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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ROGER J. LaPANT, JR., Defendant.	No. 2:16–CV–01498–KJM–DB **BRIEF IN SUPPORT OF THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT THAT DEFENDANT ROGER J. LaPANT, JR. VIOLATED THE CLEAN WATER ACT** [Corrected, Jan. 10, 2020]

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dated Dec. 19, 2019 (ECF No. 122-1) at ¶ 11.

B. DEFENDANT CANNOT ESTABLISH THAT DISCHARGES WERE EXEMPT.

The United States does not bear the burden of proof regarding whether Defendant's unpermitted discharges were exempt under 33 U.S.C. § 1344(f). Here, Defendant cannot satisfy the threshold condition of this "[l]imited" and "narrow" exemption. *Akers*, 785 F.2d at 818-19.

There simply is no evidence that Defendant's conduct was part of an established, ongoing farming operation. To the contrary, the record clearly shows that before Defendant disced, ripped, and planted wheat on most of the site in 2011, it had been decades since anyone did anything plausibly similar. For example, according to John and Charles Ohm, who owned and worked nearby farms, no one had grown crops on the site since 1980. Dep. of Charles Ohm (ECF No. 119-9) at 38:22 to 39:22 & 56:5-11; Dep. of John Ohm (ECF No. 119-10) at 39:7-16. Similarly, Donna McKenna, an employee of the Farm Service Agency who regularly drove by the site starting in 1988, testified that she never saw crops growing there prior to 2011. Dep. of Donna McKenna (ECF No. 119-7) at 207:2-14.

Historical records corroborate these eyewitness accounts. Acreage reports submitted by the site's prior owners to the Farm Service Agency show that from October 1990 through September 1996 and from October 2001 through September 2006, no wheat or crop of any sort was cultivated on the site.[14] Indeed, these records show that the only vegetation then growing on the site were "native grasses," which, as Ms. McKenna and Defendant's agricultural expert

[14] As relevant here, acreage reports for 1991 through 1996 show that no wheat, fruits, or vegetables were grown on the site. *See* Dep. Ex. 106 (ECF No. 120-6) at USACE020371 (1991); *id.* at USACE020358 (1992); *id.* at USACE020346 (1993); Dep. Ex. 107 (ECF No. 123-11) at USACE020337 (1994); *id.* at USACE020325 (1995); *id.* at USACE020311 (1996). *See also* Dep. of Donna McKenna at 98:25 to 99:3 & 110:23 to 111:9 (explaining that "where it says wheat and it has a 0," it means "[t]hey didn't plant any wheat"). The acreage reports for 2002 through 2006 do not contain the same field indicating the acreage of crops that were planted. But the reports for those years do indicate that the only vegetation on the site was native grass, abbreviated "NAG." *See* Dep. Ex. 112 (ECF No. 120-8) at USACE020303 (2002); *id.* at USACE020298 (2003); Dep. Ex. 206 (ECF No. 120-12) at USACE020403 (2004); Dep. Ex. 112 (ECF No. 120-8) at USACE020292 (2005); *id.* at USACE020286 (2006). *See also* Dep. of Donna McKenna at 101:23-25 (explaining that "NAG" stands for "native grasses," meaning "whatever comes up"). There do not appear to be acreage reports for years before 1990, for 1997 through 2001, or for after 2006.

explained, meant anything that grew naturally. Dep. of Donna McKenna (ECF No. 119-7) at 101:23 to 102:12; Dep. of Paul Squires (ECF Nos. 119-11 & 123-2) at 162:22 to165:17.

Documentation from other sources is to the same effect. The 1994 CWA delineation noted that there had been no "human activities" on the site "within the previous five years" that had affected "positive wetland indicators." Dep. Ex. 14 (ECF No. 120-1) at USA-NSR-00015. Likewise, an EIR prepared by or for Tehama County in 1992 and 1993 described the site as "grazing land for cattle." Dep. Ex. 44 (ECF No. 120-5) at LAPANT002258.

