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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 **UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** Hearing Date: Mar. 6, 2020 Courtroom: 3 Time: 10 a.m. Judge: The Honorable Kimberly J. Mueller

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§ 1311(a). The second provision then states that the Corps may issue permits "for the discharge of dredged or fill material." 33 U.S.C. 1344(a). These provisions, read together, unmistakably express Congress's understanding that the term "pollutant" includes "dredged or fill material."

C. DEFENDANT'S DISCHARGES WERE NOT EXEMPT.

1. The Act's implementing regulations are reasonable. Defendant argues that 33 C.F.R. § 323.4(a)(1)(ii), which reflects EPA's and the Corps' longstanding interpretation of 33 U.S.C. § 1344(f)(1)(A), "violates the Clean Water Act[] and is not eligible for *Chevron* deference." Def. MSJ at 24:16-17. This claim fails.

As an initial matter, Defendant's challenge is untimely. At the latest, it was incumbent on Defendant to assert it in his Answer or in a motion for leave to amend that is supported by good cause. *See supra* at 3:7-10.

In any event, Defendant's challenge is meritless. As far as we have been able to glean, no court has ever adjudged the validity of this regulatory provision. However, following the 1977 amendments to the Act, but before the agencies' promulgation of the challenged provision, one court cogently observed: "The literal terms of [33 U.S.C. § 1344(f)(1)(A)] indicate that only activities that are part of an *ongoing* agricultural or silvicultural operation were intended to be exempted from the permit program . . . . The word 'normal' connotes an established and continuing activity." *Avoyelles,* 473 F. Supp. at 535 (emphasis in original). The court's reading is reflected in the following dictionary definition of "normal": "conforming to a type, standard, or *regular pattern*." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988) (emphasis added). Thus, contrary to Defendant's argument, the statutory text *is* qualified, and the regulation reasonably reflects such text.

For similar reasons, § 1344(f)(1)(A) is ambiguous, not *unambiguous* in favor of Defendant's preferred reading of the Act. Def. MSJ at 26:1-6. Defendant's reading of the Act simply is not compelled. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 989, (2005) (if "plain terms admit of two or more reasonable ordinary usages," the terms are ambiguous); *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.,* 503 U.S. 407, 418

(1992) (a regulatory term is ambiguous when there are "alternative dictionary definitions of the word" that "each make some sense").

Also contrary to Defendant's argument, principles of *Chevron* deference apply here. When, as with the normal farming exemption, "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843-44. Indeed, enacting the exemption in 1977, Congress recognized that its scope "must be defined in regulations." S. Rep. No. 95-370, at 76 (1977), *reprinted in* 4 *Legislative History of the Clean Water Act of 1977* (Comm. Print), at 709. Soon thereafter, EPA created a "Task Force" and held "public hearings." 44 Fed. Reg. 34,244, 34,245 (June 14, 1979). The agencies' proposals, consideration and discussion of public comment, and issuance of final rules followed. *See* 44 Fed. Reg. 31,673, 34,263-64, 34,318-19 (June 1, 1979) (EPA's proposal); 45 Fed. Reg. 33,290, 33,298-99, 33,397-99 (May 19, 1980) (EPA's final rule); 45 Fed. Reg. 62,732, 62,748 (Sept. 19, 1980) (Corps' proposal); 47 Fed. Reg. 31,794, 31,812-13 (July 22, 1982) (Corps' final rule).

Further, deference is appropriate when agencies make a "choice" and reasonably accommodate "conflicting policies." *United States v. Shimer*, 367 U.S. 374, 382 (1961). The rulemaking record shows that that is what the agencies did. *See, e.g.*, 44 Fed. Reg. at 34,263 ("The background and legislative history of section 404(f)(1)(A) is exceedingly complex and has led to several schools of thought on what the section really means . . . . These regulations follow a middle ground."). Defendant provides no basis to overturn their judgment.

2. Defendant does not meet the conditions of 33 U.S.C. § 1344(f)(1)(A) and its implementing regulations. Defendant must show, as an initial matter, that his discharges are from an "established (i.e., on-going)" farming operation. However, Defendant ignores most of the applicable regulatory text and relies on an untenable interpretation of the regulatory provision that he does address.

