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14 UNITED STATES DISTRICT COURT

15 FOR THE EASTERN DISTRICT OF CALIFORNIA

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

17 Plaintiffs,)

18 v.)

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

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

**FIRST SUPPLEMENTAL
COMPLAINT FOR
DECLARATORY
JUDGMENT AND
INJUNCTIVE RELIEF**

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

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

25 12. Defendant Jon Costantino is an individual. He is sued in his capacity as a board
26 member of the Central Valley Regional Water Quality Control Board, and is sued in federal court
27 under the doctrine set forth in *Ex parte Young*, 209 U.S. 123 (1908); *see also Cardenas v. Anzai*,
28 311 F.3d 929, 934-38 (9th Cir. 2002).

1 13. Defendant Sandra O. Meraz is an individual. She is sued in her 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 Carmen Ramirez 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 Robert Schneider is an individual. He is sued in his 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 Pamela C. Creedon is an individual. She is sued in her capacity as the
14 Executive Officer of the Central Valley Regional Water Quality Control Board, and is sued in
15 federal court under the doctrine set forth in *Ex parte Young*, 209 U.S. 123 (1908); *see also*
16 *Cardenas v. Anzai*, 311 F.3d 929, 934-38 (9th Cir. 2002).

17 LEGAL BACKGROUND

18 Corps of Engineers - Regulatory Authority 19 over Discharges to Waters of the United States

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

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

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

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

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

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

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

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

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

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

23 27. In that decision, Justice Scalia authored a plurality opinion, joined by three other
24 Justices, which concluded that the Corps’ jurisdiction over non-navigable waters only extends to
25 “relatively permanent, standing or continuously flowing bodies of water” that are “connected to
26 traditional interstate navigable waters.” *Id.* at 739, 742 (plurality opinion).

27 28. Justice Kennedy concurred in the judgment but adopted a broader interpretation of
28 the Corps’ jurisdiction over non-navigable waters, finding them jurisdictional if they “possess a

1 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so
2 made." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment). According to Justice
3 Kennedy, a significant nexus exists where non-navigable waters, either alone or in combination
4 with similarly situated waterbodies, "significantly affect the chemical, physical, and biological
5 integrity" of navigable-in-fact waters (also known as "traditional navigable waters"). *Id.* at 780.

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

12 30. The result of the above history is that the Corps' regulations defining the scope of
13 waters of the United States, under which the Corps determines whether a permit is required for
14 dredge and fill activities, continue to define such waters expansively in a manner rejected by two
15 subsequent United States Supreme Court decisions.

16 **Corps of Engineers - Enforcement Procedures**

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

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

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

26 34. The Corps' regulations direct that once the district engineer has determined that a
27 violation has occurred, the district engineer should notify the responsible parties. 33 C.F.R.

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1 ¶ 326.3(b). In the case of a violation involving a project that is not complete, the regulations direct
2 the district engineer to issue a cease and desist order. 33 C.F.R. ¶ 326.3(c)(1).

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

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

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

12 37. The State Water Resources Control Board is authorized to issue state water quality
13 certifications in connection with Corps Section 404 permits under California Water Code sections
14 13160, 13376, and 13377.

15 38. The Central Valley Regional Water Quality Control Board is authorized to issue
16 cease and desist orders under California Water Code section 13301 for violations of the Water
17 Code, and Defendants collectively referred to above as Water Board have the responsibility for
18 overseeing and implementing the enforcement program of the Central Valley Regional Water
19 Quality Control Board.

20 **Constitutional Procedural Due Process Requirements**

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

23 40. The Fourteenth Amendment to the Constitution of the United States applies these
24 requirements to the State of California and its agencies and officers.

25 41. The Fifth Amendment requires that agencies of government afford private parties
26 a hearing before depriving them of liberty or property, although in limited circumstances a post-
27 deprivation hearing is constitutionally sufficient. A post deprivation hearing is only adequate in
28 those cases where the agency can make the injured party whole by restoring money or other

1 | benefits wrongfully withheld in the underlying decision. A post-deprivation hearing is not
2 | generally adequate where the underlying decision is that the private party has violated the law.

