

1 JEFFREY H. WOOD

Acting Assistant Attorney General

2 ANDREW J. DOYLE (FL Bar No. 84948)

3 JOHN THOMAS H. DO (CA Bar No. 285075)

4 SAMARA M. SPENCE (TN Bar No. 031484)

United States Department of Justice

5 Environment and Natural Resources Division

P.O. Box 7611

6 Washington, D.C. 20044 / (202) 514-4427, 514-2593 or 514-2285

7 PHILLIP A. TALBERT

United States Attorney

8 GREGORY T. BRODERICK (CA Bar No. 220871)

Assistant United States Attorney

9 501 I Street, Suite 10-100

10 Sacramento, CA 95814

(916) 554-2700 (p)

11 gregory.broderick@usdoj.gov

12 *Attorneys for Counterclaim-Plaintiff United States of America*

13 UNITED STATES DISTRICT COURT  
14 EASTERN DISTRICT OF CALIFORNIA

15 DUARTE NURSERY, INC.; and JOHN  
16 DUARTE,

17 Plaintiffs,

18 v.

19 UNITED STATES ARMY CORPS OF  
20 ENGINEERS; and UNITED STATES OF  
AMERICA,

21 Defendants.

22 UNITED STATES OF AMERICA,  
23 Counterclaim- Plaintiff,

24 v.

25 DUARTE NURSERY, INC.; and JOHN  
26 DUARTE,

27 Counterclaim- Defendants.  
28

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

**UNITED STATES' TRIAL BRIEF**

Trial: August 15, 2017

Time: 9:00 a.m.

Place: Courtroom 3

Judge: Hon. Kimberly J. Mueller

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I. INTRODUCTION .....1

II. STATUTORY AND REGULATORY BACKGROUND.....3

III. FACTS .....4

    A. PROTECTED WATERS EXIST ON AND DOWNSTREAM OF THE SITE .....4

    B. DUARTE PURCHASED A SITE IT KNEW HAD PROTECTED WATERS .....6

    C. DUARTE RIPPED OVER 22 ACRES OF PROTECTED WATERS .....8

    D. DUARTE HARMED PROTECTED WATERS .....9

IV. ARGUMENT .....11

    A. THE COURT SHOULD AWARD INJUNCTIVE RELIEF .....12

        1. Duarte should perform on-site restoration work.....12

        2. Duarte should be restrained from further work in waters .....13

        3. Duarte should effect compensatory mitigation .....14

    B. THE COURT SHOULD ASSESS A SUBSTANTIAL CIVIL PENALTY.....15

        1. Duarte’s violations are serious.....16

        2. Duarte gained a substantial economic benefit from its violations .....16

        3. Duarte made no good faith efforts to comply .....17

        4. Duarte can afford the penalty sought .....18

        5. Additional considerations compel a substantial penalty .....18

    C. DUARTE’S REMEDIAL ARGUMENTS ARE MERITLESS .....19

V. CONCLUSION.....20

**TABLE OF AUTHORITIES**

**CASES**

*Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*,  
897 F.2d 1128 (11th Cir. 1990) ..... 15, 17

*Borden Ranch P’ship v. U.S. Army Corps of Eng’rs*, No. 2:97-cv-858-GEB-JFM,  
1999 WL 1797329 (E.D. Cal. Nov. 8, 1999),  
*aff’d in part, rev’d in part, vacated in part, and remanded*,  
261 F.3d 810 (9th Cir. 2001),  
*aff’d by an equally divided Supreme Court*,  
537 U.S. 99 (2002)..... 14, 15, 16

*Butte Env’tl Council v. U.S. Army Corps of Eng’rs*,  
620 F.3d 936 (9th Cir. 2010) ..... 14

*California Sportfishing Protection Alliance v. River City Waste Recyclers, LLC*,  
205. F. Supp. 3d 1128 (E.D. Cal. 2016)..... 15

*Community Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*,  
305 F.3d 943 (9th Cir. 2002) ..... 3

*Natural Resources Defense Council v. Southwest Marine, Inc.*,  
236 F.3d 985 (9th Cir. 2000) ..... 16

*Rapanos v. United States*,  
547 U.S. 715 (2006)..... 2, 4, 19

1 *San Luis & Delta-Mendota Water Auth. v. United States,*  
2 672 F.3d 676 (9th Cir. 2012) ..... 5  
3  
4 *Tull v. United States,*  
5 481 U.S. 412 (1987)..... 18  
6  
7 *United States v. Akers,*  
8 785 F.2d 814 (9th Cir. 1986) ..... 10-11  
9  
10 *United States v. Allegheny Ludlum Corp.,*  
11 366 F.3d 164 (3d Cir. 2004)..... 17  
12  
13 *United States v. Cumberland Farms of Conn., Inc.,*  
14 526 F.2d 1151 (1st Cir. 1987)..... 11  
15  
16 *United States v. Deaton,*  
17 332 F.3d 698 (4th Cir. 2003) ..... 11  
18  
19 *United States v. Gulf Park Water Co.,*  
20 14 F. Supp. 2d 854 (S.D. Miss. 1998)..... 16, 17, 18, 19  
21  
22 *United States v. Holtzman,*  
23 762 F.2d 720 (9th Cir. 1985) ..... 13  
24  
25 *United States v. Larkins,*  
26 657 F. Supp. 76 (W.D. Ky. 1987),  
27 *aff'd*, 852 F.2d 189 (6th Cir. 1988) ..... 12  
28

1 *United States v. Mac’s Muffler Shop,*  
 2 No. 85-cv-138, 1986 WL 15443 (N.D. Ga. Nov. 4, 1986)..... 18  
 3  
 4 *United States v. Mango,* 199 F.3d 85 (2d Cir. 1999) ..... 20  
 5  
 6 *United States v. Mun. Auth. of Union Twp.,*  
 7 929 F. Supp. 800 (M.D. Pa. 1996),  
 8 *aff’d,* 150 F.3d 259 (3d Cir. 1998) ..... 16, 17  
 9  
 10 *United States v. Smith,*  
 11 149 F.3d 1172, No. 96-2450, 1998 WL 325954 (4th Cir. June 18, 1998)..... 12  
 12  
 13 *United States v. Smithfield Foods, Inc.,*  
 14 972 F. Supp. 338 (E.D. Va. 1997) ..... 16, 17, 18  
 15  
 16 *Walther v. United States,*  
 17 No. 3:15-cv-0021-HRH, 2015 WL 6872437 (D. Alaska Nov. 9, 2015)..... 14  
 18  
 19 *Weinberger v. Romero-Barcelo,*  
 20 456 U.S. 305 (1982)..... 11  
 21  
 22 **STATUTES**  
 23 16 U.S.C. § 3901(a)(7)..... 14  
 24 33 U.S.C. § 1251(a) ..... 3, 12  
 25 33 U.S.C. § 1311(a) ..... 3, 10, 15  
 26 33 U.S.C. § 1319(b) ..... 11  
 27 33 U.S.C. § 1319(d) ..... 15, 16, 18  
 28 33 U.S.C. § 1344..... 4, 10

