b. The Corps stated that “We have observed that discharges of dredged or fill
17 material into these wetlands have occurred while under the control of Mr. Duarte.”

18 c. The Corps states that “We allege that while the Property was under
19 Mr. Duarte’s control it was deep-ripped.”

20 d. The Corps states that Plaintiffs’ activities are not “on-going normal farming
21 activities” and therefore not exempt from permitting requirements.

22 55. If the Corps had provided Plaintiffs with a hearing, Plaintiffs are informed and
23 believe that they would have been able to rebut the basic factual allegations on which the Corps
24 appears to rely, to wit:

25 a. The 2012 Delineation is more recent and more accurate than the 1994
26 Delineation relied upon by the Corps, uses the currently applicable legal standard, and is based
27 on the current physical condition of the Property.

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1 b. Plaintiffs’ farming activities on the Property are normal farming practices
2 exempt from federal permitting requirements and related state water quality certification
3 requirements.

4 c. Plaintiffs have not engaged in any ‘grading activity’ unrelated to their
5 normal farming practices on the Property.

6 61. The Water Board’s NOV constitutes an ongoing violation of Plaintiffs’
7 constitutional right to procedural due process.

8 **Results of Corps CDO and Water Board NOV on Plaintiffs**

9 62. Plaintiffs’ constitutional rights to procedural due process have been denied by both
10 the Corps and the Water Board, as a direct result of those agencies issuing the CDO and NOV,
11 respectively, without providing Plaintiffs with a hearing either prior or subsequent to the issuance
12 of the CDO and NOV, respectively.

13 63. Plaintiffs are unable to determine from either the CDO or the NOV exactly what
14 farming practices the Corps and the Water Board find to violate the Clean Water Act, and in
15 exactly which locations on the Property.

16 64. As a result of this ambiguity, and of the potential legal implications of defying the
17 CDO and the NOV, Plaintiffs have left the subject wheat crop untended, resulting in its total loss,
18 at a cost to Duarte Nursery of at least \$50,000 in planting costs.

19 65. As a result of the CDO and NOV, Plaintiffs have been unable to make necessary
20 preparations for farming the property in the Fall of 2013, and hence will lose another year’s
21 opportunity to grow and harvest a crop.

22 66. Plaintiffs are informed and believe that Duarte Nursery would be unable to sell the
23 Property, or lease the Property for any valuable use, while the CDO and NOV are in effect,
24 without fully disclosing the existence of the CDO and NOV to potential buyers or lessors, and are
25 informed and believe that such disclosure would effectively render the Property unsaleable and
26 unleaseable. Plaintiffs contend that these conditions are legally tantamount to a constructive lien
27 on the Property in favor of Defendants. *See Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) (“[E]ven
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1 the temporary or partial impairments to property rights that attachments, liens, and similar
2 encumbrances entail are sufficient to merit due process protection.”).

3 67. As a result of the CDO, Plaintiffs are subject to further administrative action by
4 defendant Corps in the form of a future order directing Plaintiffs to take corrective action to
5 “resolve the violation,” 33 C.F.R. ¶ 326.3(c)(3), and potential criminal or civil legal actions, 33
6 C.F.R. ¶ 326.5(a).

7 68. As a result of the NOV, Plaintiffs are subject to a purported obligation to prepare
8 and execute a plan for mitigating the impacts of their “unauthorized fill” (*i.e.*, plowing and
9 planting a wheat crop on the Property), which must be prepared by a professional consultant
10 acceptable to the Water Board and approved by the California Department of Fish and Wildlife.

11 69. As a result of the CDO and NOV, and their dissemination to other state and federal
12 agencies, Plaintiffs have been labeled as violators, harming their reputation. Plaintiffs’
13 relationships and dealings with the Corps, the Water Board, and the other agencies have been
14 impaired by the unconstitutional denial of their procedural due process rights.

15 **ALLEGATIONS SUPPORTING DECLARATORY RELIEF**

16 70. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1
17 through 69 as though fully set forth herein.