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

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

16 | **FACTUAL ALLEGATIONS**

17 | **The Property and Duarte Nursery's Farming**

18 | 44. Plaintiff Duarte Nursery owns approximately 445 acres of property located on
19 | Paskenta Road in rural Tehama County, roughly 8 miles south of the City of Red Bluff and
20 | roughly 3 miles west of Interstate 5, Tehama County, California, APN 037-070-351 and 037-070-
21 | 371 (Property). The Property is zoned A2 (agricultural use) by the County of Tehama.

22 | 45. Plaintiff Duarte Nursery acquired the Property in 2012 for the purpose of farming
23 | it. The Property has historically been used for wheat farming, and is assigned approximately
24 | 430.7 acres of "wheat base" by the United States Department of Agriculture, Farm Service
25 | Agency, for the purpose of determining eligibility for federal farm assistance.

26 | 46. Subsequent to acquiring the Property, Duarte Nursery retained an environmental
27 | consultant to perform a wetlands delineation for the Property (2012 Delineation), to determine the
28 | scope of any wetlands on the Property.

1 requesting an explanation of any available administrative procedures or remedies, and reserving
2 all defenses to the claims made in the CDO.

3 53. On April 18, 2013, the Corps provided a partial response to the requests for
4 information made in Plaintiffs' March 21, 2013 letter, to wit:

5 a. The Corps stated that it is relying on a 1994 wetlands delineation of the
6 Property (1994 Delineation), which purportedly depicts wetlands "scattered throughout the
7 property." The Corps provided an electronic copy of the 1994 delineation.

8 b. The Corps stated that "We have observed that discharges of dredged or fill
9 material into these wetlands have occurred while under the control of Mr. Duarte."

10 c. The Corps states that "We allege that while the Property was under
11 Mr. Duarte's control it was deep-ripped."

12 d. The Corps states that Plaintiffs' activities are not "on-going normal farming
13 activities" and therefore not exempt from permitting requirements.

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

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

20 b. Plaintiffs, through Duarte Nursery's contractor, avoided wetlands on the
21 Property that are depicted on the 2012 Delineation.

22 c. Plaintiffs have never deep-ripped the property.

23 d. All of Plaintiffs' actions related to the subject wheat crop were normal
24 farming practices, exempt from permitting requirements under Section 404(f)(1)(A) of the Clean
25 Water Act.

26 **Water Board Notice of Violation**

27 55. On April 23, 2013, the Water Board issued the Notice of Violation (NOV) to
28 Plaintiffs, which states that Water Board staff inspected the Property on December 6, 2012, and

1 observed “you have discharged dredge or fill material into wetlands and other waters associated
2 with Coyote Creek, a water of the U.S., without a permit.”

3 56. The NOV states that Plaintiffs are in violation of the Clean Water Act for failing
4 to obtain a permit from the Corps and a State Water Quality Certification under Section 401 of the
5 Act, and directs Plaintiffs to submit a plan for mitigating the impacts of unauthorized fill. The
6 NOV also threatens Plaintiffs with additional enforcement action, including daily fines of up to
7 \$10,000.00.

8 57. The NOV does not provide any information on the subject of administrative appeal
9 rights or remedies available to Plaintiffs.

10 58. Prior to issuance of the NOV, the Water Board did not provide Plaintiffs with a
11 hearing on any matters which are the subject of the NOV.

12 59. If the Water Board had provided Plaintiffs with a constitutionally adequate hearing,
13 Plaintiffs are informed and believe that they would have been able to rebut the basic factual
14 allegations on which the Water Board appears to rely, to wit:

15 a. Plaintiffs have not discharged dredge or fill material into wetlands and other
16 waters associated with Coyote Creek.

17 b. Plaintiffs’ farming activities on the Property are normal farming practices
18 exempt from federal permitting requirements and related state water quality certification
19 requirements.

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

22 60. The Water Board’s NOV constitutes an ongoing violation of Plaintiffs’
23 constitutional right to procedural due process.

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

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

1 62. Plaintiffs are unable to determine from either the CDO or the NOV exactly what
2 farming practices the Corps and the Water Board find to violate the Clean Water Act, and in
3 exactly which locations on the Property.

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

7 64. As a result of the CDO and NOV, Plaintiffs have been unable to make necessary
8 preparations for farming the property in the Fall of 2013, and hence will lose another year's
9 opportunity to grow and harvest a crop.