1 33 U.S.C. § 1362(7) ..... 3

2 33 U.S.C. § 1362(12)(A)..... 3

3

4 **FEDERAL RULES OF CIVIL PROCEDURE**

5 Fed. R. Civ. P. 65(d) ..... 11

6

7 **CODE OF FEDERAL REGULATIONS**

8 33 C.F.R. § 328.3(a) (1987)..... 3

9 33 C.F.R. § 328.3(b) ..... 3

10 33 C.F.R. § 328.3(c)..... 3

11 33 C.F.R. § 328.3(e)..... 3

12 33 C.F.R. § 328.4(c)..... 4, 5

13 33 C.F.R. part 332..... 4

14 33 C.F.R. § 332.2 ..... 4, 14

15 40 C.F.R. § 19.4 ..... 15

16 40 C.F.R. § 230.10(a)..... 4

17 50 C.F.R. § 17.11(h) ..... 5

18 50 C.F.R. § 17.95(h)(13)..... 5

19 50 C.F.R. § 226.221(k)(1)(ii)..... 5

20 50 C.F.R. § 226.221(l)(1)(ii)..... 5

21

22 **FEDERAL REGISTER**

23 59 Fed. Reg. 48,136 (Sept. 19, 1994) ..... 5

24 71 Fed. Reg. 7118 (Feb. 10, 2006) ..... 5

25 73 Fed. Reg. 19,594 (Apr. 10, 2008) ..... 4, 16

26 82 Fed. Reg. 34,899 (July 27, 2017)..... 1

27

28

1 **I. INTRODUCTION**

2 John Duarte is the President of the self-described “largest permanent crops nursery in the  
3 United States,” Duarte Nursery (collectively “Duarte”), which generates tens of millions of dollars  
4 in annual revenues and owns property throughout California. In 2012, Duarte bought a large piece  
5 of property in Tehama County for \$5 million and shortly thereafter sold most of it for \$8 million,  
6 retaining 450 acres for Duarte’s use. Then, as this Court has already ruled, Duarte ripped through  
7 wetlands on the 450-acre parcel, discharging pollutants in violation of the Clean Water Act.

8 Before engaging in the unlawful activity, Duarte had received detailed maps showing the  
9 location of federally-protected streams and wetlands on the property. Although these waters took  
10 up less than 10 percent of the property, Duarte hired a contractor to conduct what they agreed were  
11 “Ripping” operations (as shown on the actual invoice for the work, *see* USA 26, which Duarte  
12 paid)—*not* mere plowing. They ripped in wetlands and in swales with standing water. They  
13 ripped in flowing streams and in running creeks. They drove the ripping equipment down into  
14 streams and ripped them lengthwise. They did all this despite a warning from Duarte’s own  
15 environmental consultant that they would be subject to “significant penalties” unless they first  
16 obtained a permit from the Army Corps of Engineers.

17 To date, Duarte has refused to take any responsibility. Duarte ripped in protected streams  
18 and wetlands and took no meaningful precautions to avoid these areas. Duarte has argued that the  
19 conduct was justified as mere “plowing” under the Clean Water Act. But this Court has also  
20 rejected that argument under the facts in this case, finding that no plowing had occurred anywhere  
21 on the site for at least 24 years and that (as intended) the ripping activity converted areas of water  
22 to dry land. *See* Summary Judgment Order (ECF No. 195) at 34; Denial of Reconsideration (ECF  
23 No. 267) at 4-5.

24 Presently, Duarte seeks to evade proper remedies in this case by arguing that the Corps  
25 (and EPA) are in the process of changing the regulations governing the jurisdictional limit of the  
26 “waters of the United States.” Recently, the Corps and EPA jointly published a proposed rule that  
27 would rescind the prior Administration’s “Clean Water Rule” and restore the previously applicable  
28 regulations originally adopted in 1986. 82 Fed. Reg. 34,899 (July 27, 2017). Crucially, however,

1 the government’s enforcement action against Duarte has *always* been based upon violations of the  
2 Clean Water Act under the 1986 regulations, not the Clean Water Rule. Nonetheless, even if the  
3 standard set forth in the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), were  
4 applied here, Duarte’s actions would have still been unlawful. The Coyote Creek tributary system,  
5 where these streams and wetlands are located, contribute flow to the Sacramento River nearly  
6 continuously during wet seasons (typically October through April), and that system includes the  
7 main stem of Coyote Creek and its many branch streams that flow through the Duarte site.

8 This Court has already determined that Duarte broke the law. Now, significant mitigation  
9 is required to remedy Duarte’s damage, and a significant penalty is appropriate. Without these  
10 measures, other landowners will be put to a difficult choice: follow the rules and be undercut by  
11 those who violate the law, or break the law themselves to gain a level playing field. Fairness to  
12 law-abiding property owners demands that Duarte must now face an appropriate remedy under  
13 law. Therefore, the Court should (1) require Duarte to fix the damage on-site to the degree  
14 possible, (2) compel Duarte to purchase off-site mitigation to make up for the damage that cannot  
15 be repaired, and (3) impose a civil penalty in the amount of \$2.8 million. *See United States’*  
16 *Proposed Judgment (“P.J.,” ECF No. 278-1).*

17 Finally, despite claims by Duarte to the contrary, this case is not (and will not be used as)  
18 a pretext for federal prosecution of farmers who engage in normal plowing on their farms. No  
19 federal dredge-or-fill permit is required for plowing as defined in the regulations, and no such  
20 permit is required for discharges from “normal farming . . . activities” (including plowing) if they  
21 are part of an established (i.e., ongoing) farming operation and not for the purpose of converting  
22 federally protected waters to new uses. Those protections for farmers remain in the law today and  
23 will continue to be recognized. But as this Court concluded, Duarte’s unpermitted activities on a  
24 site that had lain fallow for more than two decades did not satisfy the foregoing exceptions,  
25 violated the Clean Water Act, and (consistent with the rule of law) must be penalized  
26 appropriately. The United States has remained amenable to a reasonable settlement, but efforts to  
27 reach a settlement have been unproductive thus far.



1 **II. STATUTORY AND REGULATORY BACKGROUND**

2 Congress enacted the Clean Water Act (“CWA” or “the Act”) “to restore and maintain  
3 the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To  
4 serve that objective, the CWA prohibits any discharge of pollutants to “waters of the United  
5 States” except in compliance with the Act’s exemptions or permit provisions. *Id.* §§ 1311(a),  
6 1362(7), 1362(12)(A). At all times relevant here, the regulatory definition of “waters of the  
7 United States” includes waters that have been used or are reasonably susceptible to use in  
8 interstate commerce (“traditional navigable waters”), tributaries of traditional navigable waters,  
9 and wetlands adjacent to such tributaries. 33 C.F.R. § 328.3(a)(1), (5), (7) (1987). Prior to  
10 Duarte’s CWA violations, the site contained at least 43 acres of tributaries and adjacent (in many  
11 instances abutting) wetlands. *See* USA Exs. 59 & 60 (maps).

12 “Tributaries” typically include any “stream which contributes its flow to a larger stream  
13 or other body of water.” *Community Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*,  
14 305 F.3d 943, 954 (9th Cir. 2002). The lateral limit of CWA jurisdiction for any given tributary,  
15 in the absence of adjacent wetlands, extends to its “ordinary high water mark.” 33 C.F.R.  
16 § 328.4(c)(1); *see also id.* § 328.3(3)(e) (defining ordinary high water mark).

