

**From:** [BDP Director](#)  
**To:** [Vaiasicca, Andrea L CIV USARMY CESPCK \(USA\)](#)  
**Subject:** Re: [URL Verdict: Neutral][Non-DoD Source] Freedom of Information Act Request FA-22-0081; Documents related to John Duarte or Duarte's Nursery, Inc Containing Mario Mendoza and Duarte (Suspense: March 28th)  
**Date:** Friday, April 8, 2022 1:54:27 PM  
**Attachments:** [Full Color Logo 150.png](#)

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Hello Casey,

Following our discussion, I'd like to limit the scope of the FOIA in the following way.

"Documents containing the initial Army Corps of Engineers ("COE") employee allegations from November 2012 and the findings of any investigative reports conducted by COE inspectors from November 2012 to the end of 2013."

Thank you,

Richard Baris, Director  
Mobile: 352-278-4277  
Toll-Free: 1-888-317-1884 ext. 270  
Email: [director@bigdatapoll.com](mailto:director@bigdatapoll.com)  
Website: <https://www.bigdatapoll.com>



On Apr 8, 2022, at 2:34 PM, Vaiasicca, Andrea L CIV USARMY CESPCK (USA) <[Andrea.L.Vaiasicca@usace.army.mil](mailto:Andrea.L.Vaiasicca@usace.army.mil)> wrote:

Thank you for getting back to me. I will have Casey return your call. Please discuss about modifying your request and resubmit it. Thank you. Drea.

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**From:** BDP Director <[director@bigdatapoll.com](mailto:director@bigdatapoll.com)>  
**Sent:** Friday, April 8, 2022 11:28 AM  
**To:** Vaiasicca, Andrea L CIV USARMY CESPCK (USA) <[Andrea.L.Vaiasicca@usace.army.mil](mailto:Andrea.L.Vaiasicca@usace.army.mil)>  
**Cc:** Richard Baris <[ppd.ventures.llc@gmail.com](mailto:ppd.ventures.llc@gmail.com)>  
**Subject:** [URL Verdict: Neutral][Non-DoD Source] Re: Freedom of Information Act Request FA-22-0081; Documents related to John Duarte or Duarte's Nursery, Inc Containing Mario Mendoza and Duarte (Suspense: March 28th)  
**Importance:** High

Hello,

I just tried to call back Casey to talk about potentially modifying the scope of the request. The voicemail for the number was not set up. Unfortunately, I was on a video when she tried to reach me. I will make myself available now if I see the number again.

Just give me a call back when you have a chance.

Best!

Richard Baris, Director  
Mobile: 352-278-4277  
Toll-Free: 1-888-317-1884 ext. 270  
Email: [director@bigdatapoll.com](mailto:director@bigdatapoll.com)  
Website: <https://www.bigdatapoll.com>

<image001.png>

On Apr 8, 2022, at 9:58 AM, Vaiasicca, Andrea L CIV USARMY CESPCK (USA) <[Andrea.L.Vaiasicca@usace.army.mil](mailto:Andrea.L.Vaiasicca@usace.army.mil)> wrote:

Good morning,

We haven't heard back from you regarding this request. Please respond before the end of today. This request will cost over 5k. We need for you to narrow your request. We do not have any documents containing Mario Mendoza. Thank you. Drea.

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**From:** Jewell, Michael S CIV USARMY CESPCK (USA) <[Michael.S.Jewell@usace.army.mil](mailto:Michael.S.Jewell@usace.army.mil)>  
**Sent:** Wednesday, March 16, 2022 1:26 PM  
**To:** [ppd.ventures.llc@gmail.com](mailto:ppd.ventures.llc@gmail.com)  
**Cc:** Vaiasicca, Andrea L CIV USARMY CESPCK (USA) <[Andrea.L.Vaiasicca@usace.army.mil](mailto:Andrea.L.Vaiasicca@usace.army.mil)>  
**Subject:** RE: Freedom of Information Act Request FA-22-0081; Documents related to John Duarte or Duarte's Nursery, Inc Containing Mario Mendoza and Duarte (Suspense: March 28th)

Mr. Baris:

Thank you for your request under FOIA. We are working to produce the documents to be responsive to your request.

The request is pretty broad and could involve several hundred pages (or more) of information, requiring substantial staff hours to produce them. Are there any specific documents or information you are looking for that could help us limit the scope of the search? Either way, we are happy to provide the information.

Thank you.

Michael Jewell Chief, Regulatory Division  
US Army Corps of Engineers, Sacramento District  
(916) 557-6605  
[michael.s.jewell@usace.army.mil](mailto:michael.s.jewell@usace.army.mil)

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**From:** Richard Baris <[ppd.ventures.llc@gmail.com](mailto:ppd.ventures.llc@gmail.com)>  
**Sent:** Tuesday, March 8, 2022 3:18 PM  
**To:** FOIA-SPK <[FOIA-SPK@usace.army.mil](mailto:FOIA-SPK@usace.army.mil)>  
**Cc:** BDP Director <[director@bigdatapoll.com](mailto:director@bigdatapoll.com)>  
**Subject:** [URL Verdict: Neutral][Non-DoD Source] Freedom of Information Act Request

Sacramento District  
U.S. Army Corps of Engineers Regulatory District  
ATTENTION: CESP-K-OC  
1325 J St  
Sacramento, CA 95814-2922  
Phone: 916-557-7204  
Fax: 916-557-5118

Hello,

This is a request under the Freedom of Information Act (5 U.S.C. § 552).

I request that a copy of the following document(s) be provided to me: Any and all email communications, investigative reports, settlement documents, and all other documents related to lawsuits and complaints of alleged and/or violations of Section 404 of the Clean Water Act—or under any section of the CWA—in the case or cases against "John Duarte" and/or "Duarte Nursery Inc.", to include email communications and all other documents that contain "Mario Mendoza" and "Duarte".

Cases Referenced in Linked Article:  
<https://agnetwest.com/duarte-lawsuit/>

In order to help you determine my status for the purpose of assessing fees, you should know that I am:

- affiliated with a private business and am seeking information for use in the company's business.

I am willing to pay the appropriate fees for this request up to a maximum of \$250.00. If you estimate that the fees will exceed this limit, please inform me first.

I also include a telephone number at which I can be contacted if necessary to discuss any aspect of my request.

Sincerely,

Richard D. Baris  
412 Belevue Ct.  
New Bern, North Carolina 28560  
352-278-4277



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT  
1325 J STREET  
SACRAMENTO CA 95814-2922

May 11, 2022

Office of Counsel

SUBJECT: Freedom of Information Act Request No. FA-22-0093; Copies of Documents Containing the Initial United States Army Corps of Engineers (USACE) Employee Allegations from November 2012 and the Findings of Any Investigation Reports Conducted by USACE Inspectors from 2021 to The End of 2013

Mr. Richard Baris  
Big Data Poll  
412 Velevue Court  
New Bern, North Carolina 28560

Dear Mr. Baris:

On April 8, 2022, our office received your Freedom of Information Act (FOIA) request for copies of documents containing the initial USACE employee allegations from November 2012 and the findings of any investigation reports conducted by USACE inspectors from 2021 to the end of 2013.

For the purpose of assessing fees, I have classified you as a commercial requester under 32 C.F.R. § 518.85(b)(2)(i). The charge for providing the requested information is as follows:

Professional Search and Review; 4 hrs. @ \$44 per hour      \$176

Ms. Andrea Vaiasicca emailed you a payment request on May 6, 2022 and suspended further processing until we received confirmation of your payment. We received confirmation of your payment through <https://pay.gov> on the same day. Thank you.

A copy of the redacted documents containing the initial USACE employee allegations from November 2012 and the findings of any investigation reports conducted by USACE inspectors from 2021 to the end of 2013 is enclosed.

Although a majority of the information requested has been provided, names of Department of Defense (DoD) employees contained in the headers of e-mails and other similar lists of names within the records have been redacted pursuant to 5 U.S.C. §§ 552(b)(3),(6) of the FOIA. These provisions, known as Exemptions 3 and 6, exempt from disclosure any information specifically exempted from disclosure by statute, along with personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Pursuant to 10 U.S.C. § 130b(a), personally identifying information may be withheld from disclosure regarding any member of the armed forces assigned to an overseas unit, a

sensitive unit, or a routinely deployable unit. See also Hall v. C.I.A., 881 F. Supp. 2d 38, 66 (D.D.C. 2012); Dep't of Defense, Manual 5400.07 ¶ 5.2(c)(2)(a) (Jan. 25, 2017).

Also, emails containing attorney-client communication are exempt from release pursuant to the protection afforded to them under 5 U.S.C. § 552 (b)(5), generally known as "Exception 5" of FOIA. Specifically, emails are protected from disclosure under the attorney-client and attorney work product privileges as incorporated into Exemption 5. These privileges afford sweeping protection to factual materials as well as opinions generated by the United States Army Corps of Engineers (Corps) legal counsel. See *e.g.*, United States v. Weber Aircraft Corp., 465 U.S. 792 (1984); FTC v. Grolier, Inc., 103 S. Ct. 2209 (1983).

Additionally, the internal emails have been withheld in full. This information is exempt from release pursuant to the protection afforded it under 5 U.S.C. § 552 (b)(5), generally known as "Exemption 5" of FOIA. Specifically, the internal emails are protected from disclosure under the Exemption 5 deliberative process privilege. The purpose of this privilege is to "prevent injury to the quality of agency decision." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). The types of information covered by this privilege include "advisory opinion, recommendations, and deliberation comprising part of the process by which governmental decisions and policies are formulated." NLRB v. Sears, Roebuck & Co., 421 at 150. Internal emails were generated for internal use and analysis by the United States Army Corps of Engineers (Corps) and will be used by the staff in determining policy as it relates to the subject project. The internal emails contain advisory opinions and deliberations on the part of Corps employees.

Additionally, because your request has been partially denied, you are advised of your right to appeal this determination through this office to the Secretary of the Army (ATTN: General Counsel). Your appeal must be postmarked or electronically transmitted within 90 days of the date of this letter. Your appeal should clearly identify the determination that is being appealed, along with the assigned FOIA request number. The envelope containing the appeal should bear the notation "Freedom of Information Act Appeal" and should be sent to U.S. Army Corps of Engineers, Sacramento District, ATTN: CESP-K-OC, 1325 J Street, Room 1440, Sacramento, California 95814.

For any further assistance or to discuss any aspect of your request, you have the right to contact the U.S. Army Corps of Engineers FOIA Public Liaison. Additionally, you have the right to contact the Office of Government Information Services (OGIS) to inquire about FOIA mediation services they offer. Contact Information:

U.S. Army Corps of Engineers  
FOIA Public Liaison  
441 G. Street, NW  
ATTN: CECC-L (Emily Green)  
Washington, DC 20314-1000  
Email: foia-liaison@usace.army.mil  
Phone: 202-761-4791

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, MD 20740-6001  
E-Mail: ogis@nara.gov  
Phone: 202-741-5770 or  
Toll Free: 877-684-6448

