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February 2, 2017

## DUARTE NURSERY V. U.S. ACOE

**Citation:** Duarte Nursery, Inc. v. United States Army Corps of Engineers, 2016 U.S. Dist. LEXIS 76037

**Relevance:** Waterbodies that affect the chemical, physical and biological integrity of a tributary to a navigable water may be subject to the CWA because they have a “significant nexus” to navigable waters. Farming activities that require a change in the hydrological regime on a property are not exempt from CWA jurisdiction.

### **Legal Issues:**

1. Does a tractor qualify as a “point source” under the CWA?
2. Do wetlands that affect the chemical, physical, integrity of a tributary to a navigable water fall within the statutory phrase “navigable waters” under the CWA?
3. Are farming activities conducted on waters of the United States exempt from the CWA when the activities require a change in the hydrological regime?
4. Are Fifth Amendment procedural due process rights violated when the ACOE sends a letter telling property owners they must cease and desist their activities on a property until the violation is resolved, with enforcement options include penalties, fines, imprisonment, and direct removal of unauthorized work?

**Facts:** In California, Coyote Creek is a tributary to the Sacramento River, a navigable waterway. Coyote Creek flowed along the northern border of some real estate that Duarte Nursery bought. In anticipation of a sale of the real estate, Duarte Nursery hired environmental consultant, NorthStar Environmental, to complete a wetland delineation.

NorthStar's delineation revealed that the real estate had pre-jurisdictional waters and wetlands. NorthStar also found that the real estate wetlands

1. were hydrologically connected to Coyote Creek;
2. biologically filtered downstream waters because the wetlands collected the first flush of water before flowing to downstream waters, including Coyote Creek;
3. held water during significant rain events; and
4. helped moderate flood flows from storm events.

The Nursery sold most, but not all, of the real estate delineated by NorthStar. The remaining property retained by the Nursery (the Property) had wetlands. The Nursery paid a farmer to plant, care for, and harvest wheat on the Property. The farmer used a tractor, which moved soil material and created furrows and ridges for farming purposes, to till the Property. While the Property has been used in the past as open grazing land, no farming had occurred on the Property since 1988.

The farmer did not avoid all areas that NorthStar delineated as wetlands. After discovering the farmer's activities on the Property, the ACOE sent a Cease and Desist letter (CD) to the Nursery. The CD instructed the Nursery to stop all work on the Property until the violation was resolved. The CD also listed potential enforcement options, including fines, penalties, and imprisonment.

### **Holdings**

1. Yes, tractors qualify as a "point source" under the CWA because they collect and pile material that may eventually find its way into navigable waters.
2. Yes, wetlands qualify as "navigable waters" because the wetlands have a significant effect on the "chemical, physical, and biological integrity" of a tributary to a navigable water.
3. No, farming activities conducted on waters of the United States are subject to the CWA when the activities require a change in the hydrological regime to continue. Because no farming activities had occurred since on the Property since 1988, there was no ongoing farming activity. Farming activity began after the farmer started working on the Property in 2012. Moreover, the farmer's tilling substantially changed the hydrological regime on the Property. Therefore, the Nursery is not exempt from the CWA.
4. No, Fifth Amendment procedural due process rights are not violated when ACOE sends a cease and desist letter like the one issued here. The CD did not deprive the Nursery of the constitutionally protected interest of property interest. Instead, the CD informed the Nursery that it was conducting an activity that violated the CWA. Describing a violation in a CD is not an enforcement action. That the CD discusses future enforcement action (e.g., fines) further supports that the CD does not qualify as enforcement action.

**Status:** Duarte Nursery, Inc. has appealed to the Ninth Circuit Court of Appeals on a separate issue, a retaliation claim, of his case.