17 “Wetlands” are “areas that are inundated or saturated by surface or ground water at a  
18 frequency and duration sufficient to support, and that under normal circumstances do support, a  
19 prevalence of vegetation typically adapted for life in saturated soil conditions.” *Id.* § 328.3(b).  
20 “The Corps’ [1987] Wetlands Delineation Manual . . . interprets this definition of wetlands to  
21 require: (1) prevalence of plant species typically adapted to saturated soil conditions . . . ; (2)  
22 hydric soil, meaning soil that is saturated, flooded, or ponded for sufficient time during the  
23 growing season to become anaerobic, or lacking in oxygen, in the upper part; and (3) wetland  
24 hydrology, a term generally requiring continuous inundation or saturation to the surface during at  
25 least five percent of the growing season in most years.” *Rapanos*, 547 U.S. at 761-62 (Kennedy,  
26 J., concurring) (citation omitted). Indicators of all three parameters are normally present in  
27 wetlands; however, when, as here, unauthorized activities have impacted a site’s vegetation,  
28 soils, or hydrology, scientists may infer one of the three parameters from the presence of the

1 other two. Manual § IV.F.

2 “Under the Corps’ regulations, wetlands are adjacent to tributaries, and thus covered by  
3 the Act, even if they are ‘separated from other waters of the United States by man-made dikes or  
4 barriers, natural river berms, beach dunes and the like.’” *Rapanos*, 547 U.S. at 762 (Kennedy, J.,  
5 concurring) (quoting 33 C.F.R. § 328.3(c)). “When adjacent wetlands are present, [CWA]  
6 jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.”  
7 33 C.F.R. § 328.4(c)(2).

8 In this Circuit, the United States may establish—and has established here—CWA  
9 jurisdiction in accordance with Justice Kennedy’s “significant nexus” standard set forth in his  
10 concurrence in *Rapanos*. See S.J. Order at 29-30.

11 The CWA establishes a permit program, administered by the Corps, for authorizing the  
12 “discharge of dredged or fill material.” 33 U.S.C. § 1344(a). But “no discharge of dredged or  
13 fill material shall be permitted” if, for example, “there is a practicable alternative,” 40 C.F.R.  
14 § 230.10(a), or if the discharge “results in likelihood of the destruction or adverse modification  
15 of a habitat which is . . . critical habitat under the Endangered Species Act.” *Id.* § 230.10(b)(3).  
16 Further, in such permits, “[c]ompensatory mitigation is a critical tool in helping the federal  
17 government to meet the longstanding national goal of ‘no net loss’ of wetland acreage and  
18 function.” 73 Fed. Reg. 19,594, 19,594 (Apr. 10, 2008) (codifying 33 C.F.R. part 332).

### 19 III. FACTS

20 The following facts are either established or are expected to be proven at the remedy trial.

#### 21 A. PROTECTED WATERS EXIST ON AND DOWNSTREAM OF THE SITE

22 The Sacramento River runs “southward from the [Sacramento] Valley’s northern edge,  
23 through the City of Sacramento, and then onward to the San Francisco Bay and into the Pacific  
24 Ocean.” *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 682 (9th Cir.  
25 2012) (citation omitted); S.J. Order at 4. Duarte’s violations occurred in one of the River’s  
26 tributaries, Coyote Creek; nine additional tributary streams that are part of Coyote Creek; and  
27 wetlands that for the most part occur with or abut tributary streams. See USA Exs. 59 and 60  
28 (maps of features that existed just prior to Duarte’s violations); USA Ex. 61 (map of Duarte’s

1 violations). The wetlands on the Duarte property included “vernal pools” and “vernal swales.”  
2 Vernal pools are shallow, seasonally ponded wetlands that accumulate water during the wet  
3 season. Vernal swales are sloped wetlands that connect vernal pools to one another and to  
4 downstream waters. These wetlands occur over impermeable surfaces (i.e., bedrock) or “slowly  
5 permeable” soils limit the downward movement of water. With their long water residence times  
6 and low energy water flows, vernal pools and vernal swales filter water, minimize soil erosion,  
7 and provide food and cover resources for a wide range of plants and animal species. The vernal  
8 pools and vernal swales on the Duarte site are within the critical habitat for vernal pool fairy  
9 shrimp, a threatened species. 50 C.F.R. § 17.95(h)(13); 71 Fed. Reg. 7,118, 7,141-42 (Feb. 10,  
10 2006). The Duarte site also contains suitable habitat for vernal pool tadpole shrimp, an  
11 endangered species. 50 C.F.R. § 17.11(h); 59 Fed. Reg. 48,136 (Sept. 19, 1994).

12 The streams, vernal pools, and vernal swales at the Duarte site functioned as one system  
13 and as part of Coyote Creek. To help illustrate this system, one can imagine their structure as  
14 resembling the shape of a large tree. The main stem of Coyote Creek, which traverses the northern  
15 boundary of the Duarte site, is the trunk of the tree while the many streams and wetlands within  
16 the body of the Duarte site are the tree’s branches and leaves. Downstream (east) of the Duarte  
17 site, Coyote Creek regularly contributes flow to Oat Creek and to the Sacramento River at least  
18 seasonally and far more than just in response to rainfall. Coyote Creek, Oat Creek, and the  
19 Sacramento River also share close ecological connections. They all contain critical habitat for the  
20 threatened Central Valley Spring Run Chinook Salmon, and Oat Creek and the Sacramento River  
21 are listed as critical habitat for the threatened Central Valley Steelhead. 50 C.F.R.  
22 § 226.211(k)(1)(ii), (l)(1)(ii). Fish depend on these waters to complete reproduction and growth.  
23 They can be anadromous, meaning that they are hatched in freshwater, spend the majority of  
24 their life in saltwater, and return to freshwater to spawn.

25 The Duarte site has very old and well-developed soils and subsoils. Ponding and soil  
26 saturation is common during the wet season, because the slowly permeable layers at or near the  
27 ground surface impede rapid vertical movement of water. Incoming water flows downward in  
28 the soil until it encounters a slowly permeable layer. Water then flows in a horizontal fashion

1 and above the slowly permeable soil layers. These conditions favor cattle grazing, as the surface  
2 water (in streams or ponded wetlands) provide a natural water source for the cattle. But these  
3 conditions are not favorable for growing almond, walnut, olive, and other kinds of orchard trees  
4 with deep roots because these trees are not adapted to grow and thrive in shallow ponded or  
5 saturated soils. To convert and develop sites like Duarte's for orchards, powerful equipment  
6 must be used to penetrate, break up, and destroy hardened restrictive or slowly permeable soil  
7 layers so that water movement within the soil is significantly changed from being ponded or  
8 saturated at or near the soil surface to being strongly vertical, with water moving vertically to the  
9 rooting zone of the orchard trees.