The Corps' regulations assure that "[a]ctivities on areas lying fallow as part of a conventional rotational cycle are part of an established operation." 33 C.F.R. § 323.4(a)(1)(ii). *Id.* "Activities which bring an area into farming, silviculture, or ranching use," however, "are

not part of an established operation." *Id.* And "[a]n operation ceases to be established when the area . . . has been co[n]verted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations." *Id.*

Here, the evidence is clear that, as of 2011, the site was not "lying fallow as part of a conventional rotational cycle." *Id.* Indeed, prior to Defendant's activities, no crops were grown on the site since the early 1980s. *See* U.S. MSJ at 25:6 to 27:12. Moreover, Defendant ignores the next sentence of 33 C.F.R. § 323.4(a)(1)(ii) and everything before the "or" in the sentence after that. But as the evidence shows, when Defendant disced and ripped waters and wetlands in 2011, he took large areas that had previously, for decades, lain idle or been used for cattle grazing and "br[ought]" these areas "into farming." *See* 33 C.F.R. § 323.4(a)(1)(ii). A similar fact pattern occurred in *Duarte*. There, this Court rejected the discharger's attempt to claim equivalence between ranching and farming, holding that, after a nearly 24-year gap in farming, "the tillage and planting of wheat by [Duarte]" could not "be considered a continuation of established and ongoing farming activities." *Duarte*, 2016 WL 4717986, at *19. So too here.

In addition, the evidence shows that Defendant modified the site's hydrological regime. Assuming, for argument's sake, that there had ever been an established farming operation at the site, any such operation would "cease to be established" if "modifications to the hydrological regime are necessary" to restart it. 33 C.F.R. § 323.4(a)(1)(ii). To sidestep this provision, Defendant creates from whole cloth a definition of "hydrological regime." Because one legal dictionary defines "regime" as "a system of rules or regulations," he argues that "restrictive layer soil profile . . . is the correct interpretation of 'hydrologic regime' in this case." Def. MSJ at 27:4-28. According to Defendant, only by "penetrating the restrictive layer" could one "modify" the hydrological regime. *Id.* at 27:28 to 28:1. This reading is necessary, he claims, because if *his* activities modified the hydrological regime, then so would *any* soil manipulation activity, which would render "nugatory" the normal farming exemption's allowance for plowing. *Id.* at 27:7-22 (quoting *In re Carsten*, 211 B.R. 719, 734 (D. Mont. 1997)).

The first and most glaring problem with this argument is that Defendant's definition of "hydrological regime" is untenable. If accepted, anyone could eliminate the site's wetlands

through all kinds of soil manipulation, so long as they left intact subsurface restrictive soil layers. Such a result runs afoul of the Ninth Circuit's direction that "claims of exemption" from permitting requirements, "must be narrowly construed to achieve the purposes" of the Act. *Healdsburg*, 496 F.3d at 1001. The wholesale destruction of WOTUS which would result from Defendant's tortured reading of the exemption would be antithetical to the Act.

The term "hydrological regime" is better read to refer to patterns of surface and shallow subsurface water flow and circulation. This reading conforms to the (non-legal) plain meaning and ordinary usage of the word "regime," which Webster defines as "a regular pattern of occurrence or action (as of seasonal rainfall)." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988). It also recognizes that degradation of wetlands can have deleterious effects on water quality. And unlike Defendant's interpretation, it avoids imputing a site or region-specific meaning to a nationally applicable term.

Under the plain meaning of "hydrological regime" as patterns of water flow and circulation, Defendant "modifi[ed]" the site's "hydrological regime" not simply because his discing (for example) "allow[ed] rainfall to soak into the soil and hold" as he acknowledges (Decl. of Def. (ECF No. 113-2) at ¶ 22.a.), but because he degraded the functioning of waters and wetlands in the process. *See* 33 C.F.R. § 323.4(a)(1)(ii). The site's waters and wetlands had been functioning for decades while the site had lain idle or been used for cattle grazing. Had the site instead been recently and regularly tilled as part of an "established (i.e., on-going)" farm, there would be no question that Defendant could have operated under the exemption. Thus, contrary to Defendant's claim, the Corps' regulations can be and are reasonably read to both give effect to the normal farming exemption and to reach Defendant's conduct here.

