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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant.

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

ORDER

AND RELATED COUNTERCLAIMS

This matter is before the court on cross-motions for summary judgment brought by plaintiff Duarte Nursery, Inc. (the Nursery), plaintiff John Duarte, and defendant United States Army Corps of Engineers (the Army Corps) and counterclaim-plaintiff United States of America (collectively, “the United States”). ECF Nos. 128, 136, 138, 139. The United States also moves to dismiss or in the alternative for summary judgment on plaintiffs’ retaliatory prosecution claim. ECF No. 134. The court received oppositions and replies, ECF Nos. 152–161, and held a hearing on November 20, 2015 on the cross-motions. Anthony Francois, David Ivester, Gerald Brunn, and Peter Prows appeared for the Nursery and Duarte. Andrew Doyle, Gregory Broderick, and Samara Spence appeared for the United States.

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5. Exemption

Plaintiffs/counter-defendants bear the burden of proving whether their discharge falls under any statutory exemption. *City of Healdsburg*, 496 F.3d at 1001. Here, plaintiffs claim their activities on the Property were exempted as “part of an established (i.e., on-going) farming . . . operation” under 33 U.S.C. § 1344(f)(1) and 33 C.F.R. § 323.4(a)(1)(i)–(ii). They also argue their discharge was “recaptured” under 33 U.S.C. § 1344(f)(2). The court first considers the farming exemption.

a) 33 U.S.C. § 1344(f)(1)

As previously mentioned, certain activities are exempt from the definition of discharge of fill or dredged material. Specifically § 1344(f)(1) exempts certain activities in connection with farming, silviculture and ranching from the NPDES permitting requirement. The exemption provides in detail as follows:

(a) General. Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:

(1)(i) Normal farming . . . activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming . . . operation and must be in accordance with definitions in § 323.4(a)(1)(iii). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming . . . are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming . . . operation.

...

(B) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or

1 ranch land, but does not include the construction of farm, forest, or  
2 ranch roads.

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3 ...  
4 (D) Plowing means all forms of primary tillage, including  
5 moldboard, chisel, or wide-blade plowing, discing, harrowing and  
6 similar physical means utilized on farm, forest or ranch land for the  
7 breaking up, cutting, turning over, or stirring of soil to prepare it for  
8 the planting of crops. The term does not include the redistribution  
9 of soil, rock, sand, or other surficial materials in a manner which  
10 changes any area of the waters of the United States to dry land. For  
11 example, the redistribution of surface materials by blading, grading,  
12 or other means to fill in wetland areas is not plowing. Rock  
13 crushing activities which result in the loss of natural drainage  
14 characteristics, the reduction of water storage and recharge  
15 capabilities, or the overburden of natural water filtration capacities  
16 do not constitute plowing. Plowing as described above will never  
17 involve a discharge of dredged or fill material.

11 (E) Seeding means the sowing of seed and placement of seedlings  
12 to produce farm, ranch, or forest crops and includes the placement  
13 of soil beds for seeds or seedlings on established farm and forest  
14 lands.

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14 ...  
15 (c) Any discharge of dredged or fill material into waters of the  
16 United States incidental to any of the activities identified in  
17 paragraphs (a)(1) through (6) of this section must have a permit if it  
18 is part of an activity whose purpose is to convert an area of the  
19 waters of the United States into a use to which it was not previously  
20 subject, where the flow or circulation of waters of the United States  
21 may be impaired or the reach of such waters reduced. Where the  
22 proposed discharge will result in significant discernible alterations  
23 to flow or circulation, the presumption is that flow or circulation  
24 may be impaired by such alteration. For example, a permit will be  
25 required for the conversion of a cypress swamp to some other use  
26 or the conversion of a wetland from silvicultural to agricultural use  
27 when there is a discharge of dredged or fill material into waters of  
28 the United States in conjunction with construction of dikes,  
drainage ditches or other works or structures used to effect such  
conversion. A conversion of a section 404 wetland to a non-  
wetland is a change in use of an area of waters of the United States.  
A discharge which elevates the bottom of waters of the United  
States without converting it to dry land does not thereby reduce the  
reach of, but may alter the flow or circulation of, waters of the  
United States.