10 **B. DUARTE PURCHASED A SITE IT KNEW HAD PROTECTED WATERS**

11 In 2011, what is now known as the Duarte site was part of a larger site comprising 1,950  
12 acres, with approximately 450 acres located south of Coyote Creek's main stem and 1,500 acres  
13 north of that. Roger J. LaPant, Jr. purchased all 1,950 acres that year, planning to convert it to  
14 orchards. Mr. LaPant's interest reflected the steadily increasing market value of orchard trees,  
15 particularly walnuts, from 2009 to 2013. By 2013, the number of acres used for growing walnut  
16 and almond trees in Tehama County had increased by 50 percent compared to 2004.

17 Mr. LaPant used ripping equipment on the northern parcel. Then, in early 2012, he hired  
18 an environmental consultant, NorthStar Environmental ("NorthStar"), to delineate waters of the  
19 United States throughout the site. In February 2012, NorthStar produced a delineation and map  
20 identifying a significant acreage of streams and wetlands in the southern parcel, where Mr.  
21 LaPant had not operated. In April 2012, Duarte Nursery purchased the entire site from Mr.  
22 LaPant for \$5.6 million. *See* S.J. Order at 6. Duarte, like Mr. LaPant, was pursuing an orchard  
23 development. *See* USA Ex. 90A (John Duarte Dep.) at 121:22 to 122:1. Before completing the  
24 purchase, Duarte obtained a copy of NorthStar's delineation and map. Duarte regarded  
25 NorthStar's work to be "thorough and accurate." *Id.* at 72:25 to 73:1.

26 In early May 2012, Duarte entered into a scope of work agreement with NorthStar. *See*  
27 USA Ex. 13. NorthStar was to split its delineation into "two separate reports," one for the northern  
28 parcel and the other for the southern parcel. The agreement further stated that NorthStar's

1 delineation would be “possibly verified” by the Corps. The agreement repeatedly cautioned: “All  
2 Delineations are DRAFT until verified by the USACE,” and “NorthStar is not responsible for  
3 penalties that may occur from project proponents proceeding without a verified delineation.”

4 In late May 2012, James Stevens, a NorthStar principal, wrote a letter to Duarte. USA  
5 Ex. 12. He began: “Our staff has been informed by Mr. Brad Munson that you will be proceeding  
6 with farming activities on the . . . property.” (Mr. Munson acted as Duarte’s agent. *See* S.J. Order  
7 at 9-10.) He continued: “the regulatory agencies are currently taking special interest in farming  
8 activities specifically in Tehama and Glenn Counties as well as in critical habitat for listed species  
9 (which the property is in).” Further, Mr. Stevens stressed: “we strongly recommend that you have  
10 the draft Delineation of Waters of the U.S. . . . prepared by NorthStar . . . verified by the U.S.  
11 Army Corps of Engineers.” Mr. Stevens underscored that “significant penalties” may ensue if  
12 Duarte proceeded without at least a Corps-verified delineation.

13 In July 2012, NorthStar produced a delineation and map for the 450-acre southern site.  
14 *See* S.J. Order at 6. Consistent with the earlier report, the July 2012 report stated: (1) “Areas of  
15 intact vernal and seasonal swales occur within the Property” as well as “drainages”; (2) “Little  
16 evidence of past agricultural activities was observed”; and (3) “A total of 16.17 acres of pre-  
17 jurisdictional waters of the U.S. were delineated within the Property.” USA Ex. 20 at 5, 13. A  
18 map identifying all delineated waters accompanied the report. *Id.* at 275. Again, NorthStar  
19 advised Duarte to consult with the Corps before proceeding. *Id.* at 5.

20 In November 2012, Duarte completed the sale of the 1,500-acre northern portion to  
21 Goose Pond Ag, Inc. for \$ 8.7 million. S.J. Order at 9:18-19; *see also id.* at 6. Duarte profited  
22 from the sale. *See* USA Ex. 90A (John Duarte Dep.) at 46:15-18.

### 23 **C. DUARTE RIPPED MORE THAN 22 ACRES OF PROTECTED WATERS**

24 In November 2012, Duarte Nursery’s contractor, Caleb Unruh, began ripping, i.e.,  
25 operating a 360-horsepower International Harvester Case Quadtrac 9370 with attached Wilcox  
26 ripper, NSC 36-24-7, on the 450-acre parcel that Duarte still owned. *See* S.J. Order at 10; USA  
27 Ex. 90E (Unruh Dep.) at 61:22 to 63:20, 124:15-23; USA Ex. 33 at 3 (photograph). At no time  
28 prior to or during operations did Duarte or any person on Duarte’s behalf: (1) consult with the

1 Corps; (2) instruct Mr. Unruh to avoid waters of the United States; (3) allow NorthStar to install  
2 flags or similar markers in the field demarcating the boundaries of waters of the United States; or  
3 (4) even provide Mr. Unruh with NorthStar's map of waters of the United States. For nearly  
4 three weeks, the rippers operated in all varieties of waters, including, for example, below the  
5 ordinary high water mark of Coyote Creek's main stem and through the *middle* of streams, vernal  
6 pools, and vernal swales. In all, the rippers discharged pollutants into over 22 acres of waters of  
7 the United States, approximately half of which are streams and the other half wetlands.

8 *See* USA Ex. 61. On or about December 12, 2012, Mr. Unruh submitted an invoice for  
9 "Ripping" "450 acres," USA Ex. 26, which Duarte paid.

10 On or about December 19, 2012, an airplane dropped wheat seeds onto the site at Duarte's  
11 behest. The seeds were not incorporated into the ground, wheat grew only in a thin or sparse  
12 manner, and Duarte never analyzed whether it would be worth harvesting. USA Ex. 90A (John  
13 Duarte Dep.) at 67:5-68:19; USA Ex. 90B (James Duarte Dep.) at 171:15-172:1; USA Ex. 90E  
14 (Caleb Unruh Dep.) at 149:16-25, 162:10-22, 164:9-165:2.

15 Meanwhile, the Corps discovered Duarte's violations on November 28, 2012, when its  
16 chief regulatory staffer from Redding, Matthew Kelley, drove by the site. Mr. Kelley returned to  
17 Paskenta Road on December 6 and 17, 2012. At no time did Mr. Kelley observe any flags or  
18 other indications that waters of the United States were being avoided. Instead, he observed the  
19 tractor forcefully dragging ripper shanks through streams, vernal pools, and vernal swales. He  
20 saw earthen material being (1) wrenched up and redeposited from below the ground surface to  
21 above the ground surface and into waters of the United States; (2) redistributed from one location  
22 to another within waters of the United States; and (3) relocated from uplands and dragged into  
23 waters of the United States. The photographs Mr. Kelley took show heaps of freshly-deposited  
24 dredged or fill material within streams, blocking the flow. *See, e.g.*, USA Ex. 32 at 8, 10; USA  
25 Ex. 33 at 1.