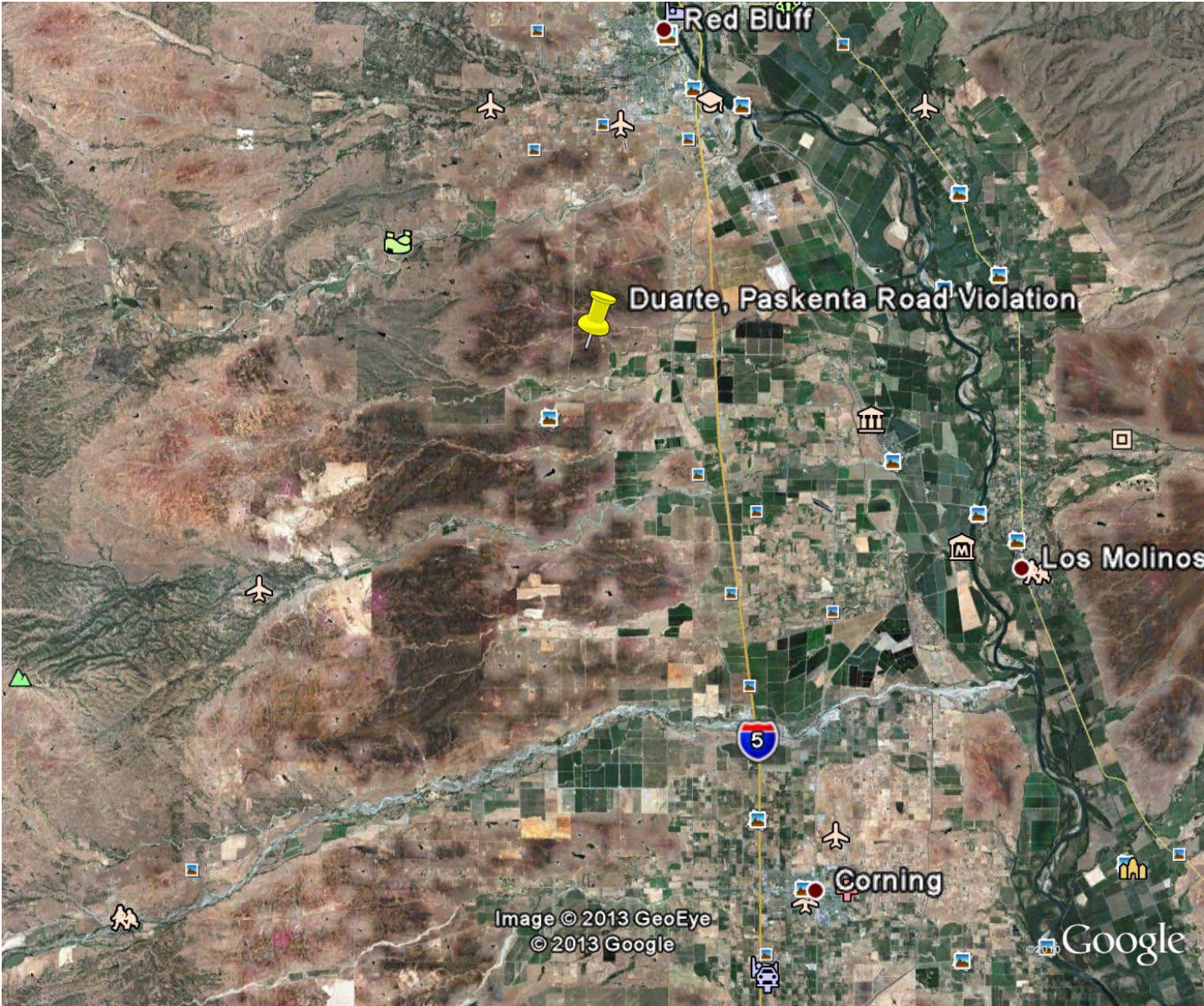
If you have any questions regarding the provided information, please contact Ms. Andrea Vaiasicca, FOIA Specialist, by phone at (916) 550-9104, or by email at [Andrea.L.Vaiasicca@usace.army.mil](mailto:Andrea.L.Vaiasicca@usace.army.mil).

Sincerely,

A handwritten signature in black ink, appearing to read "A. L. Faustino". The signature is written in a cursive style with a large, looped initial "A".

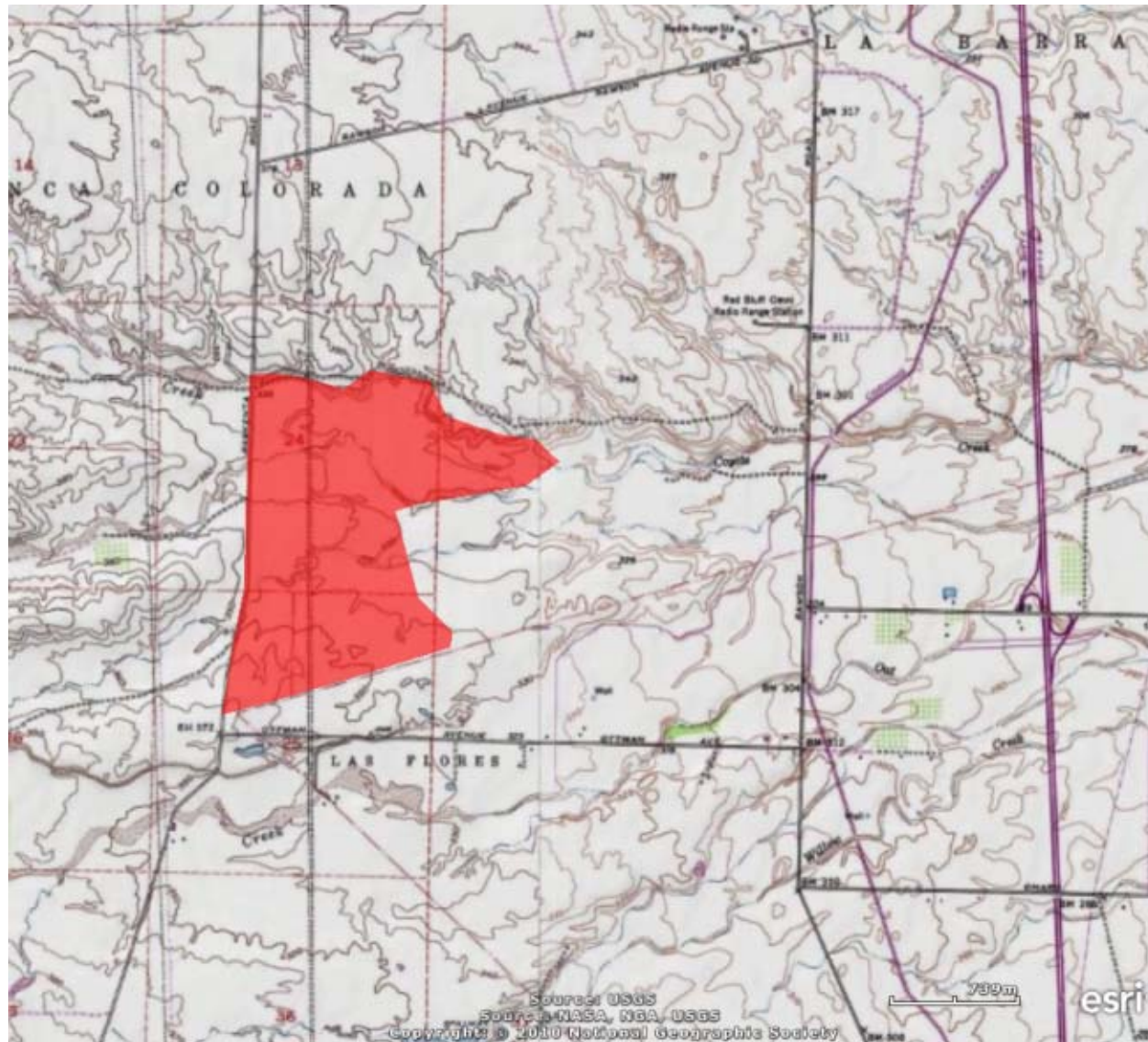
A. L. Faustino  
District Counsel  
Initial Denial Authority

Enclosures





## Duarte, Paskenta Road Violation



**PRELIMINARY JURISDICTIONAL DETERMINATION FORM**  
**Sacramento District**

**This preliminary JD finds that there “may be” waters of the United States on the subject project site, and identifies all aquatic features on the site that could be affected by the proposed activity, based on the following information:**

Regulatory Branch: **California North**      File/ORM #: **SPK-2013-00015**      PJD Date: **February 14, 2013**

|  |  |
|--|--|
| State: <b>CA</b> City/County: <b>Tehama County</b><br>Nearest Waterbody: <b>Coyote Creek</b><br><br>Location (Lat/Long): <b>40.08274°, -122.268048°</b><br><br>Size of Review Area: <b>400</b> acres | Name/Address <b>John Duarte</b><br>Of Property <b>Duarte Nursery</b><br>Owner/ <b>1555 Baldwin Road</b><br>Potential <b>Hughson, California 95326</b><br>Applicant |
|--|--|

|  |   |
|--|---|
| <b>Identify (Estimate) Amount of Waters in the Review Area</b><br><u><b>Non-Wetland Waters:</b></u><br>linear feet      ft wide <b>2.7</b> acre(s)<br>Stream Flow: <b>Mixed</b><br><br><u><b>Wetlands:</b></u> <b>20</b> acre(s)      Cowardin <b>Palustrine, emergent</b><br>Class: | Name of any Water Bodies      Tidal:<br>on the site identified as<br>Section 10 Waters:      Non-Tidal:<br><br><input type="checkbox"/> Office (Desk) Determination<br><input checked="" type="checkbox"/> Field Determination:<br>Date(s) of Site Visit(s): <b>November 27, 2012, and December 6, 2012</b> |
|--|---|

**SUPPORTING DATA: Data reviewed for preliminary JD (check all that apply – checked items should be included in case file and, where checked and requested, appropriately reference sources below)**

- Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:
- Data sheets prepared/submitted by or on behalf of the applicant/consultant.
- Data sheets prepared by the Corps.
- Corps navigable waters’ study.
- U.S. Geological Survey Hydrologic Atlas:
  - USGS NHD data.
  - USGS HUC maps.
- U.S. Geological Survey map(s). Cite scale & quad name: **1:24K; CA-WEST OF GERBER**
- USDA Natural Resources Conservation Service Soil Survey.
- National wetlands inventory map(s).
- State/Local wetland inventory map(s).
- FEMA/FIRM maps.
- 100-year Floodplain Elevation (if known):
- Photographs:       Aerial  
     Other
- Previous determination(s). File no. and date of response letter: **199400697, October 26, 1994**
- Other information (please specify):

**IMPORTANT NOTE: The information recorded on this form has not necessarily been verified by the Corps and should not be relied upon for later jurisdictional determinations.**

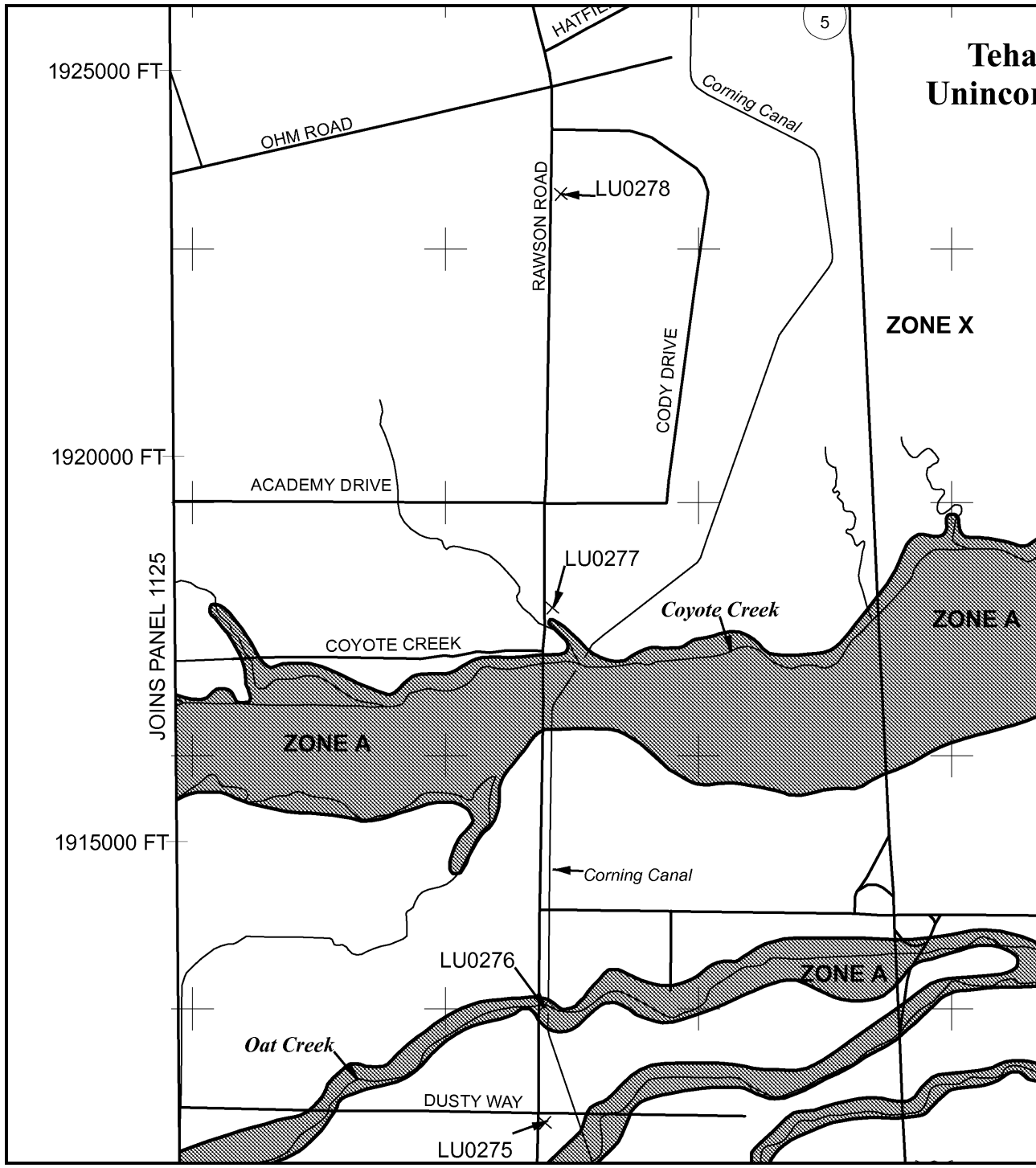
\_\_\_\_\_  
 Signature and Date of Regulatory Project Manager  
 (REQUIRED)

\_\_\_\_\_  
 Signature and Date of Person Requesting Preliminary JD  
 (REQUIRED, unless obtaining the signature is impracticable)

**EXPLANATION OF PRELIMINARY AND APPROVED JURISDICTIONAL DETERMINATIONS:**

1. The Corps of Engineers believes that there may be jurisdictional waters of the United States on the subject site, and the permit applicant or other affected party who requested this preliminary JD is hereby advised of his or her option to request and obtain an approved jurisdictional determination (JD) for that site. Nevertheless, the permit applicant or other person who requested this preliminary JD has declined to exercise the option to obtain an approved JD in this instance and at this time.