Nor can Defendant downplay the impacts of his activities by dismissing them as mere "micro effects." Def. MSJ at 27:8. Though Defendant now says that he only disced or ripped the first four-to-six inches of soil, he previously admitted to having penetrated at least twice as deep to 12 inches below ground surface. Decl. of James Robb (ECF No. 122-1) at 3:19-21 (transcribing statements made by Defendant during meeting with the Corps and a congressional aide). His consultant observed that his tillage had disturbed 12-16 inches below the surface.

NorthStar letter dated June 25, 2013 (Dep. Ex. 273, ECF No. 129-2) at NSE0005570. And the United States expert team likewise found widespread forensic evidence of Defendant's having ripped to depths of around 12 inches. *See supra* at 13:25 to 14:12.

What is more, the United States expert team also found that Defendant's ripping had fractured slowly permeable below ground layers, which, even by Defendant's strained standard, constitutes a modification to the site's hydrological regime. *See, e.g.*, Report of Dr. Lee, et al. (ECF No. 114-1) at vii-viii.

Finally, Defendant's discharges were also not exempt under 33 U.S.C. § 1344(f)(1)(A) because they did not "accord[] with" the definitions in 33 C.F.R. § 323.4(a)(1)(iii). 33 C.F.R. § 323.4(a)(ii). As relevant here, that provision defines plowing to include "breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops." *Id*. It also states, however, that "the redistribution of surface materials . . . to fill in wetland areas is not plowing." *Id.* "Filling in waters of the United States is precisely what Defendant did." U.S. MSJ at 4:8. *See* U.S. Response to Defendant's Statement of Facts (ECF No. 126-2) at no. 2 (list of evidence that Defendant filled in WOTUS).

3. Defendant's discharges were "recaptured" by 33 U.S.C. § 1344(f)(2). The Act's recapture provision only comes into play if Defendant satisfies all of the requirements of 33 U.S.C. § 1344(f)(1)(A) and its implementing regulations. He has not, as discussed above. The Court therefore need not reach the issue of recapture. But even if it did, evidence shows that Defendant's discharges were, in fact, recaptured.

Defendant argues that, because the recapture provision "only applies" to "new use[s]," and because wheat was previously grown on the site, his discharges are not recaptured. Def. MSJ at 28:13. Here again, Defendant ignores the plain text of the Act. The recapture provision does not merely require permits for new uses, it requires permits for "[a]ny discharge of dredged or fill material . . . incidental to any activity having as its *purpose* bringing an area of [WOTUS] into a use to which it was not previously subject . . . . " 33 U.S.C. § 1344(f)(2) (emphasis added); *see also* 33 C.F.R. § 323.4(c). The distinction is crucial because the record shows that–in

contrast to any prior owner of the site[17]–Defendant farmed wheat with the purpose of ultimately converting waters and wetlands to uplands suitable for orchards.

Orchards would constitute a use to which the site was not previously subject, a point Defendant seems to concede. *See* Def. MSJ at 29:2-6. He argues, however, that he "had his [wheat] crop in motion" long before any orchard conversion commenced. *Id.* at 29:3-6. But that does not answer the statutory question of *purpose*.

Defendant fails to acknowledge significant facts regarding the purpose of his earthmoving activities. For example, in Defendant's own telling, when he realized that he would not be able to make a scheduled balloon payment, he decided to find a buyer for the site before the payment came due in March 2012. Decl. of Def. (ECF No. 113-2) at ¶ 25. "It was only at [that] point," Defendant claims, that he "engaged a broker to list the Property for sale." *Id.* Having done so, he learned "that most buyers would be interested in the Property for its orchard potential." *Id.* And indeed, the potential buyers that "express[ed] interest . . . were not interested in running livestock or planting dryland wheat." *Id.* at ¶ 27. In other words, Defendant stopped viewing the purpose of his activities as producing wheat and instead regarded them as facilitating the ultimate conversion of the site to orchards.

Objective evidence, however, shows that Defendant's orchard-conversion purpose arose early on during his operations. For example, in late July 2011, Defendant's realtor, Terry Cheney, told a prospective buyer that "LaPant, seller of the 2000 acs feels he does not need to delineate the property. He will rip, 3 feet, each parcel in the order you plan on purchasing during the due diligence periods." Email from Terry Cheney to Tom Nevis, et al. (Dep. Ex. 174, ECF No. 129-11) at CHENEY0000764. Less than two weeks later, in early August 2011, Defendant transmitted counter-offers to other prospective developers. *See* Counter-Offer to Farmers Trade International (ECF No. 129-12) at CHENEY0000500; Counter-Offer to Pringle Tractor, Co. (Dep. Ex. 175, ECF No. 129-13) at CHENEY0000480-82.

