



September 20, 2017

Andrew Doyle,
Senior Attorney, United States Department of Justice,
Environment and Natural Resources Division, Environmental Defense Section
Post Office Box 7611
Washington, DC 20044

RE: United States v. Duarte Nursery, Inc. and John Duarte, DJ # 90-5-1-4-19984

I am writing on behalf of Clean water Action's nearly 1 million members to express concern around the terms of settlement for *United States v. Duarte Nursery, Inc. and John Duarte, DJ # 90-5-1-4-19984*. As a public interest organization working to protect our nation's waters, we advocate for protective implementation of the Clean Water Act. For decades, implementation of the Clean Water Act has included a goal of "no net loss" of wetland acreage and function. This consent decree fails to accomplish this goal and falls well short of the remedy needed for such a case.

The proposed settlement includes a \$330,000 civil penalty and \$770,000 in offsite mitigation credits. This is significantly lower than the penalties and mitigation credits sought and justified by the Department of Justice throughout the case. Clean Water Action urges DOJ to seek penalties and mitigation credits from Duarte consistent previously sought levels of \$2,800,000 in civil penalties and mitigation credits of between 66 and 132 acres of wetlands (valued at approximately \$15-30,000,000). Failure to seek these appropriate remedies is a failure to enforce the Clean Water Act.

Public documents already part of the record make a strong case for why the settlement must be reconsidered:

1. In the Proposed Judgment, dated 8/5/16, DOJ states that it was seeking Duarte purchase wetland mitigation credits "in an amount equal to: (a) the establishment or reestablishment of at least 66 acres of waters of the United States; or (b) the rehabilitation of at least 132 acres of waters of the United States." (Document 234-1 p. 3 lines 6-10) It also sought a civil penalty of \$2,800,000. (Document 234-1 p. 4 lines 22-24).
2. In Duarte's trial brief, the defendant cites the cost of mitigation credits sought by the U.S. "Those credits cost upwards of \$250,000 each; in total the Corps here is asking the Court to order Duarte spend \$15-\$30 million to purchase these offsite credits." (Document 306 p. 14 lines 15-16)
3. The U.S. Trial Brief lays out the rationale and authority for mitigation: "Compensatory mitigation is typically used in CWA section 404 permitting to achieve 'the longstanding national goal of 'no net loss' of wetland acreage and function.'" (Document 307 p. 13 line 28 -p. 14 line 2). Additionally the acreage of the mitigation credits is justified due to the scale of the violation. As noted, Duarte caused "adverse impacts to more than 22 acres of waters of the United States" and that "there will be a temporal and permanent loss of aquatic functioning remaining to offset." " (Document 307 p. 14 lines 20-23)

4. The Direct Expert Testimony of Lyndon C. Lee provides rationale for the acreage of mitigation credits needed which is supported by federal regulation: "Considering the 2008 national U.S. Army Corps of Engineers mitigation regulation (33 CFR Parts 325 and 332) in combination with rationale in the U.S. Army Corps of Engineers South Pacific Division February 20, 2012 'Standard Operating Procedure for Determining Mitigation Ratios' document, the amount of compensatory mitigation here should be equal to the offsite establishment or re-establishment of a stream, vernal pool, and vernal swale complete at a ratio of three acres for every one acre of impacts (3:1)...A ratio greater than one to one is needed because of the indirect, cumulative, and temporal losses of aquatic areas and functioning on the Duarte site are on-going and have been so for approximately 5 years." (Document 311 p. 37 lines 18-28). This further justifies the range sought by DOJ of 66-132 acres of credits.
5. The US Trial Brief also provides justification for size of the civil penalty. The brief notes that Duarte himself estimated a maximum penalty of over \$40 million based on precedent and the scale of adverse impacts. The \$2.8 million sought by US is well below that level, but in line with precedent of substantial penalties for similar violations. (Document 307 p. 15 lines 3-27)

In conclusion, there is no justified explanation for the low levels of penalties and mitigation credits in the proposed judgment. Clean Water Action strongly urges DOJ to reconsider the settlement and to legally enforce the Clean Water Act in this and future cases.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Grinberg", with a long horizontal flourish extending to the right.

Andrew Grinberg
National Campaigns Special Projects Manager