2. In any circumstance where a permit applicant obtains an individual permit, or a Nationwide General Permit (NWP) or other general permit verification requiring "preconstruction notification" (PCN), or requests verification for a non-reporting NWP or other general permit, and the permit applicant has not requested an approved JD for the activity, the permit applicant is hereby made aware of the following: (1) the permit applicant has elected to seek a permit authorization based on a preliminary JD, which does not make an official determination of jurisdictional waters; (2) that the applicant has the option to request an approved JD before accepting the terms and conditions of the permit authorization, and that basing a permit authorization on an approved JD could possibly result in less compensatory mitigation being required or different special conditions; (3) that the applicant has the right to request an individual permit rather than accepting the terms and conditions of the NWP or other general permit authorization; (4) that the applicant can accept a permit authorization and thereby agree to comply with all the terms and conditions of that permit, including whatever mitigation requirements the Corps has determined to be necessary; (5) that undertaking any activity in reliance upon the subject permit authorization without requesting an approved JD constitutes the applicant's acceptance of the use of the preliminary JD, but that either form of JD will be processed as soon as is practicable; (6) accepting a permit authorization (e.g., signing a proffered individual permit) or undertaking any activity in reliance on any form of Corps permit authorization based on a preliminary JD constitutes agreement that all wetlands and other water bodies on the site affected in any way by that activity are jurisdictional waters of the United States, and precludes any challenge to such jurisdiction in any administrative or judicial compliance or enforcement action, or in any administrative appeal or in any Federal court; and (7) whether the applicant elects to use either an approved JD or a preliminary JD, that JD will be processed as soon as is practicable. Further, an approved JD, a proffered individual permit (and all terms and conditions contained therein), or individual permit denial can be administratively appealed pursuant to 33 C.F.R. Part 331, and that in any administrative appeal, jurisdictional issues can be raised (see 33 C.F.R. 331.5(a)(2)). If, during that administrative appeal, it becomes necessary to make an official determination whether CWA jurisdiction exists over a site, or to provide an official delineation of jurisdictional waters on the site, the Corps will provide an approved JD to accomplish that result, as soon as is practicable.



Original Flood Insurance Program at 1-800-658-6620.

**MAP SCALE 1" = 2000'**

**NATIONAL FLOOD INSURANCE PROGRAM**

**PANEL 1150H**

**FIRM**  
**FLOOD INSURANCE RATE MAP**

**TEHAMA COUNTY, CALIFORNIA AND INCORPORATED AREAS**

**PANEL 1150 OF 1775**

(SEE MAP INDEX FOR FIRM PANEL LAYOUT)

CONTAINS:

| COMMUNITY     | NUMBER | PANEL | SUFFIX |
|---------------|--------|-------|--------|
| TEHAMA COUNTY | 065064 | 1150  | H      |

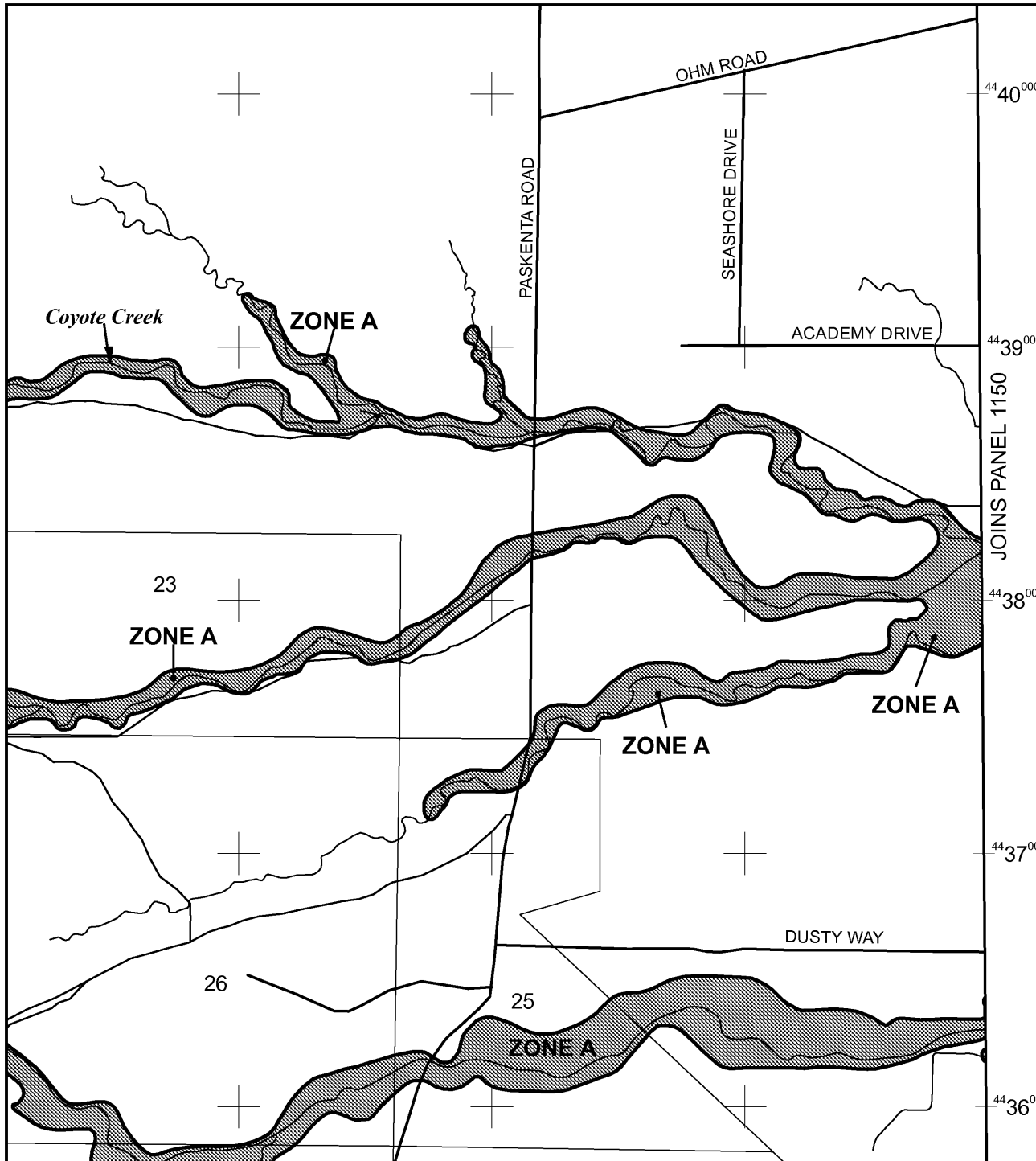
Notice to User: The **Map Number** shown below should be used when placing map orders; the **Community Number** shown above should be used on insurance applications for the subject community.

**MAP NUMBER**  
**06103C1150H**

**EFFECTIVE DATE**  
**SEPTEMBER 29, 2011**

Federal Emergency Management Agency

This is an official copy of a portion of the above referenced flood map. It was extracted using F-MIT On-Line. This map does not reflect changes or amendments which may have been made subsequent to the date on the title block. For the latest product information about National Flood Insurance Program flood maps check the FEMA Flood Map Store at [www.msc.fema.gov](http://www.msc.fema.gov)



Original Flood Insurance Program at 1-800-658-6620.

**MAP SCALE 1" = 2000'**

NATIONAL FLOOD INSURANCE PROGRAM

PANEL 1125H

**FIRM**  
FLOOD INSURANCE RATE MAP

TEHAMA COUNTY,  
CALIFORNIA  
AND INCORPORATED AREAS

PANEL 1125 OF 1775

(SEE MAP INDEX FOR FIRM PANEL LAYOUT)

CONTAINS:

| COMMUNITY     | NUMBER | PANEL | SUFFIX |
|---------------|--------|-------|--------|
| TEHAMA COUNTY | 065064 | 1125  | H      |

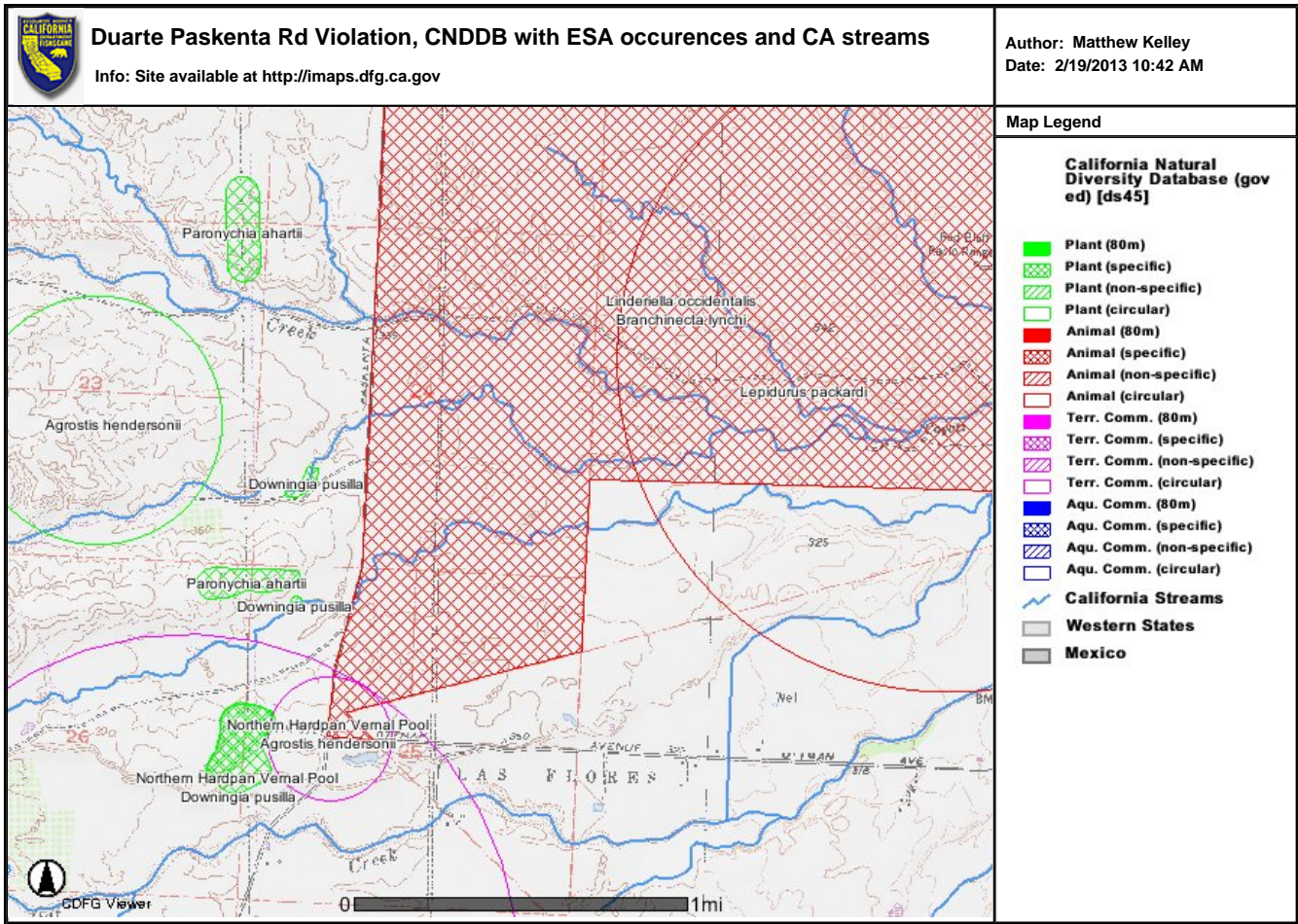
Notice to User: The **Map Number** shown below should be used when placing map orders; the **Community Number** shown above should be used on insurance applications for the subject community.