18 71. An actual and substantial controversy exists between Plaintiffs and Defendants over
19 Defendants’ respective duties to provide Plaintiffs with a hearing prior to making the
20 determinations set forth in the CDO and NOV respectively.

21 72. An actual and substantial controversy exists between Plaintiffs and Defendants over
22 Defendants’ respective duties to provide Plaintiffs with a hearing after making the determinations
23 set forth in the CDO and NOV, respectively, if no pre-deprivation hearing is required.

24 73. This case is currently justiciable because Defendants have failed, and continue to
25 fail, to timely comply with their constitutionally imposed duty to afford Plaintiffs with a hearing
26 prior to or subsequent to making the determinations set forth in the CDO and NOV, respectively.

27 74. Declaratory relief that will clarify the rights and obligations of the parties is
28 therefore appropriate to resolve this controversy.

ALLEGATIONS SUPPORTING INJUNCTIVE RELIEF

75. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1 through 74 as though fully set forth herein.

76. Plaintiffs have been injured by Defendants’ failure to provide Plaintiffs with a constitutionally required hearing on the determinations set forth in the CDO and NOV, respectively. If an injunction does not issue enjoining Defendants from continuing to evade their duty to provide a hearing, Plaintiffs will be irreparably harmed.

77. Plaintiffs have no plain, speedy, and adequate remedy at law for such an injury.

78. This action is ripe.

79. If not enjoined by this Court, Defendants will continue to violate the law requiring them to provide Plaintiffs with a hearing on the determinations set forth in the CDO and NOV, respectively.

SUPPLEMENTAL ALLEGATIONS

80. Plaintiffs hereby supplement the Complaint to allege facts occurring subsequent to the filing of the complaint herein.

81. On October 10, 2013, Plaintiffs filed the Complaint in this action to challenge the Corps’ violation of Plaintiffs’ procedural due process rights in the issuance of the CDO. After filing the Complaint, Plaintiffs engaged in a variety of First Amendment protected activities to make others aware of this lawsuit. These included the release of a short video about the case, a press release, blog posts and other internet based communications, and numerous radio and print media interviews about the case. Plaintiff John Duarte also appeared on a nationally broadcast television program to discuss the case against the Corps.

82. Prior to issuing the Cease and Desist Order, the Corps characterized the alleged Clean Water Act violations on the Property as flagrant. This characterization was incorrect, owing to the Corps’ inadequate investigation of the facts, and violations of Duarte’s due process rights to a hearing. At the time the Corps issued the Cease and Desist Order in February, 2013, it did not consider the alleged Clean Water Act violation to be appropriate for legal action under 33 C.F.R. § 326.5(a). After the Corps ordered Plaintiffs to cease and desist farming the Property in February,

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1 | 2013, it took no further enforcement action toward Plaintiffs regarding the alleged violations of
2 | the Clean Water Act on the Property until after Plaintiffs filed their due process Complaint against
3 | the Corps and engaged in several other First Amendment protected actions related to the case.

4 | 83. In response to news coverage of the filing of Duarte’s Complaint, the Corps
5 | immediately initiated enforcement steps against Duarte, including but not limited to referring the
6 | alleged Clean Water Act violation to the United States Environmental Protection Agency for civil
7 | penalty enforcement.

8 | 84. Following the filing of the Complaint and Duarte’s related First Amendment
9 | protected activity, the Corps abandoned its prior determination that the alleged Clean Water Act
10 | violation was not appropriate for legal action, and referred the alleged violations to the Justice
11 | Department for civil action. The Corps’ decision to refer the alleged Clean Water Act violations
12 | to the Justice Department was retaliatory against Duarte, in that Duarte’s Complaint, and related
13 | publicity actions, were substantial or motivating factors in the decision to refer. The Corps’
14 | decision to refer to the Justice Department was not legally warranted under 33 C.F.R. § 326.5(a),
15 | because, among other reasons, it had violated Duarte’s due process rights and as a result its
16 | determination that Duarte discharged dredged or fill materials to waters of the United States was
17 | wrong, and its characterization of the alleged violation as flagrant was incorrect.