26 33 C.F.R. § 323.4(a), (c). In sum, while § 1344(f)(1) provides a farming exemption, to fall under  
27 the exemption, the farming activities must be “established and ongoing.” A farming operation  
28 ceases to be established when the area has been converted to another use, or modifications to the

1 “hydrological regime” are necessary for continue the farming operations. 33 C.F.R.  
2 § 323.4(a)(1)(ii). In addition, even if the farming activities are established and ongoing, if they  
3 convert waters of the United States into a new use to which they were not previously subjected, or  
4 impair the flow or circulation of waters of the United States, then a permit is required. *Id.*  
5 § 323.4(c).

6 Here, there is no evidence the Property supported farming activity between 1988  
7 and the summer of 2012. Stokely Expert Report at 6–7. Unruh, who performed the tillage  
8 service for the Nursery and John Duarte in 2012, stated the ground on the Property was hard and  
9 difficult to penetrate from the grazing activities. Unruh Dep. 98:9–24. Plaintiffs have provided  
10 no support to show grazing is analogous to the farming activity they conducted beginning in  
11 2012. The court is not persuaded that, after nearly twenty-four years of no activity that meets the  
12 applicable definition of farming, the tillage and planting of wheat by plaintiffs can be considered  
13 a continuation of established and ongoing farming activities.

14 Moreover, the aerial photos provided in the Stokely Expert Report show a  
15 substantial amount of wetlands impacted by the tillage and planting activities. Stokely Expert  
16 Report at 7–8, 22–55. The photos demonstrate substantial changes in the hydrological regime,  
17 which are prohibited if a party is to benefit from the farming exemption under § 1344(f)(1). *Cf.*  
18 *Akers*, 785 F.2d at 819–20 (court rejects the exemption for the wetland portion of the subject farm  
19 because of substantial hydrological alteration).

20 b) 33 U.S.C. 1344(f)(2)

21 Notwithstanding its conclusion above, the court also considers the recapture  
22 provision of 33 U.S.C. § 1344(f)(2), which provides:

23 Any discharge of dredged or fill material into the navigable waters  
24 incidental to any activity having as its purpose bringing an area of  
25 the navigable waters into a use to which it was not previously  
26 subject, where the flow or circulation of navigable waters may be  
impaired or the reach of such waters be reduced, shall be required  
to have a permit under this section.

27 33 U.S.C. § 1344(f)(2). The statutory provision expressly notes that “any” discharge of dredge or  
28 fill material into the navigable waters requires a permit. Thus, plaintiffs’ argument that all the

1 existing wetlands on the Property still exist, and no waters of the United States have been  
2 converted to dryland, ECF No. 128, ignores not only the statute but also the purpose of the CWA  
3 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”  
4 33 U.S.C. § 1251(a). The CWA does not simply prohibit the complete conversion of waters of  
5 the United States. Even under the farming exemption, a discharge of dredged or fill material  
6 incidental to the farming activities that impairs the flow of the waters of the United States still  
7 requires a permit, because it changes the chemical, physical and biological integrity of the waters.  
8 33 C.F.R. § 323.4(c); 33 U.S.C. § 1344(f)(2).

9 6. Summary

10 The Nursery and John Duarte, through Munson, hired Unruh to till the Property,  
11 with the exception of the southwest corner, which was cordoned off by a fence. Unruh Dep.  
12 55:22–56:7. The Equipment did not avoid all of the wetlands delineated by NorthStar in 2012.  
13 DRCWA No. 28; NRDP No. 31. The Equipment moved dirt from around and in the wetlands  
14 before redepositing it back into the wetlands on the Property. The wetlands on the Property have  
15 a “significant nexus” to Coyote Creek, which is a tributary of the Sacramento River, a  
16 traditionally navigable waterway. The tillage was not part of an established and ongoing farming  
17 activity.

18 Accordingly, the United States has established each element of a violation and  
19 plaintiffs have not established an exemption applies. The court GRANTS the United States’  
20 motion for summary judgment on its CWA counterclaim.

21 D. Retaliation

22 Plaintiffs allege in the complaint that the United States violated the First  
23 Amendment by retaliatory prosecution.<sup>7</sup> SAC ¶¶ 115–121. Specifically, plaintiffs allege that  
24 public statements show the United States filed the counterclaim because plaintiffs filed their  
25 complaint. SAC ¶¶ 118–120. The United States contends: (1) the claim should be dismissed  
26 because the court does not have subject matter jurisdiction over this claim because there has been

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27 <sup>7</sup> The Second Amended Complaint also asserts the retaliatory prosecution claim against  
28 Bostick and Lynch, but does not clarify who they are.