**MAP NUMBER**  
06103C1125H

**EFFECTIVE DATE**  
SEPTEMBER 29, 2011

Federal Emergency Management Agency

This is an official copy of a portion of the above referenced flood map. It was extracted using F-MIT On-Line. This map does not reflect changes or amendments which may have been made subsequent to the date on the title block. For the latest product information about National Flood Insurance Program flood maps check the FEMA Flood Map Store at [www.msc.fema.gov](http://www.msc.fema.gov)



### Duarte Violation aerial with photopoints















SUBJECT: Initial Enforcement Investigation Report, SPK-2013-00015

1. Information Reported to the Corps:

a. Responsible Party(s)/Owner Name and Contact Information:

John Duarte  
Duarte Nursery  
1555 Baldwin Road  
Hughson, California 95326

b. Affected Waters: Unnamed intermittent and ephemeral drainages, seasonal wetlands, and vernal pool habitat that are hydrologically connected and tributary to Coyote Creek. Approximately 22.53 ac of waters and wetlands in 151 individual features have either been lost or directly impacted by the activities that have occurred on site without a permit. These acreages were calculated using the previously verified 1994 delineation map of the property for the Hancock Tehama County Project, 199400697.

c. Unauthorized Activities Reported: On November 28, 2012, at approximately 1500 hrs, I was returning from a site visit on Paskenta Road in Tehama County several miles south of this site. When driving north on Paskenta Road I observed agricultural activities occurring on the parcel within the polygon North of Dusty Avenue, West of Paskenta Road, South of Ohm Road, and East of Rawson Road. I observed a rubber tracked agricultural tractor with a seven shank ripper attached to the tractors three point hitch. This tractor was sitting in the recently ripped field East of Paskenta Road and South of Coyote Creek. The ripping appeared to have gone through and impacted seasonal wetlands and drainages on the site that are tributary abutting, and adjacent to Coyote Creek.

2. Information Gathered from Office Sources: A search of the Corps' Regulatory database did not reveal any recent permitting or jurisdictional determinations for the site. The search did reveal project identification number 199400697 for this property. In 1994 the owner Mr. Lee Hancock provided a delineation of wetlands and waters of the United States for the site for the Corps to verify. In addition Mr. Hancock was perusing creating a development and mitigation bank on the property. On October 26, 1994, the Corps of Engineers issued an approved jurisdictional determination for the Hancock Property that verified the delineation maps sheets 1-5 that identified 186.17 acres of wetlands and other waters of the United States on site. The Hancock project was never constructed and based on aerial photographs the site remained as grazing land until July 2011. In July 2011 it appears that initial activities were started to place the grazing land in the northern portion of the site into crop production. This information was confirmed by Mr. John Duarte who purchased the entire property from Roger J Lapant in March 2012. Mr. Duarte advised that Mr. Lapant planted the wheat crop just before the property was listed for sale in 2011, when he had first looked at the property. The initial activities included the cultivation of the pasture and planting of wheat in uplands and seasonal wetlands on the portion of the site north of Coyote Creek. Mr. Duarte sold the northern portion of the site to Farmland Management Services in November 2012. Mr. Duarte kept the approximately 400 acres south of Coyote Creek and contracted with Mr. Brad Munson to plant the site in winter wheat. Based on Mr. Duarte's December 11, 2012, statements the ripping activities that were observed in November 2012, were the initial activities to cultivate the soil for the planting of the wheat crop.

3. Project Information: The site is located on or near Coyote Creek, Sections 24 and 25, Township 26 North, Range 4 West, Tehama County, CA. Lat 40.084126°, Lon -122.265744°; USGS West of Gerber, CA 7.5 min quadrangle.

4. Information Obtained from Site Visit & Existing Environmental Setting:

a. Jurisdiction - The site is approximately 400 acres in size and consists of rolling topography that previously consisted of upland grasses interspersed with vernal pools, vernal swales, and small drainages. The site's hydrology originates both on and off site and the water is conveyed through the system of swales, pools and drainages and discharges into Coyote Creek. These hydrologically connected wetlands and waters are abutting and/or adjacent to and including several small unnamed intermittent streams tributary to Coyote Creek a relatively permanent intermittent tributary to Oat Creek a tributary to the Sacramento River approximately 7 miles downstream and East of the project site.

The lower reaches of Coyote Creek, Oat Creek, and all of the Lower Sacramento River are designated critical habitat for and are known to support Federally-listed salmon and steelhead. The small unnamed streams on-site are tributary to Coyote Creek and are mapped on the Tehama County Soil Survey, USGS 7.5 min West of Gerber Quadrangle, the Federal Emergency Management Agency's flood plain maps, and California Natural Diversity Database's California Streams data layer. The wetlands and water on-site are hydrologically connected the Coyote Creek and help to moderate flood flows due to storm events, provide filtration of sediments and pollutants prior to entering Coyote Creek, and are designated critical habitat and are known to support the Federally-listed vernal pool fairy shrimp (*Branchinecta lynchi*) and the vernal pool tadpole shrimp (*Lepidurus packardii*). The wetlands and waters on site are hydrologically connected the Sacramento River a Rivers and Harbors Act Section 10 navigable waterway and have a significant nexus to that Traditionally Navigable Water and are therefore are waters of the United States themselves in accordance with 33 CFR 328.3(a)3.

b. Site Details - The ongoing work was viewed from the county roads that border the site on November 27 and December 6, 2012. The property is approximately 400 acres in size south of Coyote Creek. Based on the delineation of waters of the United States that was conducted and verified in October 1994, approximately 186.17 acres of waters of the United States were on a larger parcel that included land both north and South of Coyote Creek. The delineation described the vernal pool and swale complexes hydrology as originating offsite and onsite. The majority of the water is conveyed through the system of swales and pools and discharges into Coyote Creek. This description of the hydrology in 1994 is consistent with the conditions on the site where the hydrology has not been permanently altered. Based on a review of aerial photography the site remained as grazing land until Mr. Duarte initiated the conversion of the grazing land to crop production. Based on review of the 1994 verified delineation for the site, the August 18, 2012 aerial, and the December 6, 2012, site visit approximately 22.53 acres of wetlands and waters in 151 features have either been lost entirely or directly affected by these activities.

The site is currently bounded on at least two sides that have undisturbed or mostly undisturbed drainages and wetlands to use as reference sites. This includes the large property on the west side of Paskenta Road across from this site which contains similar aquatic resources to what occurred on the impact site. In some cases features on the reference sites continued onto the project site.

5. Elements of a Violation: Section 404

- a. Section 10
  - Work in, under, or over navigable waters
  - Without authorization or in violation of a Department of the Army permit
  
- b. Section 404
  - Discharge of
  - Pollutants into
  - Waters of the United States from a
  - Point source by any
  - Person
  - Without authorization, exemption, or in violation of a Department of the Army permit

6. Information Obtained from Alleged Violator: On December 11, 2012, I contacted Mr. John Duarte, Duarte Nursery, 1555 Baldwin Road, Hughson, California 95326, to discuss the farming activities occurring on the property bounded by Ohm Road, Paskenta Road, Rawson Road, and Dusty Way, South of Red Bluff, California. Mr. Duarte advised that he purchase the approximately 2000 ac parcel from Mr. Roger Jack Lapant in the spring of 2012. He stated that he sold the northern 1600 acres to Farmland Management Services and kept the southern 400 acres to grow wheat. He stated that he contracted with Mr. Brad Munson to cultivate the land and plant the winter wheat crop. I advised that I had been by the site on December 6, 2012, and seen the site was being ripped. He stated that the site would be chiseled and disked prior to planting. I advised that there are vernal pools and wetlands that are being impacted and that no Clean Water Act permit has been issued for the work. Additionally, I advised that the site is known occupied and designated critical habitat for Federally-listed threatened and/or endangered species. Mr. Duarte stated that North Star Engineering did the environmental clearance for the site and completed a delineation of the site. They determined that most of the site is designated prior converted cropland and some is farmed wetlands. There were a few wetlands in the southwest corner but that they were staying away from them. I advised that North Star Engineering cannot legally make a prior converted or farmed wetland determination, only NRCS can make that determination. I also stated that for the purposes of the Clean Water Act only the Corps of Engineers or the US Environmental Protection Agency can make a determination that aquatic features are or are not jurisdictional waters of the United States. I advised Mr. Duarte that the wetlands were not being avoided and had been ripped. Since agricultural conversion that results in the discharge of dredged or fill material requires a CWA 404 permit and no permit has been issued, the work conducted is in violation of the Clean Water Act. I advised that he should Cease and Desist any additional fills in waters of the United States, including wetlands.

7. Information Obtained from Local Resource Agencies: The US Fish and Wildlife Service (USFWS), Regional Water Quality Control Board, and the California Department of Fish and Game (CDFG) were contacted during the investigation of the activities on site. All agencies contacted stated that their agency would have some permitting requirements for the activities occurring. Review of CDFG's California Natural Diversity Database and USFWS' data indicates that the entire project area is within the designated critical habitat range for Federally-listed as threatened vernal pool fairy shrimp (*Branchinecta lynchi*). The presence of *B. lynchi* has been documented on site in 1994, 1996, 1997, and 2001. Additionally, the federally listed as endangered (*Lepidurus packardii*) have been located on site in 2001.

8. Description of Findings and Impact Assessment: Based on the information as described above the portions of the property South of Coyote Creek, which comprises approximately 400 acres agricultural conversion has been initiated. Approximately 400 acres have been ripped in preparation for planting in wheat in 2012. These activities

collectively have impacted approximately 22.53 acres of waters and wetlands that have previously been verified in 1994 as waters of the United States. The activities to establish the winter wheat crop included ripping the site to approximately 3 feet deep. The actions of ripping the site loosened and mixed the soil layers, causing fill to be placed in the wetlands and the ripping of the soil appears to have loosened the substrate and opened the soil layers so that water penetrates deeper rather than perching on the surface and/or saturating the upper layers. The water perched on the surface and within the upper 12 inches is necessary for the formation and continued success of the vernal pool digressional wetland habitats that occurred on site. This action appears to have eliminated many of the smaller features and reduced the area and the depth of the larger features. The features that were ripped may be lost and not restorable.

9. Other: Based on information provided by Christy Dawson, North Star Engineering, Mr. Duarte was provided a copy of the delineation that they had conducted for the previous owner Mr. Lapant. Upon purchasing the property Mrs. Dawson was contacted by Mr. Duarte and advised to contact the Natural Resource Conservation Service and withdraw the request for the prior converted cropland determination that was made. Based on discussions with Larry Branham, the Tehama County District Conservationist for the NRCS, the request for wetland determination was withdrawn prior to any determinations being made by his agency. Mr. Duarte then asked North Star Engineering to work on a property split and to split the previously conducted delineation into two reports one for the northern area and one for the southern area. Along with the revised reports North Star Engineering submitted a May 23, 2012, letter to Mr. Duarte advising him that the delineation should be submitted to the Corps for verification, that their delineation does not constitute permission to work in waters, and what the potential penalties could be for violations of the Clean Water Act. Prior to me contacting Mr. Duarte on December 11, 2012, the Corps had received no contact from Mr. Duarte or anyone representing him regarding the presence or absence of wetlands, waters or the need for permitting for his project. Based on this information I can only conclude that the presence of potential wetlands and waters were known and that work conducted there could constitute a violation of the Clean Water Act.

10. Recommendations for Resolution of Unauthorized Activity:

- The Corps of Engineers should **retain** the case and resolve the unauthorized activity, as the completed work does not constitute an activity identified in Part III D.1 of the Enforcement MOA.

*Tolling Agreement:*

- Should be sent before After-the-Fact application is accepted.
- Should be sent with After-the-Fact jurisdiction determination.
- The Corps of Engineers will act as enforcement lead as activity is a **noncompliance of a Corps issued permit**.
- The Corps of Engineers will notify EPA that because of limited staff, resources we will not take an action on a permit condition violation (see MOA Part III D.4).
- The Corps of Engineers has determined the completed work qualifies for **emergency procedures** pursuant to 33 CFR 325.2(e)(4). Work may continue subject to appropriate limitations and conditions as prescribed define these while the violation is being resolved.



