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7
8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

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

12 Plaintiffs,

13 v.

14 UNITED STATES ARMY CORPS OF
ENGINEERS,

15 Defendant.

No. 2:13-CV-02095-KJM-DB

DUARTE'S MOTION IN LIMINE # 5

**TO PROHIBIT RELIANCE ON
ILLEGAL 2008 RAPANOS GUIDANCE**

Date: June 16, 2017
Time: 10:00am
Courtroom: 3
Judge: Hon. Kimberly J.
Mueller

17 UNITED STATES OF AMERICA
18 Counterclaim- Plaintiff,

19 v.

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

22 Counterclaim- Defendants.
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1 **I. INTRODUCTION**

2 One issue remaining for trial is the extent of the seasonal waters and wetlands on the property
3 regulated under the Clean Water Act—often called “jurisdictional” waters or wetlands. To establish
4 jurisdiction, the Government and its experts rely exclusively on an illegal guidance document. That
5 guidance is illegal because it was not submitted to Congress as required by the Congressional
6 Review Act, and that Act makes such guidance ineffective as a matter of law.

7 The Government’s experts’ reliance on that guidance document is also patently unreliable,
8 because they obviously misapplied some of its most basic concepts.

9 The Government should be prohibited from basing evidence or argument on this illegal—
10 and misapplied—guidance document.

11 **II. EVIDENCE AT ISSUE**

12 The memorandum, jointly published by the U.S. Environmental Protection Agency and the
13 U.S. Army Corps of Engineers and dated December 2, 2008, entitled “Clean Water Act Jurisdiction
14 Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United*
15 *States*” (“2008 *Rapanos* Guidance”, “*Rapanos* Guidance”, or “Guidance”). The Guidance was not
16 produced during discovery or otherwise disclosed by the Government in this matter, but the
17 Government’s main expert report relies heavily on the Guidance. (Dkt. #87-3 at 106-113.) The
18 Guidance is available online,¹ and a courtesy copy is attached as Exhibit 1 to the Prows declaration
19 supporting this motion.

20 **III. THE RAPANOS GUIDANCE IS INEFFECTIVE**

21 The Congressional Review Act (“CRA”), 5 U.S.C. § 800 *et seq.*, prohibits any “rule” from
22 “tak[ing] effect” until after a “report” on that rule is submitted to Congress and the Controller
23 General. (5 U.S.C. § 801(a)(1)(A); *see also* para. (a)(4) (“a rule shall take effect as otherwise
24 provided by law *after* submission”, emphasis added).) The CRA defines “rule” by reference to the
25 definition of “rule” in the Administrative Procedures Act (“APA”), with a few exceptions irrelevant
26 to this case. (5 U.S.C. § 804(3).) The APA, in turn, defines “rule” broadly as “the whole or a part of

27
28 ¹ https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf

1 an agency statement of general or particular applicability and future effect designed to implement,
2 interpret, or prescribe law or policy”. (5 U.S.C. § 551(4).) If an agency “bases enforcement actions
3 on the policies or interpretations formulated in the document”, then that document is a rule.
4 (*Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).)

5 The Government Accountability Office maintains a database of rules that have been
6 submitted in compliance with the CRA.²

7 The *Rapanos* Guidance is a rule, within the meaning of the CRA and APA. The Guidance
8 prescribes those features over which the Government “will assert jurisdiction” and those over which
9 it “will not assert jurisdiction” under the Clean Water Act. (Guidance at 1.) The Guidance is
10 intended to ensure that the Government’s assertions of jurisdiction are “consistent”. (Guidance at 3.)
11 The Government is basing this enforcement action on the policies or interpretations formulated in
12 the Guidance. Because the Guidance is intended to prescribe generally applicable rules to guide the
13 Government’s application of law or policy in enforcement actions under the Clean Water Act, the
14 Guidance is a rule.

15 A report on this rule has not been submitted to Congress or the Controller General. (Prows.
16 Decl. ¶ 2.)

17 Because the Guidance is a rule, and a report on the rule has not been submitted as required,
18 the Guidance is ineffective under the CRA. Evidence or argument based on an ineffective—
19 essentially illegal—rule should be barred.

20 **IV. THE GOVERNMENT’S USE OF THE *RAPANOS* GUIDANCE IS PATENTLY** 21 **UNRELIABLE**

22 Evidence or arguments by the Government based on the Guidance should be excluded for the
23 additional reason that the Government’s application of the Guidance in this case is patently
24 unreliable. (*See* FRE 702(d) (expert testimony inadmissible if expert has not “reliably applied the
25 principles and methods to the facts of the case”).) For example, the Government’s experts assert that
26 the mostly dry seasonal wetlands and swales on the Duarte property are all “*tributaries* that flow
27 *directly* to the traditional navigable waters of the Sacramento River.” (Dkt. #87-3 at 107, emphasis

28 ² The GAO CRA database can be searched, at <http://www.gao.gov/legal/congressional-review-act/overview>

1 added.) The Guidance defines “tributaries” as “the entire reach of the stream that is of the same
2 order”. (Guidance at 6, 10 emphasis added.) But the Government’s experts admit that the wetlands
3 and swales on the Duarte property are of at least three different orders. (Dkt. #87-2 at 21 (“on the
4 Duarte Site, there are first-, second-, and third-order streams”).) Because the Guidance defines
5 tributaries as being of the same order, and yet the Government’s experts admit that the seasonal
6 waters and wetlands on the Duarte property are of at least three different orders, those experts cannot
7 have reliably applied the Guidance.

8 This unreliability is significant, because the Guidance draws a sharp distinction between
9 “tributaries” of navigable waters and mere “swales” or other “low-volume” features, as the
10 Government’s experts acknowledge. (Guidance at 1; Dkt. #87-3 at 108 (quoting Guidance).) The
11 Guidance takes the position that tributaries of navigable waters are always, or at least may be,
12 jurisdictional. (*Id.*) But the Guidance takes the position that mere swales and other low-volume
13 features are *never* jurisdictional. (*Id.*) The seasonal wetlands and swales on the Duarte property
14 carry quite low volumes of water: a small fraction of one percent of the watershed. (Dkt. #150-3 at
15 15.) Those features are not jurisdictional under the Guidance, and the evidence and arguments the
16 Government might offer otherwise, in conflict with the Guidance, should be excluded as patently
17 unreliable.

18 **V. CONCLUSION**

19 Evidence or argument based on the Guidance should be excluded.

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27 JOHN DUARTE
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