26 On December 11, 2012, Mr. Kelley telephoned John Duarte. Mr. Kelley advised that  
27 "there were wetlands and drainages on the site and the ripping activities needed a permit." USA  
28 Ex. 28. Mr. Duarte responded that "they knew where the wetland[s] were and were staying away

1 from them.” *Id.* Mr. Kelley stated that “wetlands and drainages were not being avoided and  
2 [Duarte] should cease and desist additional impacts to waters of the U.S. without a permit.” *Id.*

3 The Corps followed up with a letter in February 2013, which Duarte challenged when  
4 commencing this action in October 2013. For two years into the litigation, Duarte continued to  
5 assert that there had been complete avoidance.<sup>1</sup> But in fact, John Duarte did not investigate the  
6 question of avoidance until the summer of 2014. In September 2015, Mr. Duarte finally conceded  
7 that rippers “did not avoid all of the wetlands delineated by NorthStar.” S.J. Order at 11:16-17.

#### 8 **D. DUARTE HARMED PROTECTED WATERS**

9 The United States’ inspection of the Duarte site was led by Lyndon C. Lee, Ph.D.,  
10 Professional Wetland Scientist, and supported by Wade L. Nutter, Ph.D., Professional  
11 Hydrologist; Scott R. Stewart, Ph.D., Certified Professional Soil Scientist; Mark C. Rains, Ph.D.,  
12 Professional Wetland Scientist; and Richard A. Lis, Ph.D. These scientists were already familiar  
13 with the Coyote Creek watershed, having examined and taken measurements in streams, vernal  
14 pools, and vernal swales in various locations, including just west of the Duarte site and  
15 downstream from the Duarte site along Coyote Creek all the way to Oat Creek’s junction with  
16 the Sacramento River. The scientists were also familiar with the data collected on the site and  
17 mapping products developed by NorthStar in 2012 (USA Ex. 20) and North State Resources in  
18 1994 (USA Ex. 8).

19 Over the course of about two weeks, the scientists examined representative aquatic  
20 locations on the site and conducted various analyses. The team found, *inter alia*:

- 21 • Ripping created upland (or dryland) areas within waters of the United States.
- 22 • These upland areas are not conducive to growth and development of plant species  
23 that are typically adapted to life in saturated soil conditions (i.e., hydrophytic plant  
24 species), and they significantly impede subsurface water flow patterns.
- 25 • The ripper changed soil conditions and patterns of water flow and circulation in a  
26 manner that retarded growth of native hydrophytic plant species.

27  
28 <sup>1</sup> USA Ex. 1 (Duarte’s original compl.) ¶ 47; USA Ex. 4 (Duarte’s first am. compl.) ¶ 47; *see also*  
USA Ex. 5 (Duarte’s second am. compl.) ¶ 48 (substantially similar allegation).



- The equipment dragged soil into waters of the United States and resulted in an increase of the bottom elevation of waters of the United States, the conversion of their boundary areas to upland, and increased erosion and sediment deposition within on-site and in downstream waters.
- The rippers adversely impacted the critical habitat of protected vernal pool fairy shrimp and the suitable habitat of protected vernal pool tadpole shrimp.

Moreover, the equipment pierced or fractured slowly permeable layers at and up to approximately 14 inches below the surface. Fracturing these layers significantly and discernibly alters the rate of vertical and lateral water movement into, within, and out of waters of the United States. This alteration has numerous secondary impacts.

#### IV. ARGUMENT

The Court has already found Duarte Nursery, Inc. and John Duarte liable for violating 33 U.S.C. § 1311(a) when they discharged dredged or fill material into waters of the United States—“at least in areas of the wetlands as delineated by NorthStar,” S.J. Order at 29:18—without authorization under 33 U.S.C. § 1344. During the remedy phase, the Court should award injunctive relief aimed at removing the pollutants from all of the impacted waters of the United States, bringing Duarte into compliance, and compensating for the loss of functioning to the large and sensitive complex of streams, vernal pools, and vernal swales that Duarte harmed. In addition, the Court should assess a civil penalty sufficient to punish Duarte and effect deterrence.

##### A. THE COURT SHOULD AWARD INJUNCTIVE RELIEF

Under the CWA, this Court has broad discretion “to order that relief it considers necessary to secure prompt compliance with the Act.” *United States v. Akers*, 785 F.2d 814, 823 (9th Cir. 1986) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982)). The Court may order any “appropriate relief, including a permanent or temporary injunction.” 33 U.S.C. § 1319(b). “Every order granting an injunction . . . must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.” Fed. R. Civ. P. 65(d). As elaborated below, the United States requests three components of injunctive relief.



1                   **1. Duarte should perform on-site restoration work**

2           First, Duarte should be ordered to remove the dredged or fill material that it unlawfully  
3 placed into 22.2 acres of waters of the United States on the Duarte property, in the locations shown  
4 in USA Ex. 61. See P.J. ¶ 3. “In evaluating remediation or restoration proposals, courts . . .  
5 consider[] three factors: (1) whether the proposal ‘would confer maximum environmental  
6 benefits,’ (2) whether it is ‘achievable as a practical matter,’ and (3) whether it bears ‘an equitable  
7 relationship to the degree and kind of wrong it is intended to remedy.’” *United States v. Deaton*,  
8 332 F.3d 698, 714 (4th Cir. 2003) (quoting *United States v. Cumberland Farms of Conn., Inc.*, 826  
9 F.2d 1151, 1164 (1st Cir. 1987)). The United States’ restoration proposal meets these criteria.

10           Expert testimony will show that, in the absence of any restoration on the Duarte property, it  
11 will take unacceptably long, indeed many decades, for the ripped soils to re-organize and build  
12 new slowly permeable layers at or near the surface. The streams, vernal pools, and vernal swales  
13 on the Duarte site depend upon the lateral movement of water on the soil surface and in shallow  
14 subsurface horizons that occur above slowly permeable layers. Duarte’s ripping physically  
15 converted waters to dry land, including along the borders of vernal pools and vernal swales where  
16 upland materials were dragged into waters of the United States. Without restoration, additional  
17 waters are likely to become uplands, especially if California returns to another drought cycle.

18           Similarly, expert testimony will show that, in the absence of restoration, the topography  
19 created by ripping is likely to persist for decades. The dredged or fill material prevents, impedes,  
20 or consolidates surface and shallow subsurface water flow patterns, depending on the direction that  
21 the ripper shanks were dragged through waters of the United States and their inlets and outlets.  
22 Not only is more water required to cause saturation of soils or ponding of water due to the damage  
23 and destruction of slowly permeable layers, but those changes in the hydrology and soil conditions  
24 adversely affect the maintenance of the chemical, physical, and biological integrity of Coyote  
25 Creek and downstream to the Sacramento River. The flow and circulation of surface flows should  
26 be restored.

27           As Dr. Lee will explain at trial, straightforward and practicable steps can be taken quickly  
28 to at least partially mitigate on-going harm and accelerate the restoration of the functioning of the

1 waters of the United States: (1) smooth ripped areas where abrupt changes have caused  
2 significant alterations in patterns of water flow and circulation; (2) stabilize ripped and smoothed  
3 sites with a native grass seed mix specified by a qualified botanist or restoration ecologist; (3)  
4 establish buffers around all streams, vernal pools, and vernal swales, and smooth and stabilize  
5 those areas as well; and (4) monitor the conditions of restorations on the property and execute  
6 adaptive management and contingency measures sufficient to ensure success. An appropriate  
7 process to effectuate this conceptual proposal is set forth in the United States' proposed judgment.  
8 *See* P.J. ¶ 3. Duarte should draft a technical plan; submit it to the United States for review;  
9 incorporate comments; and implement the approved plan in a timely manner. To the extent that  
10 the parties encounter disputes, judicial review is available.