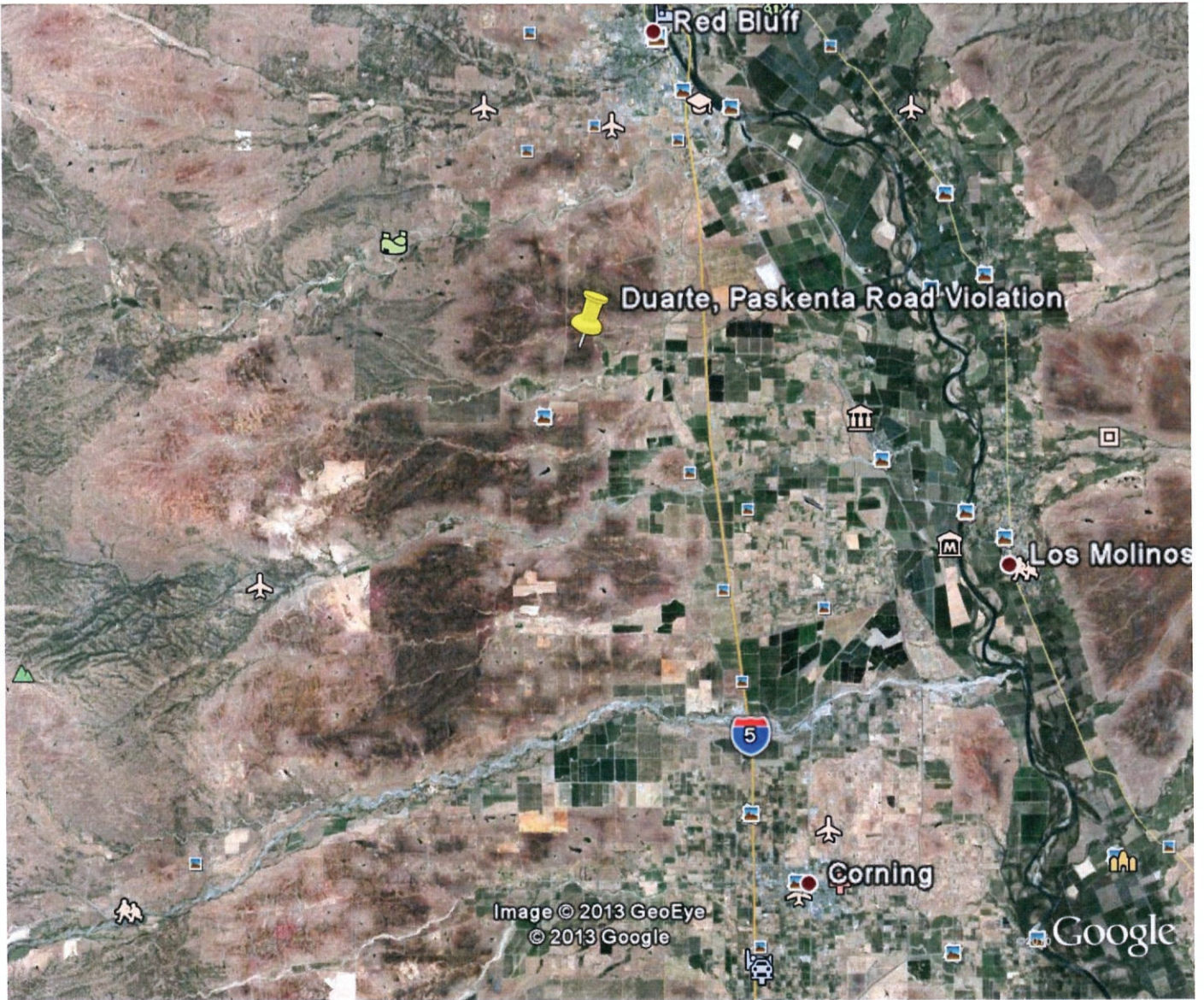
- Initial corrective measures** are required. As a result of the investigation, coordination, and preliminary evaluation of the case, initial corrective measures are required. In coordination with the EPA, USFWS, and other Federal, state, and local agencies, see 33 CFR 326.3(d) the responsible party(s) is required to specify the measures required and time limits for completing this work. Compliance with the order will not foreclose the Government's options to initiate appropriate legal action or to later require the submission of a permit application.
  
- An After-the-Fact permit application should not be accepted**
  
- In accordance with the 1989 Corps-EPA Memorandum of Agreement concerning Federal enforcement for the Section 404 program of the Clean Water Act (MOA), the Corps of Engineers has determined the completed work does constitute an activity identified in Part III.D.1 of the MOA. Therefore, the EPA should accept the case and resolve the unauthorized activity. **Referral to EPA** is recommended because
  - We have documentation showing that the responsible party is **repeat** violator of Section 404 of the Clean Water Act.
  - The unauthorized activity is considered **flagrant** because there appears to be prior knowledge of the Clean Water Act permitting program and the presence of wetlands and waters on site. Additionally, the consequences of violating the Clean Water Act were conveyed to Mr. Duarte by the environmental consults he hired to advise him.
  - EPA requests this case.** Part III.D (Lead Enforcement Agency Selection) 1.c states the EPA will act as lead where **it requests a class of cases or a particular case.**
  - We believe an **EPA administrative penalty** is warranted. The violations that have occurred on-site have impacted a substantial amount of wetlands that based on the investigation thus far appear to be in excess of 20 acres. Based on the acreage of the wetlands and waters impacted and the scarcity and importance of the vernal pool wetland habitat impacted, this appears to have resulted in significant environmental harm.

**(b) (6)**

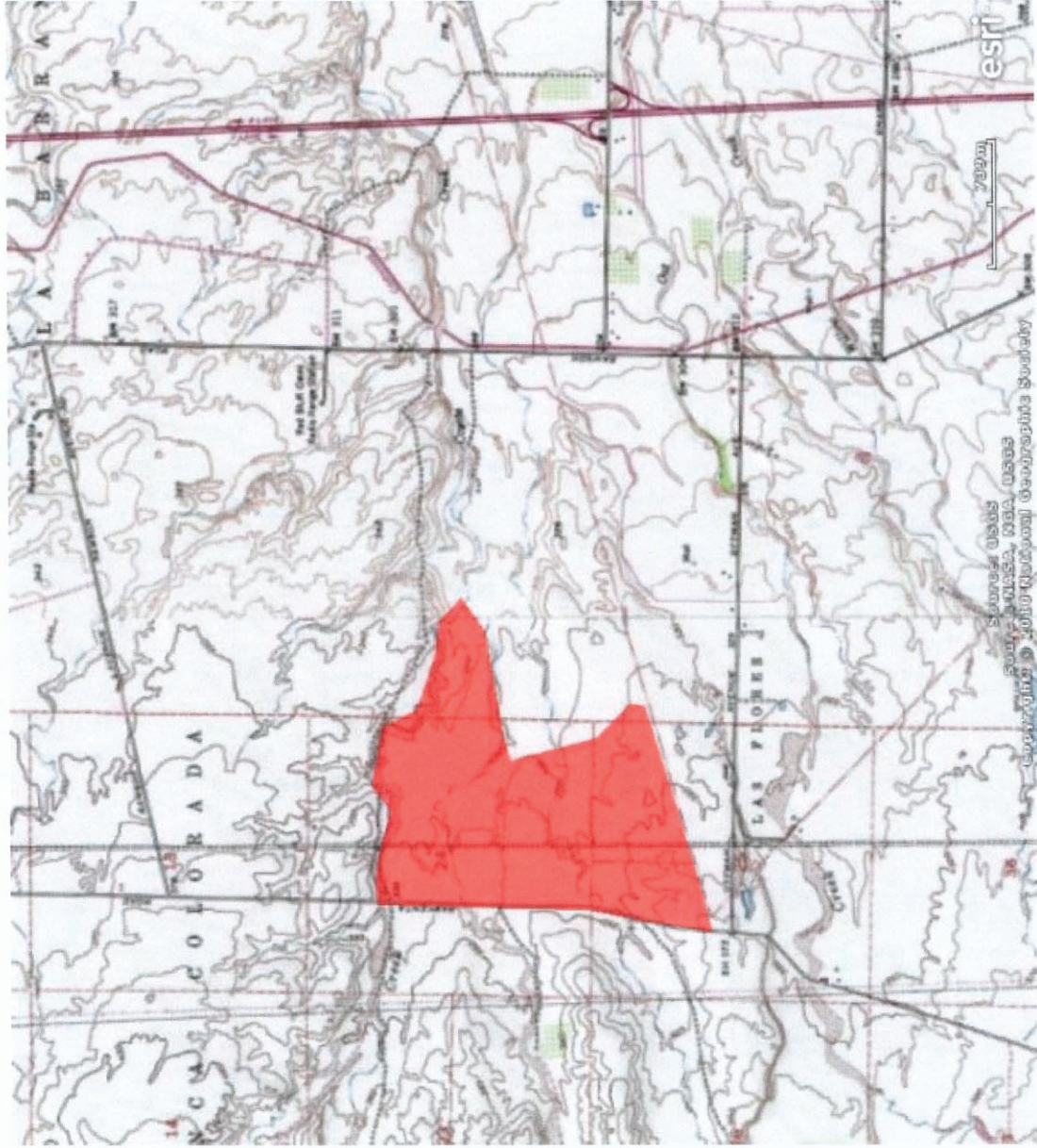
Chief, Redding Regulatory Office

Appendices:

- A. Vicinity Map
- B. West of Gerber 7.5 Min USGS Quadrangle
- C. Preliminary Jurisdictional Form
- D. FEMA Flood Maps, Pgs 1 & 2
- E. CNDDDB Map with CA streams and ESA occurrences
- F. Aerial photograph with photo points
- G. Ground photos 1-5



Duarte, Paskenta Road Violation



**PRELIMINARY JURISDICTIONAL DETERMINATION FORM**  
**Sacramento District**

**This preliminary JD finds that there "may be" waters of the United States on the subject project site, and identifies all aquatic features on the site that could be affected by the proposed activity, based on the following information:**

Regulatory Branch: **California North**      File/ORM #: **SPK-2013-00015**      PJD Date: **February 14, 2013**

|  |  |
|--|--|
| State: <b>CA</b> City/County: <b>Tehama County</b><br>Nearest Waterbody: <b>Coyote Creek</b><br><br>Location (Lat/Long): <b>40.08274°, -122.268048°</b><br><br>Size of Review Area: <b>400 acres</b> | Name/Address <b>John Duarte</b><br>Of Property <b>Duarte Nursery</b><br>Owner/ <b>1555 Baldwin Road</b><br>Potential <b>Hughson, California 95326</b><br>Applicant |
|--|--|

|  |   |
|--|---|
| <b>Identify (Estimate) Amount of Waters in the Review Area</b><br><b>Non-Wetland Waters:</b><br>linear feet                      ft wide <b>2.7 acre(s)</b><br>Stream Flow: <b>Mixed</b><br><br><b>Wetlands: 20 acre(s)</b> Cowardin <b>Palustrine, emergent</b><br>Class: | Name of any Water Bodies      Tidal:<br>on the site identified as<br>Section 10 Waters:              Non-Tidal:<br><br><input type="checkbox"/> Office (Desk) Determination<br><input checked="" type="checkbox"/> Field Determination:<br>Date(s) of Site Visit(s): <b>November 27, 2012, and</b><br><b>December 6, 2012</b> |
|--|---|

**SUPPORTING DATA: Data reviewed for preliminary JD (check all that apply – checked items should be included in case file and, where checked and requested, appropriately reference sources below)**

- Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:
- Data sheets prepared/submitted by or on behalf of the applicant/consultant.
- Data sheets prepared by the Corps.
- Corps navigable waters' study.
- U.S. Geological Survey Hydrologic Atlas:
  - USGS NHD data.
  - USGS HUC maps.
- U.S. Geological Survey map(s). Cite scale & quad name: **1:24K; CA-WEST OF GERBER**
- USDA Natural Resources Conservation Service Soil Survey.
- National wetlands inventory map(s).
- State/Local wetland inventory map(s).
- FEMA/FIRM maps.
- 100-year Floodplain Elevation (if known):
- Photographs:       Aerial  
                                   Other
- Previous determination(s). File no. and date of response letter: **199400697, October 26, 1994**
- Other information (please specify):

**IMPORTANT NOTE: The information recorded on this form has not necessarily been verified by the Corps and should not be relied upon for later jurisdictional determinations.**

|  |   |
|--|---|
| Signature and Date of Regulatory Project Manager<br>(REQUIRED) | Signature and Date of Person Requesting Preliminary JD<br>(REQUIRED, unless obtaining the signature is impracticable) |
|--|---|