[17] "No orchards, vines or any other sort of permanent agricultural or horticultural land use was [ever] established on the Tehama North Site." Report of Peter Stokely (ECF No. 118-1) at 11.

Defendant's orchard-conversion purpose became even clearer in the "fall of 2011." Decl. of Def. at ¶ 25. By early October 2011, Defendant was negotiating with the site's eventual purchaser, Duarte. *See* U.S. MSJ at 15:22 to 16:4. Defendant knew that Duarte was interested in "planting orchard," not "dryland farming." Dep. of Def. (ECF No. 119-4) at 76:15-16 & 144:16-17. During this same time period, Mr. Cheney was touting the site's orchard potential to other prospective buyers. *See* Comparison Market Analysis dated Oct. 15, 2011 (Dep. Ex. 182, ECF No. 129-14) at CHENEY0000723-38.

Ultimately, whether Defendant had decided to sell in late July or early October, he clearly made up his mind to do so before discing or ripping the vast majority of the site's waters and wetlands. *See* Decl. of Def., Ex. B (ECF No. 113-4) (underlying aerial image showing the extent of Defendant's operation as of July 17, 2011); Decl. of Def., Ex. C (ECF No. 113-5) (underlying aerial image showing the extent of Defendant's operation as of October 8, 2011). Thus, almost all of Defendant's tillage occurred after he had "determined that [his] only real viable course of action was to sell" to a buyer who was not interested in farming wheat but was interested instead in converting the site to orchards. Decl. of Def. at ¶¶ 25 & 27.

Defendant's wheat planting facilitated the site's conversion to orchards. As the United States' agricultural expert explains: "It is a common practice for orchardists to grow a wheat or similar small grain crop prior to planting an orchard to help improve soil tilth, to provide some organic matter, and to dry out the subsoil so that it can be effectively deep ripped or slip plowed." Suppl. Decl. of Gregory A House and attachments (ECF No. 129-15) at 15 of 28. Defendant's activities were thus "consistent with the preparation of the land for the planting of orchard crops in the year following wheat harvest." *Id.*

Second, by operating *first* and *then* retaining NorthStar, Defendant obscured many of the site's wetland features from his consultant and thus helped ensure the production of an orchard-friendly CWA delineation. The draft delineation's failure to meaningfully assess huge areas of the site (relying on incorrect information Defendant had provided about the site's farming history) left the impression that the site contained far less waters and wetlands subject to the Act. Map accompanying Feb. 2012 Draft Delineation (ECF No. 129-16) at NSE0001796-98.

Defendant's realtor, Mr. Cheney, proceeded to market the site as having "[b]iologists [sic.] clearance and map for planting permanent crops and deep ripping." Posting on real estate website (Dep. Ex. 181, ECF No. 129-17) at USA103732; *see also* Dep. of Terry Cheney (ECF No. 129-18) at 65:14 to 67:11 ("[b]iologists['] clearance and map" referred to NorthStar's draft delineation).

Further, from an economic standpoint, Defendant had little to gain from planting wheat for its own sake, but had much to gain by finding an orchard developer willing to buy it. *See* Supp. Decl. of Gregory A House and attachments (ECF No. 129-15) at 22-26 of 27 (comparing the economics of wheat and orchards in Tehama County); Defendant's realtor's Comparison Market Analysis dated Oct. 15, 2011 (Dep. Ex. 182, ECF No. 129-14) at CHENEY0000723 (valuing the 1,950-acre property at $3,000 per acre based on orchard potential). And gain Defendant did, selling the site for $5.6 million after having purchased it for only $1.9 million just a year earlier. *See* U.S. MSJ at 9:17 to 10:1.

In sum, while Defendant did not himself perform all of the activities necessary to convert waters and wetlands to orchards, the purpose of his conduct was orchard conversion. Defendant's discharges did not avoid recapture.

VI. CONCLUSION

Defendant Roger J. LaPant, Jr.'s motion for summary judgment (ECF No. 113) should be denied.

Dated: January 31, 2020

Respectfully submitted,

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