11 Courts typically find it appropriate to direct violators to perform restoration work where  
12 practicable. *See, e.g., United States v. Smith*, 149 F.3d 1172, No. 96-2450, 1998 WL 325954, \*3  
13 (4th Cir. June 18, 1998) (“Removal of all the fill would reestablish the pre-existing hydrology  
14 and set the stage for restoring the area to a productive, swampy, palustrine forested wetland”);  
15 *United States v. Larkins*, 657 F. Supp. 76, 86 & n.25 (W.D. Ky. 1987) (citing “numerous  
16 precedents for restoration”), *aff'd*, 852 F.2d 189 (6th Cir. 1988). This is consistent with the  
17 CWA's objective “to restore and maintain the chemical, physical, and biological integrity of the  
18 Nation's waters.” 33 U.S.C. § 1251(a).

19 The United States' on-site restoration proposal is environmentally beneficial, equitable,  
20 and eminently practicable. With this relief, the streams, vernal pools, and vernal swales Duarte  
21 impacted stand the best chance of being returned to their condition before Duarte's violations.

## 22 **2. Duarte should be restrained from further work in waters**

23 In addition, the Court should prohibit Duarte from further ripping or conducting other  
24 earthmoving activities that could result in discharges of pollutants into any waters of the United  
25 States as mapped on USA Ex. 60. *See* P.J. ¶ 4. The injunction would have two exceptions: (1)  
26 Duarte may perform ecosystem restoration work as discussed above; and (2) Duarte may  
27 perform activities on the site that comply with the CWA so long as, before initiating any such  
28 activity, Duarte first consults with the Corps. *Id.* This relief would provide an additional layer

1 of protection tailored to waters of the United States on the Duarte site, including those which are  
2 subject to the requested ecosystem restoration work. A prohibitory injunction is thus necessary  
3 to bring Duarte into compliance with the Act. *Cf. United States v. Holtzman*, 762 F.2d 720, 724-  
4 25 (9th Cir. 1985) (court’s authority to “restrain violations” under the Clean Air Act includes  
5 power to enjoin activity where necessary and appropriate to dissipate harmful effects of  
6 violations). The waters need time to heal.

7 A prohibitory injunction is also warranted by the fact that had Matthew Kelley not caught  
8 Duarte in the act, Duarte would likely have continued to destroy waters of the United States. As  
9 agricultural practices expert Gregory House will explain, ripping and wheat-seeding are steps in  
10 the orchard conversion process. In addition, it is common in this part of California to plant wheat  
11 the year before conducting further orchard development work. Growing wheat helps bring a field  
12 under cultivation, control weeds, and condition the soil. Even Duarte admits that a wheat crop was  
13 never its goal; John Duarte testified that “we would like to develop the property into permanent  
14 crops, probably walnuts.” USA Ex. 90A (John Duarte Dep.) at 121:22 to 122:1.

15 Further, Duarte has shown little regard for the CWA. A sophisticated party, Duarte  
16 received clear and repeated warnings from its own environmental consultant not to rip federally-  
17 protected waters without consulting the Corps or, at the very least, avoiding all waters. Duarte  
18 repeatedly rejected that advice. Then, after the Corps discovered Duarte’s violations in late  
19 2012, Duarte did not even bother to inspect streams, vernal pools, or vernal swales for evidence  
20 of ripping until well after the United States filed its counterclaim in mid-2014. The United  
21 States should not have to start from the beginning if Duarte breaks the law again.

22 **3. Duarte should effect compensatory mitigation**

23 The third component of the requested injunctive relief is a mandatory injunction requiring  
24 Duarte to effect compensatory mitigation, defined as “restoration (re-establishment or  
25 rehabilitation), establishment (creation), enhancement, and/or in certain circumstances  
26 preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts  
27 which remain after all appropriate and practicable avoidance and minimization has been  
28 achieved.” 33 C.F.R. § 332.2. Compensatory mitigation is typically used in CWA section 404

1 permitting to achieve “the longstanding national goal of ‘no net loss’ of wetland acreage and  
2 function.” *Butte Env’tl Council v. U.S. Army Corps of Eng’rs*, 620 F.3d 936, 947 (9th Cir. 2010)  
3 (quoting 73 Fed. Reg. at 19,594); *see also* 16 U.S.C. § 3901(a)(7) (congressional findings on the  
4 importance of wetlands and their “disappear[ance] by hundreds of thousands of acres each  
5 year”). That goal is especially important here because greater than 80 percent of California’s  
6 vernal pool complexes have already been lost. *See, e.g., California Vernal Pools*,  
7 [www.wildlife.ca.gov/Conservation/Plants/Vernal-Pools](http://www.wildlife.ca.gov/Conservation/Plants/Vernal-Pools).

8 “Compensatory mitigation can be accomplished in one of three ways: 1) mitigation  
9 banks, 2) in-lieu fee programs, or 3) permittee-responsible mitigation, with the use of mitigation  
10 banks being the preferred method.” *Walther v. United States*, No. 3:15-cv-0021-HRH, 2015 WL  
11 6872437, at \*2 (D. Alaska Nov. 9, 2015) (citing 33 C.F.R. § 332.3(b)). Although Duarte did not  
12 obtain a permit—or avoid or minimize its discharges—compensatory mitigation rules and  
13 guidance are highly instructive in cases involving illegal discharges without a permit. *See, e.g.,*  
14 *Borden Ranch P’ship v. U.S. Army Corps of Eng’rs*, No. 2:97-cv-858-GEB-JFM, 1999 WL  
15 1797329, at \*21 (E.D. Cal. Nov. 8, 1999) (ordering compensatory mitigation consistent with  
16 EPA’s policy at that time), *aff’d in relevant part*, 261 F.3d 810 (9th Cir. 2001), *aff’d by an*  
17 *equally divided Court*, 537 U.S. 99 (2002) (*per curiam*). Otherwise, CWA violators could  
18 receive an advantage over similarly situated persons who obtain section 404 permits.

19 Here, the relevant question is what amount of restoration, establishment, and/or  
20 preservation of aquatic resources will offset Duarte’s adverse impacts to more than 22 acres of  
21 waters of the United States. The evidence will show that even if Duarte timely and fully  
22 completes on-site ecosystem restoration work and complies with the prohibitory injunction, there  
23 will still be a substantial temporal and permanent loss of aquatic functioning remaining to offset.  
24 Specifically, Duarte should be required to purchase mitigation credits in an amount equal to: (a)  
25 the *establishment* or *reestablishment* of up to 66 acres of waters of the United States (a three-to-  
26 one ratio); or (b) the *rehabilitation* of up to 132 acres of such waters (a six-to-one ratio). *See* P.J.  
27 ¶ 5. The United States’ proposed judgment also provides options for Duarte to reduce the  
28 number of mitigation credits through, for example: (a) preserving waters of the United States on

1 its property, P.J. ¶ 6; (b) preserving *other* vernal pool complexes in the region, *id.* ¶ 7; and/or (c)  
2 establishing or re-establishing wetlands in the region, including on the Duarte site, *id.* ¶ 8.