18 | 85. The Justice Department’s decision to file the Counterclaim would not have been
19 | made absent the Corps’ retaliatory motive against Duarte’s Complaint and related First
20 | Amendment protected publicity actions.

21 | 86. By way of this Supplemental Complaint, Plaintiffs seek a declaration that the Corps
22 | violated Plaintiffs’ First Amendment rights by engaging in retaliatory prosecution against them.
23 | Plaintiffs also seek an injunction enjoining the Corps from prosecuting the Counterclaim, and from
24 | engaging in further enforcement actions against Plaintiffs in violation of Plaintiffs’ First
25 | Amendment rights.

26 | 87. An actual and substantial controversy exists between Plaintiffs and the Corps over
27 | whether the Counterclaim violates Plaintiffs’ First Amendment rights.

28 | ///

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1 88. This case is currently justiciable because the Corps has violated and continues to
2 violate Plaintiffs' First Amendment rights by filing and prosecuting the Counterclaim.

3 89. Declaratory relief that will clarify the rights and obligations of the parties is
4 therefore appropriate to resolve this controversy.

5 90. Plaintiffs have been injured by the Corps' retaliatory prosecution of the
6 Counterclaim in violation of Plaintiffs' First Amendment rights. If an injunction does not issue
7 enjoining Defendants from prosecuting the Counterclaim, Plaintiffs will be irreparably harmed.

8 91. Plaintiffs have no plain, speedy, and adequate remedy at law for such an injury.

9 92. This action is ripe.

10 93. If not enjoined by this Court, Defendants will continue to violate the law by
11 engaging in the retaliatory prosecution of the Counterclaim in violation of Plaintiffs' First
12 Amendment rights.

13 **FIRST CAUSE OF ACTION**

14 **(Against Defendant Corps - Violation of the Fifth Amendment to the**
15 **United States Constitution - Failure to Provide a Pre-Deprivation Hearing)**

16 94. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1
17 through 93 as though fully set forth herein.

18 95. Defendant Corps has a mandatory and nondiscretionary duty under the Fifth
19 Amendment to provide Plaintiffs with a constitutionally adequate hearing in satisfaction of
20 Plaintiffs' right to procedural due process prior to making the determination set forth in the CDO.
21 A pre-deprivation hearing is required in this case because there is no provision for staying further
22 enforcement proceedings once the determination is made, and no means of remedying the harm
23 to Plaintiffs in the event of an erroneous determination if a hearing is held after the fact.

24 96. Defendant Corps did not provide any hearing to Plaintiffs prior to making the
25 determination set forth in the CDO that Plaintiffs have violated federal law by discharging dredge
26 and fill material to waters of the United States without a permit.

27 97. Defendant Corps' failure to provide a pre-deprivation hearing violates the Fifth
28 Amendment to the United States Constitution and is unlawful.

1 **SECOND CAUSE OF ACTION**

2 **(Against Defendant Corps - Violation of the Fifth Amendment to the**
3 **United States Constitution - Failure to Provide a Post-Deprivation Hearing)**

4 98. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1
5 through 97 as though fully set forth herein.

6 99. Defendant Corps has a mandatory and nondiscretionary duty under the Fifth
7 Amendment to provide Plaintiffs with a constitutionally adequate hearing in satisfaction of
8 Plaintiffs' right to procedural due process after making the determination set forth in the CDO, and
9 prior to taking any further action pursuant to the CDO.

10 100. Defendant Corps did not provide any hearing to Plaintiffs subsequent to making
11 the determination set forth in the CDO that Plaintiffs have violated federal law by discharging
12 dredge and fill material to waters of the United States without a permit.

13 101. Defendant Corps' failure to provide a post-deprivation hearing violates the Fifth
14 Amendment to the United States Constitution and is unlawful.

15 **THIRD CAUSE OF ACTION**

16 **(Against Defendant Water Board - Violation of the Fifth and Fourteenth Amendments**
17 **to the United States Constitution - Failure to Provide a Pre-Deprivation Hearing)**

18 102. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1
19 through 101 as though fully set forth herein.