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

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

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

26 68. As a result of the CDO and NOV, and their dissemination to other state and federal
27 agencies, Plaintiffs have been labeled as violators, harming their reputation. Plaintiffs’

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1 relationships and dealings with the Corps, the Water Board, and the other agencies have been
2 impaired by the unconstitutional denial of their procedural due process rights.

3 **ALLEGATIONS SUPPORTING DECLARATORY RELIEF**

4 69. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1
5 through 68 as though fully set forth herein.

6 70. An actual and substantial controversy exists between Plaintiffs and Defendants over
7 Defendants' respective duties to provide Plaintiffs with a hearing prior to making the
8 determinations set forth in the CDO and NOV respectively.

9 71. An actual and substantial controversy exists between Plaintiffs and Defendants over
10 Defendants' respective duties to provide Plaintiffs with a hearing after making the determinations
11 set forth in the CDO and NOV, respectively, if no pre-deprivation hearing is required.

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

15 73. Declaratory relief that will clarify the rights and obligations of the parties is
16 therefore appropriate to resolve this controversy.

17 **ALLEGATIONS SUPPORTING INJUNCTIVE RELIEF**

18 74. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1
19 through 73 as though fully set forth herein.

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

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

25 77. This action is ripe.

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

SUPPLEMENTAL ALLEGATIONS

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2 79. Plaintiffs hereby supplement the Complaint to allege facts occurring subsequent
3 to the filing of the complaint herein.

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

11 81. After the Corps ordered Plaintiffs to cease and desist farming the Property in
12 February 2013, it took no further enforcement action of which Plaintiffs are aware regarding the
13 alleged violations of the Clean Water Act on the Property until after Plaintiffs filed their due
14 process Complaint against the Corps and engaged in several other First Amendment protected
15 actions related to the case.

16 82. The Corps moved to dismiss the Complaint and the Court heard oral argument on
17 that motion on February 10, 2014. Plaintiffs are informed and believe and on that basis allege that
18 at the time of the hearing or shortly thereafter the Corps concluded that the Court would likely
19 deny the motion.

20 83. Following the February 10 hearing, the Corps disclosed for the first time that it was
21 considering a counterclaim in this action for alleged Clean Water Act violations if the Court did
22 not grant the motion to dismiss. The Court denied the motion to dismiss on April 23, 2014, and
23 the Corps filed its Answer and Counterclaim on May 7, 2014, alleging that Plaintiffs violated the
24 Clean Water Act by farming the Property, and seeking civil penalties.

25 84. On information and belief, Plaintiffs allege that their Complaint and/or other First
26 Amendment protected actions were substantial or motivating factors in the United States' decision
27 to file the Counterclaim, in violation of Plaintiffs' rights under the First Amendment to the United
28 States Constitution.

1 85. By way of this Supplemental Complaint, Plaintiffs seek a declaration that the Corps
2 violated Plaintiffs' First Amendment rights by engaging in retaliatory prosecution against them.
3 Plaintiffs also seek an injunction enjoining the Corps from prosecuting the Counterclaim, and from
4 engaging in further enforcement actions against Plaintiffs in violation of Plaintiffs' First
5 Amendment rights.

6 86. An actual and substantial controversy exists between Plaintiffs and the Corps over
7 whether the Counterclaim violates Plaintiffs' First Amendment rights.

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

10 88. Declaratory relief that will clarify the rights and obligations of the parties is
11 therefore appropriate to resolve this controversy.

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

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

16 91. This action is ripe.

17 92. If not enjoined by this Court, Defendants will continue to violate the law by
18 engaging in the retaliatory prosecution of the Counterclaim in violation of Plaintiffs' First
19 Amendment rights.

20 **FIRST CAUSE OF ACTION**

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

23 93. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1
24 through 92 as though fully set forth herein.

25 94. Defendant Corps has a mandatory and nondiscretionary duty under the Fifth
26 Amendment to provide Plaintiffs with a constitutionally adequate hearing in satisfaction of
27 Plaintiffs' right to procedural due process prior to making the determination set forth in the CDO.
28 A pre-deprivation hearing is required in this case because there is no provision for staying further

1 enforcement proceedings once the determination is made, and no means of remedying the harm
2 to Plaintiffs in the event of an erroneous determination if a hearing is held after the fact.