3 **B. THE COURT SHOULD ASSESS A SUBSTANTIAL CIVIL PENALTY**

4 “Any person who violates [33 U.S.C.] section 1311 . . . shall be subject to a civil penalty  
5 not to exceed [\$37,500] per day for each violation.” 33 U.S.C. § 1319(d); *see also* 40 C.F.R.  
6 § 19.4 (adjusting for inflation the \$25,000 amount in the statute). “The focus is clearly on *each*  
7 violation.” *Borden Ranch*, 261 F.3d at 817. When, as here, violations are committed with  
8 ripping equipment, “the better rule is to treat each rip as a separate violation.” *Id.* at 818.

9 The starting point for a civil penalty assessment is to count the number of violations and  
10 determine “the maximum fines for such violations permitted by the Clean Water Act.” *Atlantic*  
11 *States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1137 (11th Cir. 1990). Given the  
12 magnitude of Duarte’s CWA violations—discharges of pollutants to over 22 acres of waters of  
13 the United States—the statutory maximum is a large number. Even assuming that the rippers  
14 made only 10 passes through each acre of waters of the United States, the statutory maximum  
15 would be over \$8 million (\$37,500 x 22 acres x 10). This estimate is highly conservative in  
16 Duarte’s favor. In *Borden Ranch*, the rippers made more than 150 passes through each acre of  
17 waters of the United States. *See* 261 F.3d at 818 (358 passes through two acres). Duarte itself  
18 has estimated the maximum to be over \$40 million. *See* ECF No. 154 at 12:21-23.

19 Ordinarily, “[o]nce the court has calculated maximum civil penalties, the court may  
20 proceed to adjust downward from this maximum based on statutory factors.” *California*  
21 *Sportfishing Protection Alliance v. River City Waste Recyclers, LLC*, 205 F. Supp. 3d 1128, 1155  
22 (E.D. Cal. 2016). Although the Court has discretion to set the penalty at the statutory maximum,  
23 *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 1001 (9th Cir.  
24 2000), the Court need not precisely calculate the statutory maximum here because the United  
25 States’ request, \$2.8 million, is far below even the most conservative estimate. Moreover, while  
26 Duarte has no “history” of CWA violations, 33 U.S.C. § 1319(d), all relevant factors strongly  
27 support a substantial seven-figure civil penalty.

1                   **1. Duarte’s violations are serious**

2           In considering the “seriousness of the . . . violations,” 33 U.S.C. § 1319(d), courts  
3 examine their number, duration, and severity; importance to the CWA regulatory scheme; and  
4 the actual or potential harm to the environment. *See, e.g., United States v. Gulf Park Water Co.*,  
5 14 F. Supp. 2d 854, 859 (S.D. Miss. 1998); *United States v. Smithfield Foods, Inc.*, 972 F. Supp.  
6 338, 343 (E.D. Va. 1997); *United States v. Mun. Auth. of Union Twp.*, 929 F. Supp. 800, 807  
7 (M.D. Pa. 1996), *aff’d*, 150 F.3d 259 (3d Cir. 1998).

8           The geographic reach of Duarte’s violations is significant—the ripping equipment  
9 operated for more than two weeks and made hundreds of passes (at least) through more than 22  
10 acres of streams, vernal pools, and vernal swales. Indeed, at more than 10 times the acreage of  
11 the *Borden Ranch* violations, Duarte’s violations are among the largest on record.

12           Duarte’s violations were no mere accident. The shanks did not merely “clip” waters of  
13 the United States. To the contrary, ripping often occurred in the *middle* of these features.

14           “[A]ctual harm to the environment is by nature difficult and sometimes impossible to  
15 demonstrate, [and] it need not be proven to establish that substantial penalties are appropriate in  
16 a Clean Water Act case.” *Union Twp.*, 929 F. Supp. at 807. Nevertheless, here, expert testimony  
17 will establish actual harm. Duarte significantly degraded or destroyed the chemical, physical,  
18 and biological functioning of streams and wetlands at the site. That loss—which also has  
19 adverse water quality implications downstream, in the traditional navigable waters of the  
20 Sacramento River—cannot fully be repaired.

21                   **2. Duarte gained a substantial economic benefit from its violations**

22           “[T]he purpose of the economic benefit component of the penalty is to level the economic  
23 playing field.” *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 177 (3d Cir. 2004)  
24 (internal quotation marks omitted). “In other words, . . . [it] prevent[s] a party violating the  
25 CWA from gaining an unfair advantage against its competitors, and [it] prevent[s] it from  
26 profiting from its wrongdoing.” *Id.* at 177-78. “In order for the penalty to serve the purpose of  
27 deterrence, it should exceed the economic benefit enjoyed by the Defendant.” *Gulf Park*, 14 F.  
28 Supp. 2d at 862; *see also Tyson Foods*, 897 F.2d at 1141.

1 Joan K. Meyer, Ph.D., will explain at trial that the economic benefit resulting from  
2 Duarte's violations is between \$303,940 and \$831,148. This estimate represents the difference  
3 between (1) the value of the Duarte property assuming the maximum orchard-convertible  
4 acreage with no avoidance of waters of the United States, and (2) the value of the Duarte  
5 property assuming that a more limited amount of orchard-convertible acreage with avoidance of  
6 waters of the United States. For penalty purposes, the Court should attribute to Duarte the higher  
7 estimate. Because it is difficult if not impossible to measure economic benefit precisely, *Union*  
8 *Twp.*, 150 F.3d at 264-65, "an elaborate . . . showing" regarding economic benefit is not  
9 necessary; a reasonable approximation will suffice. *Gulf Park*, 14 F. Supp. 2d at 863.  
10 Uncertainties are resolved in favor of the higher estimate. *Id* at 864.

11 **3. Duarte made no good faith efforts to comply**

12 "Whether defendants took any actions to decrease the number of violations or made  
13 efforts to mitigate the impact of their violations on the environment must be also considered."  
14 *United States v. Smithfield Foods, Inc.*, 972 F. Supp. at 349-50. Relevant factors include whether  
15 the violators heeded the advice of consultants, took reasonable steps to prevent violations,  
16 properly supervised the work in question, investigated the violations once government agencies  
17 became involved, and took steps to mitigate the harm. *Id.* at 350-52. Duarte made no such  
18 efforts. Despite repeated warnings from its own environmental consultant regarding the  
19 presence of important and sensitive waters of the United States and the need to avoid those  
20 waters or to obtain a permit for its site development, Duarte violated the CWA. Similarly,  
21 Duarte failed to cooperate with the Corps' investigation. In December 2012, John Duarte falsely  
22 assured the Corps that the rippers were "staying away" from wetlands. Yet at that time he had  
23 never even been to the site and had no way of knowing whether this was true. At no time did  
24 Mr. Duarte follow up to correct his false assertion, let alone take any measure of responsibility  
25 for the unauthorized discharges. He remains recalcitrant, characterizing those responsible for  
26 enforcing the Act as "evil" and a "carload of idiots."<sup>2</sup>

27  
28 <sup>2</sup> <http://www.krcrtv.com/news/local/tehama/farmer-facing-28-million-fine-claims-no-damage-was-done-to-his-land/546140802>.