20 103. Defendant Water Board has a mandatory and nondiscretionary duty under the Fifth
21 and Fourteenth Amendments to provide Plaintiffs with a constitutionally adequate hearing in
22 satisfaction of Plaintiffs' right to procedural due process prior to making the determination set
23 forth in the NOV. A pre-deprivation hearing is required in this case because there is no provision
24 for staying further enforcement proceedings once the determination is made, and no means of
25 remedying the harm to Plaintiffs in the event of an erroneous determination if a hearing is held
26 after the fact.

27 104. Defendant Water Board did not provide any hearing to Plaintiffs prior to making
28 the determination set forth in the NOV that Plaintiffs have violated federal and state law by

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1 discharging dredge and fill material to waters of the United States without a federal permit and
2 related state water quality certification.

3 105. Defendant Water Board's failure to provide a pre-deprivation hearing violates the
4 Fifth and Fourteenth Amendments to the United States Constitution and is unlawful.

5 **FOURTH CAUSE OF ACTION**

6 **(Against Defendant Water Board - Violation of the Fifth Amendment to the**
7 **United States Constitution - Failure to Provide a Post-Deprivation Hearing)**

8 106. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1
9 through 105 as though fully set forth herein.

10 107. Defendant Water Board has a mandatory and nondiscretionary duty under the Fifth
11 and Fourteenth Amendments to provide Plaintiffs with a constitutionally adequate hearing in
12 satisfaction of Plaintiffs' right to procedural due process after making the determination set forth
13 in the NOV, and prior to taking any further action pursuant to the NOV.

14 108. Defendant Water Board did not provide any hearing to Plaintiffs subsequent to
15 making the determination set forth in the NOV that Plaintiffs have violated state and federal law
16 by discharging dredge and fill material to waters of the United States without a federal permit and
17 related state water quality certification.

18 109. Defendant Water Board's failure to provide a post-deprivation hearing violates the
19 Fifth and Fourteenth Amendments to the United States Constitution and is unlawful.

20 **FIFTH CAUSE OF ACTION**

21 **(Against Defendant Corps - Violation of the Fifth Amendment to the United States**
22 **Constitution - As-Applied Invalidity of Enforcement Regulations at 33 C.F.R. Part 326)**

23 110. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1
24 through 109 as though fully set forth herein.

25 111. Defendant Corps has a mandatory duty under the Fifth Amendment to provide a
26 hearing to any responsible party before or, in limited circumstances, after determining that a
27 private party is responsible for a violation of federal law as set forth in 33 C.F.R. ¶ 326.3(b).

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1 112. The regulations at 33 C.F.R. ¶ 326.3(a)-(b), governing surveillance and initial
2 investigation of suspected violations, do not provide for any hearing prior to determining that a
3 private party is responsible for a violation of federal law. 33 C.F.R. pt. 326 does not provide for
4 any hearing subsequent to such a determination, but does allow the district engineer, on behalf of
5 the Corps, to require remedial action by the responsible party.

6 113. Judicial review of a 33 C.F.R. ¶ 326.3(b) determination under the Administrative
7 Procedures Act, whether of the determination itself or of any subsequent final action based on the
8 determination, is ordinarily limited to the administrative record compiled by the Corps, and is
9 deferential to the Corps' factual findings. Because the regulations at 33 C.F.R. pt. 326 do not
10 provide a hearing to the responsible party, and allow the Corps to develop a record with no input
11 from the responsible party, judicial review currently does not satisfy responsible parties'
12 constitutional procedural due process rights.

13 114. Because the regulations at 33 C.F.R. pt. 326 provide no hearing to responsible
14 parties, prior or subsequent to the district engineer's determination that the responsible party
15 violated federal law, and judicial review of such action under the APA fails to satisfy due process
16 requirements for such cases, the regulations at 33 C.F.R. pt. 326 are unconstitutional and invalid
17 as applied to Plaintiffs in this case.