**EXPLANATION OF PRELIMINARY AND APPROVED JURISDICTIONAL DETERMINATIONS:**

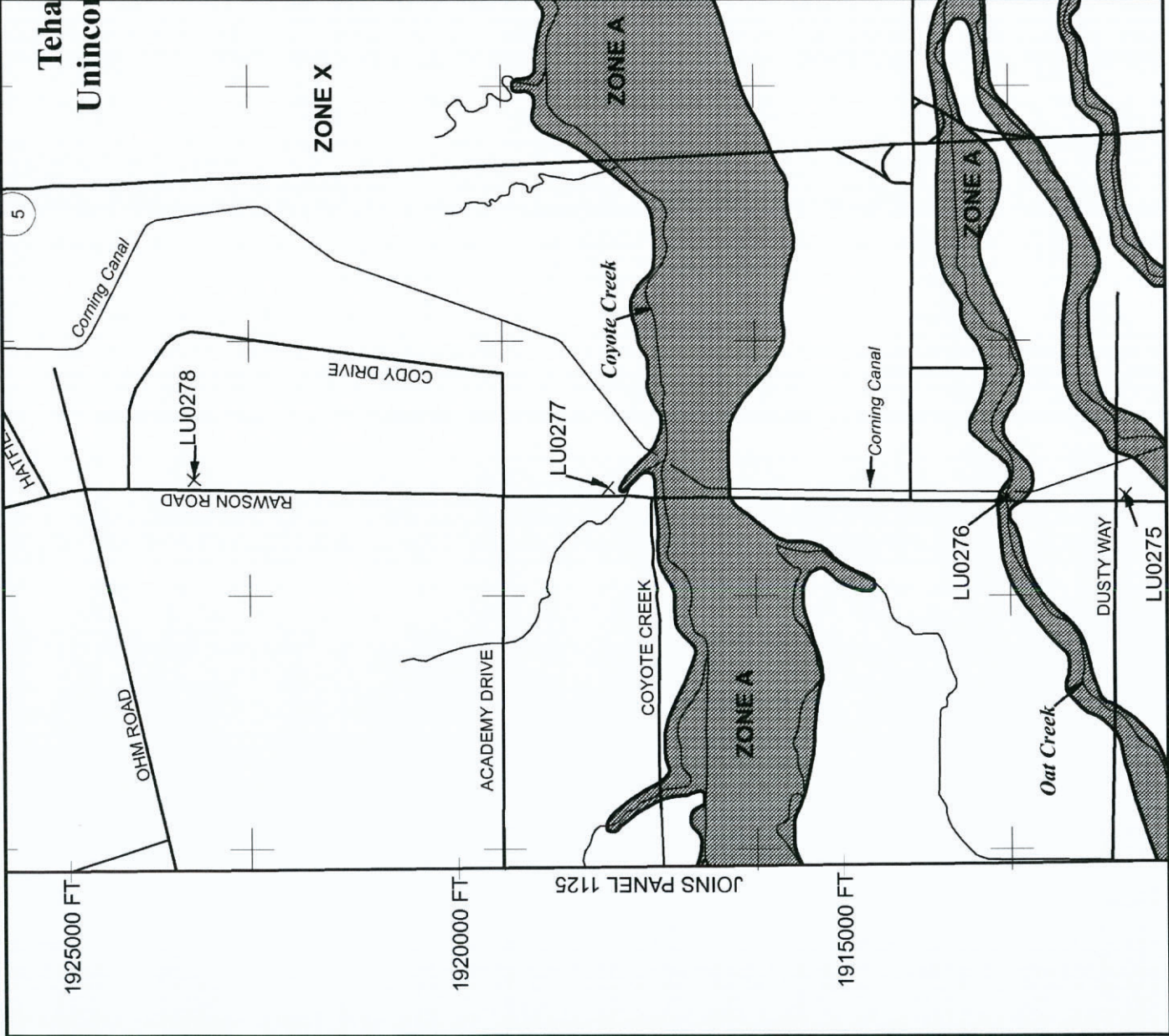
1. The Corps of Engineers believes that there may be jurisdictional waters of the United States on the subject site, and the permit applicant or other affected party who requested this preliminary JD is hereby advised of his or her option to request and obtain an approved jurisdictional determination (JD) for that site. Nevertheless, the permit applicant or other person who requested this preliminary JD has declined to exercise the option to obtain an approved JD in this instance and at this time.

2. In any circumstance where a permit applicant obtains an individual permit, or a Nationwide General Permit (NWP) or other general permit verification requiring "preconstruction notification" (PCN), or requests verification for a non-reporting NWP or other general permit, and the permit applicant has not requested an approved JD for the activity, the permit applicant is hereby made aware of the following: (1) the permit applicant has elected to seek a permit authorization based on a preliminary JD, which does not make an official determination of jurisdictional waters; (2) that the applicant has the option to request an approved JD before accepting the terms and conditions of the permit authorization, and that basing a permit authorization on an approved JD could possibly result in less compensatory mitigation being required or different special conditions; (3) that the applicant has the right to request an individual permit rather than accepting the terms and conditions of the NWP or other general permit authorization; (4) that the applicant can accept a permit authorization and thereby agree to comply with all the terms and conditions of that permit, including whatever mitigation requirements the Corps has determined to be necessary; (5) that undertaking any activity in reliance upon the subject permit authorization without requesting an approved JD constitutes the applicant's acceptance of the use of the preliminary JD, but that either form of JD will be processed as soon as is practicable; (6) accepting a permit authorization (e.g., signing a proffered individual permit) or undertaking any activity in reliance on any form of Corps permit authorization based on a preliminary JD constitutes agreement that all wetlands and other water bodies on the site affected in any way by that activity are jurisdictional waters of the United States, and precludes any challenge to such jurisdiction in any administrative or judicial compliance or enforcement action, or in any administrative appeal or in any Federal court; and (7) whether the applicant elects to use either an approved JD or a preliminary JD, that JD will be processed as soon as is practicable. Further, an approved JD, a proffered individual permit (and all terms and conditions contained therein), or individual permit denial can be administratively appealed pursuant to 33 C.F.R. Part 331, and that in any administrative appeal, jurisdictional issues can be raised (see 33 C.F.R. 331.5(a)(2)). If, during that administrative appeal, it becomes necessary to make an official determination whether CWA jurisdiction exists over a site, or to provide an official delineation of jurisdictional waters on the site, the Corps will provide an approved JD to accomplish that result, as soon as is practicable.

NATIONAL FLOOD INSURANCE PROGRAM AT F0007030-0020.



MAP SCALE 1" = 2000'



NATIONAL FLOOD INSURANCE PROGRAM

PANEL 1150H

**FIRM**  
FLOOD INSURANCE RATE MAP  
TEHAMA COUNTY,  
CALIFORNIA  
AND INCORPORATED AREAS

PANEL 1150 OF 1775

(SEE MAP INDEX FOR FIRM PANEL LAYOUT)

CONTAINS:  
COMMUNITY: TEHAMA COUNTY  
NUMBER: 065064  
PANEL: 1150  
SHEET: 4

Notice to User: The Map Number shown below should be used when placing map orders; the Community Number shown above should be used on insurance applications for the subject community.



MAP NUMBER  
06103C1150H  
EFFECTIVE DATE  
SEPTEMBER 29, 2011

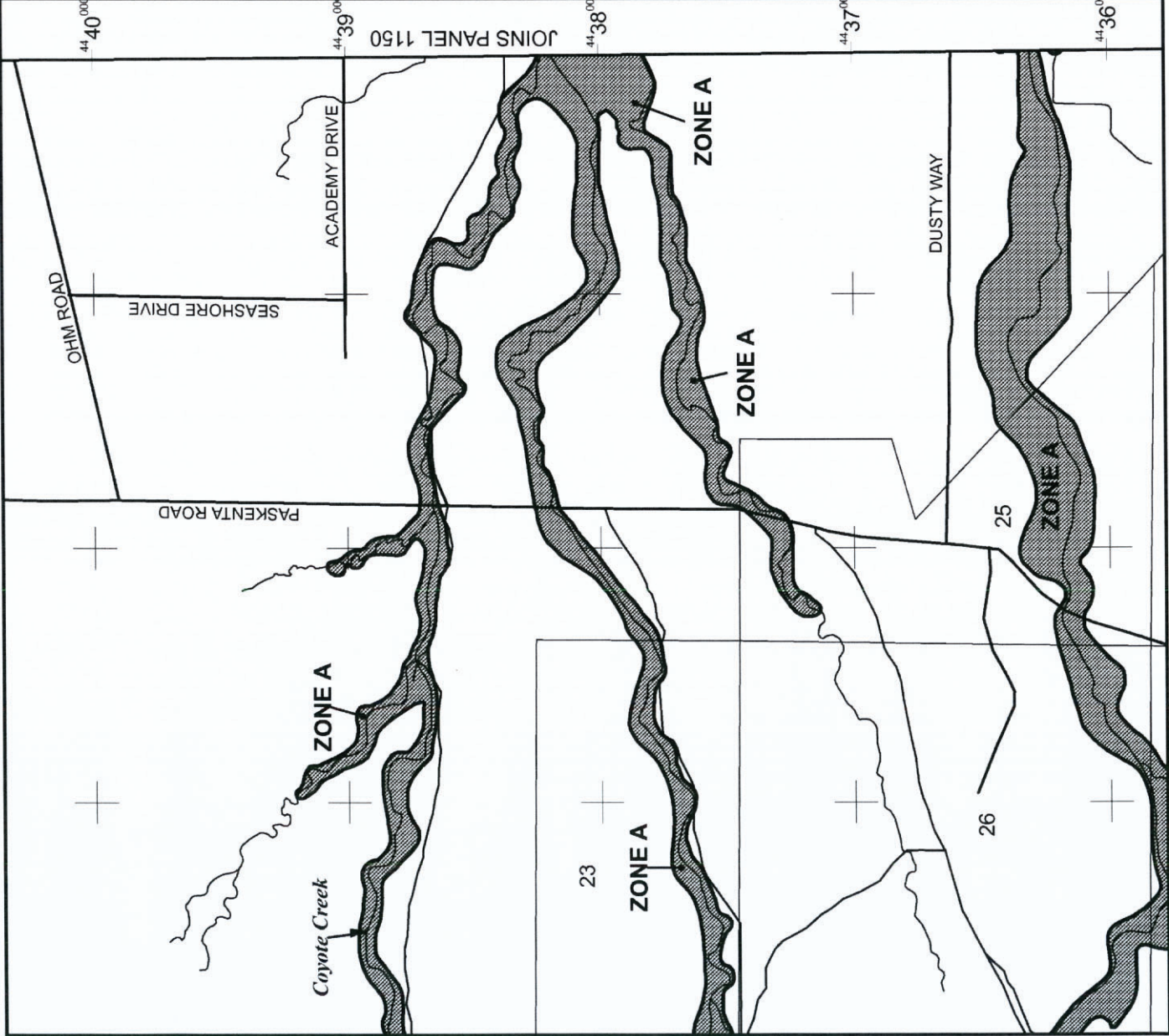
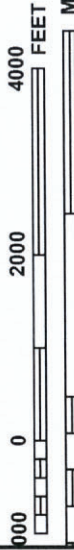
Federal Emergency Management Agency

This is an official copy of a portion of the above referenced flood map. It was extracted using F-MIT On-Line. This map does not reflect changes or amendments which may have been made subsequent to the date on the title block. For the latest product information about National Flood Insurance Program flood maps check the FEMA Flood Map Store at www.msc.fema.gov

NATIONAL FLOOD INSURANCE PROGRAM AT F00U03070020



MAP SCALE 1" = 2000'



NATIONAL FLOOD INSURANCE PROGRAM

PANEL 1125H

**FIRM**  
FLOOD INSURANCE RATE MAP  
TEHAMA COUNTY,  
CALIFORNIA  
AND INCORPORATED AREAS

PANEL 1125 OF 1775

(SEE MAP INDEX FOR FIRM PANEL LAYOUT)

CONTAINS:  
COMMUNITY NUMBER 065064  
PANEL NUMBER 1125  
SUFFIX H

Notice to User: The Map Number shown below should be used when placing map orders; the Community Number shown above should be used on insurance applications for the subject community.