1                   **4. Duarte can afford the penalty sought**

2           Because a key purpose of a civil penalty is to deter the violator from committing future  
3 violations, *Tull v. United States*, 481 U.S. 412, 422-23 (1987), courts consider “the economic  
4 impact of the penalty on the violator.” 33 U.S.C. § 1319(d); *see also Smithfield Foods*, 972 F.  
5 Supp. at 352-53. The penalty amount must be “high enough so that the discharger cannot ‘write  
6 it off’ as an acceptable environmental trade-off for doing business.” *Gulf Park*, 14 F. Supp. 2d at  
7 869 (citation and internal quotations omitted). “[T]he burden of showing that the impact of a  
8 penalty would be ruinous or otherwise disabling” is on the violator. *Id.* at 868 (citation omitted).

9           Here, the penalty requested is “large enough to hurt,” *United States v. Mac’s Muffler*  
10 *Shop, Inc.*, No. 85-cv-138, 1986 WL 15443, at \*8 (N.D. Ga. Nov. 4, 1986) (citation and internal  
11 quotations omitted), but would not have the adverse impacts that Duarte’s hyperbolic arguments  
12 suggest. Dr. Meyer has examined Duarte’s finances in detail, notwithstanding Duarte’s refusal  
13 to produce all relevant information. As she will explain, Duarte Nursery and John Duarte  
14 combined have the ability to pay a penalty of at least \$ 8.4 million. Indeed, the same year as the  
15 violations, the company made more than \$3 million from a related real estate transaction in  
16 Tehama County, i.e., flipping the northern parcel after owning it for less than a year. When, as  
17 here, CWA violators “cannot show that a penalty will have a ruinous effect, the economic impact  
18 factor . . . will not reduce the penalty.” *Gulf Park*, 14 F. Supp. 2d at 868 (citations omitted).

19                   **5. Additional considerations compel a substantial penalty**

20           “[J]ustice [] require[s]” that the Court consider one additional factor: the need to reaffirm  
21 that similarly situated persons must comply with the CWA. *See* 33 U.S.C. § 1319(d). This  
22 action is one of three recent cases along the Coyote Creek tributary system, all of which involve  
23 illegal discharges to convert streams, vernal pools, and vernal swales to orchards. *United States*  
24 *v. LaPant*, No. 2:16-cv-01498-KJM-DB (E.D. Cal.); *United States v. Anchordoguy*, No. 2:13-cv-  
25 848-MCE-CMK (E.D. Cal.). The penalty here will be taken by many as a measure of the  
26 importance of complying with the CWA in Tehama County: “if the regulated community  
27 perceives that violations of the law are treated lightly, the government’s regulatory program is  
28



1 subverted.” *Gulf Park*, 14 F. Supp. 2d at 869 (citation omitted). A substantial civil penalty will  
2 show that Duarte cannot violate the CWA and fare better than law-abiding developers.

3 **C. DUARTE’S REMEDIAL ARGUMENTS ARE MERITLESS**

4 Duarte argues, without support, that no injunctive relief or civil penalty is appropriate.  
5 *See* Amended Joint Pretrial Statement (ECF No. 278) at 24:1 to 26:7, 34:3-5. As explained  
6 above, Duarte is wrong that: (1) its CWA violations were harmless; (2) Duarte took meaningful  
7 precautions to avoid waters of the United States; (3) the Corps knew ahead of time that Duarte  
8 would violate the CWA; and (4) the civil penalty sought exceeds Duarte’s ability to pay.

9 Duarte also argues—both here (in a motion for stay, ECF Nos. 269, 273) and to the Ninth  
10 Circuit (in a petition for a writ of mandamus, No. 17-71983)—that the Court’s remedial  
11 decisions should be different if the streams, vernal pools, and vernal swales that Duarte filled  
12 were subject to the waters-of-the-United-States standard set forth in the *Rapanos* plurality  
13 opinion, 547 U.S. at 732 n.5, 733, 739 & 742. Duarte is wrong. That standard is met. The  
14 Coyote Creek tributary system contributes flow to the Sacramento River nearly continuously  
15 during wet seasons (typically October through April), and that system includes the main stem of  
16 Coyote Creek and its many branch streams that flow through the Duarte site. In addition, the  
17 vast majority of the vernal pools and vernal swales on the site are part of that system; they either  
18 occur within or abut streams. Only a negligible (i.e., one to two) percent of the sites’ adjacent  
19 wetlands are physically separated from streams by uplands. *See, e.g.*, USA Ex. 43 (Expert  
20 Report) at 79, 167; USA Exs. 59-61 (maps of streams, vernal pools, and vernal swales); USA Ex.  
21 20 (NorthStar’s July 2012 delineation) at 15. The conservative (i.e., in Duarte’s favor) nature of  
22 the United States’ remedial requests more than offset any minor difference.

23 Finally, the civil penalty requested is easily justified even if this Court only considers  
24 streams and wetlands meeting the *Rapanos* plurality criteria. In addition, it would be within the  
25 scope of this Court’s discretion to order injunctive relief based on the full 22.2 acres of waters  
26 impacted because such a remedy would be “reasonably related to a discharge” into the wetlands  
27 in or abutting jurisdictional waters on the property. *United States v. Mango*, 199 F.3d 85, 94 (2d  
28 Cir. 1999) (“[I]f a condition requiring the defendants *to take measures on dry land* reasonably

1 relates to a discharge into the navigable waters, it is valid.”) (emphasis added).<sup>3</sup>

2 **V. CONCLUSION**

3 The United States’ requests for injunctive relief and a civil penalty should be granted.

4 Respectfully submitted,

5 JEFFREY H. WOOD

6 Acting Assistant Attorney General

7 Dated: July 31, 2017

*/s Andrew J. Doyle*

8 ANDREW J. DOYLE (FL Bar No.84948)

9 JOHN THOMAS H. DO (CA Bar No. 285075)

10 SAMARA M. SPENCE (TN Bar No. 031484)

11 United States Department of Justice

12 Environment and Natural Resources Division

13 PHILLIP A. TALBERT

14 United States Attorney

15 GREGORY T. BRODERICK (CA Bar No. 220871)

16 Assistant United States Attorney

17 501 I Street, Suite 10-100

18 Sacramento, CA 95814

19 (916) 554-2700 (p)

20 (916) 554-2900 (f)

21 gregory.broderick@usdoj.gov

22 *Attorneys for the United States*

23  
24  
25  
26 <sup>3</sup> Contrary to Duarte’s suggestion in a recent motion *in limine* (ECF No. 277-1), the Court would  
27 not need to hear any additional expert testimony or receive any new exhibits to conclude that the  
28 *Rapanos* plurality standard is met. The foregoing facts are already relevant to show that Duarte’s  
CWA violations are harmful. As explained above, Duarte’s ripping fundamentally altered the  
hydrology of streams, vernal pools, and vernal swales; given the system’s hydrological  
interconnectedness, that alteration affects the integrity of the Sacramento River.