18 **SUPPLEMENTAL SIXTH CAUSE OF ACTION**

19 **(Against Defendants Corps, United States, Bostick, and Lynch - Violation of the First**
20 **Amendment to the United States Constitution - Retaliatory Prosecution)**

21 115. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1
22 through 114 as though fully set forth herein.

23 116. Plaintiffs allege that the filing of their Complaint in this case was a substantial
24 factor in the Corps' and United States' decision to file the Counterclaim.

25 117. Plaintiffs allege that the filing of their Complaint in this case was a motivating
26 factor in the Corps' and United States' decision to file the Counterclaim.

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1 118. Plaintiffs allege that the other public statements in the news media, on the internet,
2 and/or on radio and television subsequent to the filing of their Complaint in this case were
3 substantial factors in the Corps' and United States' decision to file the Counterclaim.

4 119. Plaintiffs allege that the other public statements in the news media, on the internet,
5 and/or on radio and television subsequent to the filing of their Complaint in this case were
6 motivating factors in the Corps' and United States' decision to file the Counterclaim.

7 120. Plaintiffs allege that the Corps and United States filed the Counterclaim in
8 retaliation against Plaintiffs and with retaliatory intent to chill or otherwise interfere with
9 Plaintiffs' First Amendment rights, that the alleged violation of the Clean Water Act against
10 Plaintiffs is not appropriate for civil legal action under 33 C.F.R. § 326.5(a), and that the United
11 States would not have filed the Counterclaim absent the Corps' retaliatory motives against
12 Plaintiffs.

13 121. On information and belief, Plaintiffs allege that the Corps' and United States'
14 prosecution of the Counterclaim violates Plaintiffs' First Amendment rights.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiffs pray for judgment from this Court as follows:

17 1. A declaratory judgment that Defendant Corps' failure to provide Plaintiffs with a
18 hearing prior to making the determination set forth in the CDO violates the Fifth Amendment and
19 is therefore invalid and unenforceable;

20 2. A declaratory judgment that Defendant Corps' failure to provide Plaintiffs with a
21 hearing subsequent to making the determination set forth in the CDO violates the Fifth
22 Amendment and is therefore invalid and unenforceable;

23 3. A declaratory judgment that Defendant Water Board's failure to provide Plaintiffs
24 with a hearing prior to making the determination set forth in the NOV violates the Fifth and
25 Fourteenth Amendments and is therefore invalid and unenforceable;

26 4. A declaratory judgment that Defendant Corps' failure to provide Plaintiffs with a
27 hearing subsequent to making the determination set forth in the NOV violates the Fifth and
28 Fourteenth Amendments and is therefore invalid and unenforceable;

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1 5. A declaratory judgment that the regulations at 33 C.F.R. pt. 326 are
2 unconstitutional and therefore invalid and unenforceable against Plaintiffs;

3 6. A declaratory judgment that the filing and prosecution of the Counterclaim violate
4 Plaintiffs' First Amendment rights;

5 7. A prohibitory injunction preventing Defendants from enforcing or taking further
6 action on the CDO and NOV, respectively;

7 8. A mandatory injunction requiring Defendants to advise any other agency or private
8 party to whom they have directly delivered the CDO or NOV, respectively, that the same are
9 invalid and unenforceable;

10 9. A prohibitory judgment preventing the Corps and United States from prosecuting
11 the Counterclaim and taking other enforcement actions in violation of Plaintiffs' First Amendment
12 rights until the Corps and United States can establish that they would make the same enforcement
13 decisions absent Plaintiffs' First Amendment protected activity;

14 10. An award to Plaintiffs of reasonable attorneys' fees and expert fees for bringing and
15 maintaining this action;

16 11. An award to Plaintiffs of costs of suit pursuant to Federal Rule of Civil Procedure
17 54(d); and

18 12. An award to Plaintiffs of any other and further relief that the Court deems just and
19 proper under the circumstances of this case.

20 DATED: July 7, 2015.

21 Respectfully submitted,

22 M. REED HOPPER
23 ANTHONY L. FRANÇOIS
24 PETER PROWS
25 DAVID M. IVESTER
26 GERALD E. BRUNN

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

Attorneys for Plaintiffs