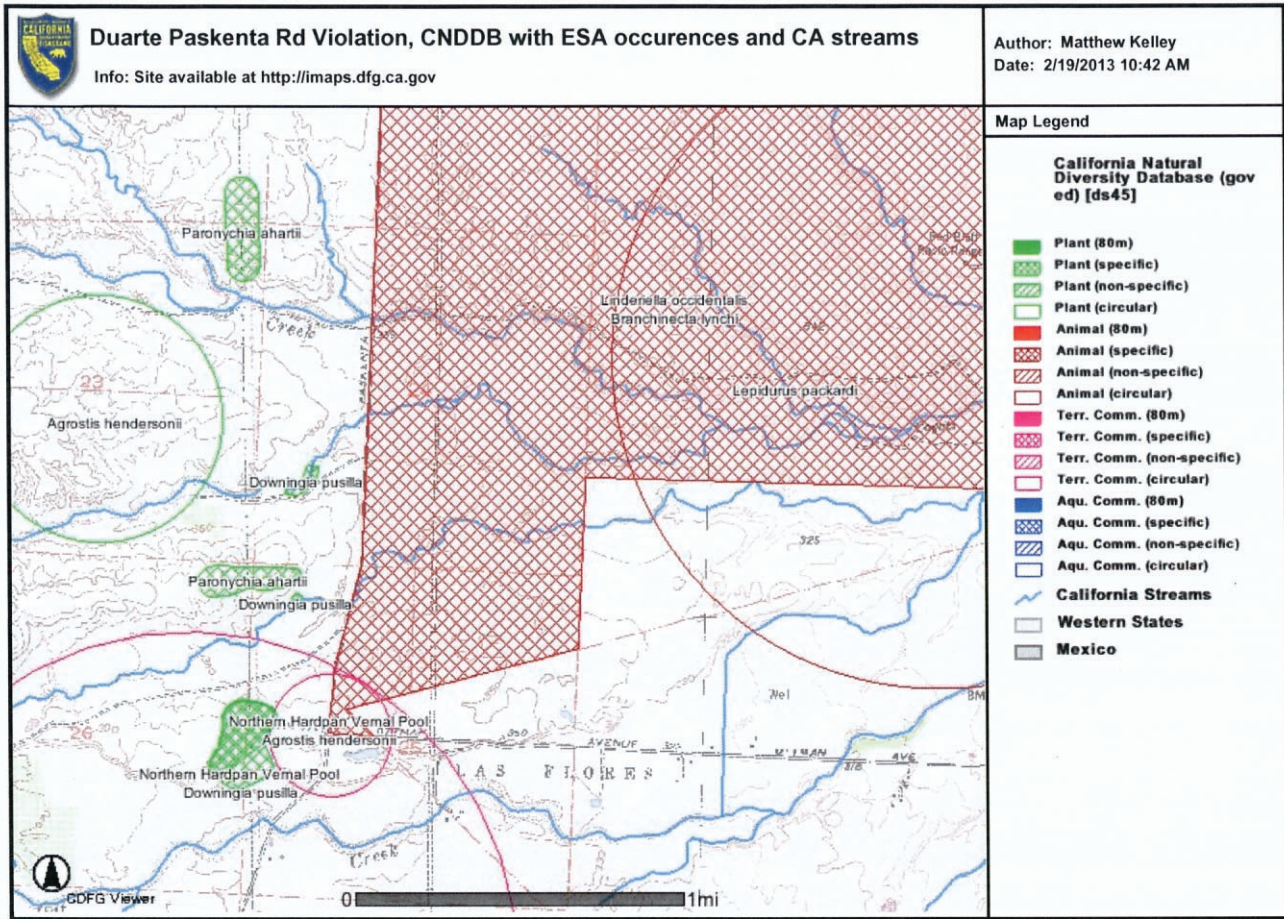


MAP NUMBER  
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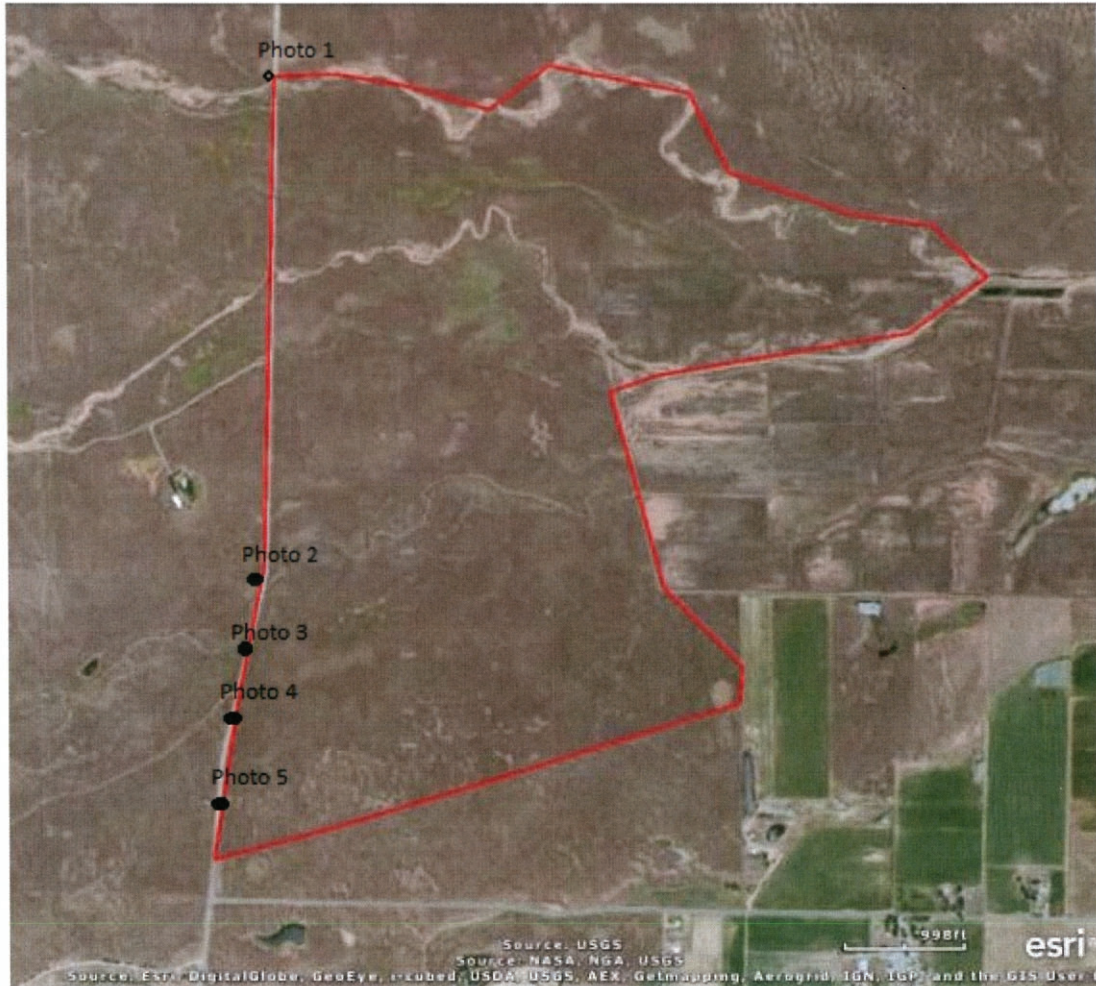
EFFECTIVE DATE  
SEPTEMBER 29, 2011

Federal Emergency Management Agency

This is an official copy of a portion of the above referenced flood map. It was extracted using F-MIT On-Line. This map does not reflect changes or amendments which may have been made subsequent to the date on the title block. For the latest product information about National Flood Insurance Program flood maps check the FEMA Flood Map Store at [www.msc.fema.gov](http://www.msc.fema.gov)



### Duarte Violation aerial with photopoints

















DEPARTMENT OF THE ARMY  
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO  
CORPS OF ENGINEERS  
1325 J STREET  
SACRAMENTO CA 95814-2922

REPLY TO  
ATTENTION OF

**CERTIFIED MAIL RETURN RECEIPT REQUESTED**

February 25, 2013

Regulatory Division SPK-2013-00015

Mr. John Duarte  
Duarte Nursery  
1555 Baldwin Road  
Hughson, California 95326

Dear Mr. Duarte:

This letter concerns your unauthorized work in waters of the United States. The work is located on or near Coyote Creek, Sections 24 and 25, Township 26 North, Range 4 West, Mount Diablo Base & Meridian, Latitude 40.08274°, Longitude -122.268048°, Tehama County, California.

Based on available information we have determined that you have discharged dredged or fill material into seasonal wetlands, vernal pools, vernal swales, and intermittent and ephemeral drainages, which are waters of the United States, without a Department of the Army (DA) permit. Section 404 of the Clean Water Act requires that a DA permit be obtained prior to the discharge of dredged or fill material into waters of the United States, including wetlands. Since a DA permit has not been issued authorizing this discharge, the work is in violation of the Clean Water Act.

You are hereby directed to cease and desist all work in waters of the United States until this violation is resolved. We are conducting an investigation to determine the impact of this work as it relates to public interest and the appropriate course of action to remedy the situation. Potential enforcement actions, in addition to or in lieu of fines, penalties and imprisonment, include directing removal of the unauthorized work and restoration of the site to pre-project conditions. An extract of the law is enclosed. Prompt voluntary restoration of the site in accordance with a Corps-approved plan may preclude some or all of these actions.

By copy of this letter, we are soliciting the views of appropriate Federal, State, and local agencies, which may also have jurisdiction, regarding this unauthorized activity. Based upon your responses to this notice, comments received from the agencies and any available information, we will determine the appropriate course of action to resolve this violation.

To ensure that all pertinent information is available for our evaluation and included in the public record, you are invited to provide any information which you feel should be

considered. Your plans for utilization of the completed work and your evaluation of the need to retain this fill may be of particular significance in determining what actions are to be taken. Since the information provided will become a part of the public record, it may be presented in any court action that could result from this investigation and will be retained in our files. Any information you wish to provide should reach this office no later than March 21, 2013. We appreciate your cooperation and timely action on this matter.

Please refer to identification number SPK-2013-00015 in any correspondence concerning this project. If you have any questions, please contact (b) (6) at Redding Regulatory Office, 310 Hemsted Drive, Suite 310, Redding, California 96002, email (b) (6)@usace.army.mil, or telephone 530-223-9534. For more information regarding our program, please visit our website at [www.spk.usace.army.mil/Missions/Regulatory.aspx](http://www.spk.usace.army.mil/Missions/Regulatory.aspx).

Sincerely,

(b) (6)

Chief, Redding Division

Enclosure

Copies Furnished with enclosure:

- Mr. George Day, California Regional Water Quality Control Board, 364 Knollerest Drive, Suite 200, Redding, California 96002
- Mrs. Donna Cobb, California Department of Fish and Game, 601 Locust Street, Redding, California 96001
- Mr. David Wampler, Environmental Protection Agency, WTR-7, 75 Hawthorne Street, San Francisco, California 94105-3901
- Mr. Ken Sanchez, U.S. Fish and Wildlife Service, 2800 Cottage Way, Suite W2605, Sacramento, California 95825-1888

## Appendix A

### THE CLEAN WATER ACT

#### **Section 404 (33 USC § 1344) states in part:**

"(a) The ...Chief of Engineers, may issue permits, ... for the discharge of dredged or fill material into the navigable waters..."

#### **Section 301 (33 USC § 1311) states in part:**

"(a) Except as in compliance with this section and sections ... 1344... the discharge of any pollutant by any person shall be unlawful."

*Note: Dredged or fill material is considered a pollutant under the Clean Water Act.*

#### **Section 309 (33 USC §1319) states in part:**

##### (c) Criminal penalties –

(1) ... (A) Any person who negligently violates Section ... 1311 ... shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or by both ...

(2) .... (A) Any person who knowingly violates section ... 1311 ... shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both ...

(d) Civil penalties; ... any person who violates section ...1311...and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed \$ 25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. ...





DEPARTMENT OF THE ARMY  
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO  
CORPS OF ENGINEERS  
1325 J STREET  
SACRAMENTO CA 95814-2922

REPLY TO  
ATTENTION OF

April 18, 2013

Regulatory Division SPK-2013-00015

Ms. Ronda Azevedo Lucas  
Lucas Law  
P.O. Box 696  
Hilmar, California 95324

Dear Ms. Lucas:

Thank you for your letter dated March 21, 2013, in response to the Cease and Desist Order this office issued on February 25, 2013. We appreciate your cooperation as we investigate this matter.

In 1994, at the request of the property owner, this office verified a wetland delineation of the property in question (compact disk enclosed). This delineation mapped numerous wetlands. These wetlands were scattered throughout the property. We have observed that discharges of dredged or fill material into these wetlands have occurred while under the control of Mr. Duarte. The activities and equipment that we observed associated with these discharges are consistent with the site preparation practice of deep-ripping. Deep-ripping is not an on-going, normal farming practice and is therefore not exempted. Even if we were to consider this normal plowing, the effect of the discharge associated with this activity appears to have been to reduce the reach of Waters of the U.S. While the Clean Water Act does exempt on-going, normal farming practices, it does not exempt these activities when the result is the reduction in reach of these waters or impairment to the flow or circulation of these waters.