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

6 96. Defendant Corps' failure to provide a pre-deprivation hearing violates the Fifth
7 Amendment to the United States Constitution and is unlawful.

8 **SECOND CAUSE OF ACTION**

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

11 97. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1
12 through 96 as though fully set forth herein.

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

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

20 100. Defendant Corps' failure to provide a post-deprivation hearing violates the Fifth
21 Amendment to the United States Constitution and is unlawful.

22 **THIRD CAUSE OF ACTION**

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

25 101. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1
26 through 100 as though fully set forth herein.

27 102. Defendant Water Board has a mandatory and nondiscretionary duty under the Fifth
28 and Fourteenth Amendments to provide Plaintiffs with a constitutionally adequate hearing in

1 satisfaction of Plaintiffs' right to procedural due process prior to making the determination set
2 forth in the NOV. A pre-deprivation hearing is required in this case because there is no provision
3 for staying further enforcement proceedings once the determination is made, and no means of
4 remedying the harm to Plaintiffs in the event of an erroneous determination if a hearing is held
5 after the fact.

6 103. Defendant Water Board did not provide any hearing to Plaintiffs prior to making
7 the determination set forth in the NOV that Plaintiffs have violated federal and state law by
8 discharging dredge and fill material to waters of the United States without a federal permit and
9 related state water quality certification.

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

12 **FOURTH CAUSE OF ACTION**

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

15 105. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1
16 through 104 as though fully set forth herein.

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

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

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

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FIFTH CAUSE OF ACTION

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

109. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1 through 108 as though fully set forth herein.

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

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

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

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

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SUPPLEMENTAL SIXTH CAUSE OF ACTION

**(Against Defendant Corps - Violation of the First Amendment
to the United States Constitution - Retaliatory Prosecution)**

114. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1 through 113 as though fully set forth herein.

115. On information and belief, Plaintiffs allege that the filing of their Complaint in this case was a substantial factor in the Corps' decision to file the Counterclaim

116. On information and belief, Plaintiffs allege that the filing of their Complaint in this case was a motivating factor in the Corps' decision to file the Counterclaim

117. On information and belief, Plaintiffs allege that the other public statements in the news media, on the internet, and/or on radio and television subsequent to the filing of their Complaint in this case were substantial factors in the Corps' decision to file the Counterclaim.

118. On information and belief, Plaintiffs allege that the other public statements in the news media, on the internet, and/or on radio and television subsequent to the filing of their Complaint in this case were motivating factors in the Corps' decision to file the Counterclaim.

119. On information and belief, Plaintiffs allege that the Corps filed the Counterclaim in retaliation against Plaintiffs to chill or otherwise interfere with Plaintiffs' First Amendment rights.

120. On information and belief, Plaintiffs allege that the Corps' prosecution of the Counterclaim violates Plaintiffs First Amendment rights.

PRAYER FOR RELIEF

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

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

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

1 3. A declaratory judgment that defendant Water Board’s failure to provide Plaintiffs
2 with a hearing prior to making the determination set forth in the NOV violates the Fifth and
3 Fourteenth Amendments and is therefore invalid and unenforceable;

4 4. A declaratory judgment that defendant Corps’ failure to provide Plaintiffs with a
5 hearing subsequent to making the determination set forth in the NOV violates the Fifth and
6 Fourteenth Amendments and is therefore invalid and unenforceable;

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

9 6. A declaratory judgment that the filing and prosecution of the Counterclaim violate
10 Plaintiffs’ First Amendment rights;

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

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

16 9. A prohibitory judgment preventing the Corps from prosecuting the Counterclaim
17 and taking other enforcement actions in violation of Plaintiffs’ First Amendment rights until the
18 Corps can establish that it would make the same enforcement decisions absent Plaintiffs’ First
19 Amendment protected activity;

20 10. An award to Plaintiffs of reasonable attorneys’ fees and expert fees for bringing and
21 maintaining this action;

22 11. An award to Plaintiffs of costs of suit pursuant to Federal Rule of Civil Procedure
23 54(d); and

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

DATED: August 20, 1014.

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