Moreover, all of this evidence align with historical aerial photographs and other imagery, which show evidence of nearly site-wide disturbance in or about 1979 and 1984, but then nothing even remotely comparable until Defendant's activities in 2011. Report of Peter Stokely dated Feb. 2018 (ECF No. 118-1) at 11-12 & Figures 10 through 17.

Defendant's invocation of the normal farming exemption is not supported by the conclusions of one of his experts, Paul Wisniewski, who purports to observe evidence of human impacts on the site in aerial images from 1988, 1992, 1998, 2005, and 2009. Report of Paul Wisniewski dated Feb. 23, 2018 (ECF No. 123-8) at 2:9 to 3:3; Suppl. Report of Paul Wisniewski dated Sept. 6, 2019 (ECF No. 123-9) at 2. The United States' expert, Peter Stokely, disagrees, explaining, for example, that variations in the site's topography noted by Mr. Wisniewski were artifacts of "the natural landscape" not new "human activity." Response to Report of Wisniewski dated June 12, 2018 (ECF No. 118-2) at 1. Mr. Wisniewski's claim that most of the site was farmed between 1988 and 1992 is also belied by the eyewitness accounts and historical records described above. At best, as Mr. Stokely explains, the 1992 image shows only vestiges of *past* (i.e., mid-1980's) soil manipulation. Report of Peter Stokely dated Feb. 2018 (ECF No. 118-1) at 11; Suppl. Report of Stokely dated Sept. 2019 (ECF No. 118-3) at 4.

But even assuming, for argument's sake, that aerial imagery truly supported Mr. Wisniewski's claims, by his own account in all but the 1992 image, the putative new impacts are restricted to small pockets of the site, such as a few roads and limited activities in the site's easternmost reaches. *See* Dep. Ex. 284 (ECF No. 123-10) at 7-14 (Mr. Wisniewski's hand-drawn markings on imagery from 1988, 1998, 2005, and 2010, to indicate areas of the site where

he believes activities occurred in those years). With respect to the 1992 image, even assuming one could interpret it as Mr. Wisniewski does, it would mean that Defendant's activities in 2011 were two, rather than three, decades removed from any analogous conduct.

Crucially, Defendant offers nothing to suggest that such a long gap in wheat or production could be considered "part of a conventional rotational cycle" indicative of an "established (i.e., ongoing)" farming operation. 33 C.F.R. § 323.4(a)(1)(ii). In fact, a "typical" rotational cycle for a wheat farm would entail "fallow periods [of just] one or two years and occasionally up to approximately five or six." Declaration of Gregory A. House dated June 12, 2018 (ECF No. 117) at ¶ 10. Nor is there any evidence that the site's numerous previous owners managed it according to any kind of farming plan. *Id.* In fact, at least one of those owners "attempted to convert [the site] to an urban development" and succeeded in rezoning the parcel accordingly—an undertaking that "does not describe an ongoing farming operation." *Id.*

What Defendant is left with, then, is historical evidence of decades-old farming and nothing more. Courts interpreting 33 U.S.C. § 1344(f) have routinely held such evidence insufficient to exempt discharges of dredged or fill material from CWA permitting requirements. *See, e.g.*, *Akers*, 785 F.2d at 819 (deeming inadequate historical evidence of farming when crop production "has not occurred on these wetlands on a regular basis"); *Larkins*, 657 F. Supp. at 85-86, n.23 ("[E]ven if the wetlands had a history of farm use, that use was no longer established at the [relevant] time."). Or as this Court aptly put it in *Duarte*: "The court is not persuaded that, after nearly twenty-four years of no activity that meets the applicable definition of farming, the tillage and planting of wheat . . . can be considered a continuation of established and ongoing farming activities." 2016 WL 4717986, at *19.

So too here. Because Defendant cannot show that his discharges in 2011 were part of an operation that was "established" or "on-going" in any sense of those terms, Defendant's invocation of the Act's normal farming exemption fails as a matter of law.

C. DEFENDANT'S REMAINING DEFENSES ARE UNAVAILING.

Defendant cannot escape responsibility for his CWA violations under other "affirmative defenses" alleged in his Answer (ECF No. 18). "[D]efendant[] bear[s] the burden of proof on