We allege that while the property was under Mr. Duarte's control it was deep-ripped. Deep-ripping is not a normal farming activity exempted at 33 CFR 323.4(a)(1). Deep-ripping is not a practice that occurs annually or at some regular interval, but is used in preparing a site for a change in use such as conversion of pasture to orchard, establishing new farming operations, or preparing land that has laid fallow for another use.

Even if we were to consider this activity to be normal plowing, a review of the readily available aerial photography reveals that the property in question has lain fallow. There is no evidence to support that this area was fallow due to any conventional crop rotation. The exemption at 33 CFR 323.4(a)(1) only applies to on-going normal farming activities. Further, our observations indicate that this discharge has reduced the reach of Waters of the U.S. by converting wetlands into uplands. An activity, such as plowing, that would otherwise be exempt, require a permit if it results in such a conversion [33 CFR 323.4(c)].

Normal farming activities that would otherwise be exempted by 33 CFR 323.4(a)(1), such as plowing, require a permit if the discharge is incidental to any activity having as its purpose bringing an area of waters of the U.S. into a use to which it was not previously subject, where the flow or circulation of the waters may be impaired or the reach of such waters reduced. For example, conversion from rangeland to orchard or fallow ground to wheat is a change of use. Conversion from wetland into upland

is both a change of use and a reduction in the reach of waters of the U.S. The 1994 Delineation documents wetlands and their locations. We have observed discharges to these wetlands. Our observations indicate that these discharges have resulted in the impairment of the flow or circulation of these waters or reduced the reach of these waters by converting them from wetland to upland.

As discussed in our previous correspondence, we would appreciate any information which you feel we should consider. Providing the following information in particular will assist us with our investigation:

1. Please describe the soil preparation activities that occurred on the property while under your client's control.
2. How deep did the equipment used penetrate the soil?
3. On what dates, and in which areas of the property have these activities occurred and by whom?
4. Please provide descriptions and pictures of the equipment used.
5. Has the Natural Resources Conservation Service made a wetland determination on this property subsequent to 1994, but prior to your activities?
6. What is the cropping history for the property? Please provide documentation.

Please refer to identification number SPK-2013-00015 in any correspondence concerning this project. If you have any questions, please contact (b) (6) by email (b) (6)@usace.army.mil, or telephone 916-557-7610. For more information regarding our program, please visit our website at [www.spk.usace.army.mil/Missions/Regulatory.aspx](http://www.spk.usace.army.mil/Missions/Regulatory.aspx).

Sincerely,

A black rectangular redaction box containing the text "(b) (6)" in red, indicating a redacted signature.

Chief, Enforcement Unit

Enclosure

Copies Furnished without enclosures:

Mr. George Day, California Regional Water Quality Control Board, 364 Knollcrest Drive, Suite 200, Redding, California 96002

Mrs. Donna Cobb, California Department of Fish and Game, 601 Locust Street, Redding, California 96001

Mr. David Wampler, Environmental Protection Agency, WTR-7, 75 Hawthorne Street, San Francisco, California 94105-3901

Mr. Ken Sanchez, U.S. Fish and Wildlife Service, 2800 Cottage Way, Suite W2605, Sacramento, California 95825-1888

## Conversation Record

|                  |   |
|------------------|---|
| Date             | 5NOV13  |
| Time             | 1332  |
| Setting          | Voice mail received   |
| Person Contacted | Ben Letton  |
| Phone Number     | 530-224-4129  |
| Organization     | Central Valley Regional Water Quality Control Board, Redding Office                                   |
| Subject          | Ohm Road Violations SPK-1994-00697  |
| Action Required  | Forward to counsel  |
| Summary          | The water board has been named in the lawsuit Duarte filed and they would like an update on the case. |
| Documented By    | (b) (6)   |
| Signature        | (b) (6)   |
| Signature Date   | Date: 2013.11.05 14:25:08 -08'00'   |

# CONVERSATION RECORD

TIME

DATE

12-11-12

TYPE

VISIT

CONFERENCE

TELEPHONE

INCOMING

OUTGOING

ROUTING

| NAME/SYMBOL | INT |
|-------------|-----|
|             |     |
|             |     |
|             |     |
|             |     |
|             |     |
|             |     |

Location of Visit/Conference:

NAME OF PERSON(S) CONTACTED OR IN CONTACT WITH YOU

John Duarte

ORGANIZATION (Office, dept, bureau, etc.)

Duarte Nursery

TELEPHONE NO.

(209) 531-0351

SUBJECT

Ag activities on Paskenta Rd, Red Bluff (209) 531-6879

SUMMARY

John Duarte, Duarte Nursery, 1555 Baldwin Rd, Hughson, CA 95326

Contacted Mr. Duarte regarding the ag activities south of Red Bluff along Paskenta Rd. Mr. Duarte said he purchased ~ 2000 ac. from Jack LaPant. He said he sold 1700 ac and kept about 400 ac. Purchased in spring of 2012 and sold the northern part to Farmland Management in the fall of 2012. When he bought the property Mr. LaPant had put the northern part into winter wheat. He kept the southern part and was going to put it into wheat as well. Said that Mr. Brad Munson was coordinating the planting. I advised that there were wetlands and drainages on the site and the ripping activities needed a permit. He said they knew where the wetland were and were staying away from them. I advised that wetlands and drainages were not being avoided and they should cease and desist additional impacts to waters of the US. without a permit. I advised we would be sending a formal notice regarding the unauthorized activities.

ACTION REQUIRED

Work on C&D

NAME OF PERSON DOCUMENTING CONVERSATION

(b) (6)

SIGNATURE

(b) (6)

DATE

12-11-12

ACTION TAKEN

SIGNATURE

TITLE

DATE

# CONVERSATION RECORD

TIME 12:15 hrs

DATE 12-14-12

TYPE  VISIT  CONFERENCE  TELEPHONE  INCOMING  OUTGOING

| ROUTING     |     |
|-------------|-----|
| NAME/SYMBOL | INT |
|             |     |
|             |     |
|             |     |
|             |     |
|             |     |
|             |     |

Location of Visit/Conference:

NAME OF PERSON(S) CONTACTED OR IN CONTACT WITH YOU

Richard Casias

ORGANIZATION (Office, dept., bureau, etc.)

RCC Group LLC

TELEPHONE NO.

530 758-8178

SUBJECT

Farmland Management Services Red Bluff Property Returning our call to Mr. Carl Evers on 12-10-12

SUMMARY

I asked Mr. Casias about the farmland property on Ohm Rd and the activities going on there. Mr. Casias said he works w/ farmland and he came out to the property this past summer to do their Due Diligence before closing the deal and starting farming. He has his own company RCC Group which does environmental evaluations of property. Mr. Casias said Farmland bought the property from Mr. John Duarte Duarte Nursery. Duarte bought the whole ~2000 ac from Roger LePant and then sold Farmland the northern 1500 ac and kept the southern portion. He said Farmland did not buy the property south of Coyote Creek. He said Farmland looked at the whole 2000 ac to buy from Duarte but a delineation report said there were wetland issues where they would have wanted to farm. Only wanted the northern part because Mr. Duarte told them it was clear. Mr. LePant did work out there in 2011 and then Northstar did full delineation of ranch in Jan 2012. Duarte had Northstar split the property and report so Farmland could buy the northern part. cont →

ACTION REQUIRED

work on NOV/CSD

NAME OF PERSON DOCUMENTING CONVERSATION

(b) (6)

SIGNATURE

(b) (6)

DATE

12-19-12

ACTION TAKEN

SIGNATURE

TITLE

DATE

I advised Mr. Casias that disking, ripping, and grading activities have occurred on site which appear to be a violation of the Clean Water Act. Mr. Casias stated they have only done shallow 4" disking in stream/wetland areas to knock the tops off the humps. He stated that no deep ripping or grading has been done, only the equipment has been staged. I advised that I have been to the site and deep ripping, grading, and disking has been done in wetlands and waters. I advised that there are known wetlands, waters, and endangered species out on this site. I advised him they should not do any more work in wetlands and waters and that we would be issuing a notice of violation. He said they have stopped because the site is too wet to work any further.

Richard Casias  
RCC Group LLC  
417 Mace Blvd, suite J284  
Davis CA 95618  
Richard @ RCCgroupLLC.net  
530 758-8178

Carl Evers  
Farmland Management Services  
301 East Main St  
Turlock, CA 95380  
(530) 993-6452

Dave Evers (Sr. Farm Manager for Area)  
Farmland Management Services  
301 East Main St  
Turlock, CA, 95380

# CONVERSATION RECORD

TIME 12:15 hrs

DATE 12-14-12

TYPE  VISIT  CONFERENCE  TELEPHONE  INCOMING  OUTGOING

| ROUTING     |     |
|-------------|-----|
| NAME/SYMBOL | INT |
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|             |     |
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|             |     |
|             |     |
|             |     |

Location of Visit/Conference:

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NAME OF PERSON DOCUMENTING CONVERSATION

(b) (6)

SIGNATURE

(b) (6)

DATE

12-19-12

ACTION TAKEN

SIGNATURE

TITLE

DATE

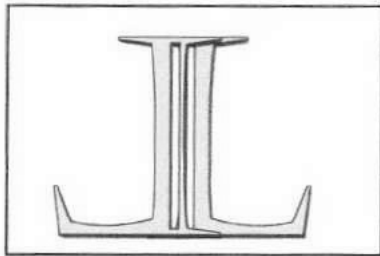
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Farmland Management Services  
301 East Main St  
Turlock, CA, 95380





March 21, 2013

Via U.S. Mail & Electronic Mail  
(b) (6) @usace.army.mil

(b) (6)  
Redding Regulatory Office  
U.S. Army Corps of Engineers  
310 Hemsted Dr., Ste. 310  
Redding, CA 96002

**RE: SPK-2013-00015**

(b) (6) :

By virtue of this letter, please be advised that I represent Mr. John Duarte and Duarte Nursery, Inc. on this matter. Henceforth, please direct any future correspondence on this matter to me at Lucas Law, P.O. Box 696, Hilmar, CA 95324. My e-mail address is [rlucas@ralucaslaw.com](mailto:rlucas@ralucaslaw.com).

By virtue of a letter dated February 25, 2013 (“Communication”), your agency accused my client, without any proof or documentation, of undertaking “unauthorized work in waters of the United States.” This allegation is completely without merit, and, on behalf of my client, I insist you immediately provide any and all documentation which you utilized in order to make this false allegation of wrongdoing. I further demand that you describe, with exact specificity, the precise location where the alleged “unauthorized work” occurred, including GPS coordinates and a complete legal description. This information is necessary in order for me to even begin to understand any aspects of your Communication.

The Communication references “available information” as being the basis for your incorrect assertions of misconduct under the Clean Water Act. Please provide, within 10 working days, all “available information” you and your agency used in this matter.<sup>1</sup> In addition to providing the “available information” utilized to make your determination that my client violated the Clean Water Act<sup>2</sup>, also provide all agency policies, regulations, memorandums, communications, and/or guidance documents utilized to ascertain the presence or absence of seasonal wetlands, vernal pools, vernal swales, and intermittent and ephemeral drainages which are waters of the United States within 10 working days.

<sup>1</sup> This deadline corresponds to the allotted time for an agency to respond to a Freedom of Information Act (“FOIA”) request. (5 U.S.C. §§ 552, *et seq.*)

<sup>2</sup> Nothing contained in this correspondence is a concession that your agency is correct in any of its assertions as communicated in the Letter.

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Although couched as a letter, the Communication states my client is “hereby directed to cease and desist all work in waters of the United States until this violation is resolved.” Please advise me immediately if the Communication is a letter or an enforcement action. Be advised that a wheat crop is currently planted on property owned by Duarte in Tehama County. The minimal expense, not taking into account time, for putting in this crop is approximately \$50,000.00. Your Communication, and specifically your direction to “cease and desist” threaten to completely destroy the wheat crop, costing my client not only the roughly \$50,000.00 in costs already incurred but also the lost revenues that would result from harvesting and selling the crop. Presently, routine farming practices need to be undertaken in order to properly care for this wheat crop. However, solely as a result of your Communication, my client is unclear if proceeding with the routine care and best management practices employed by wheat farmers will result in any liability or enforcement action. This uncertainty and my client’s subsequent unwillingness to act in light of the uncertainty threatens the viability of the wheat crop. Who will pay for my client’s expenses and lost revenues as a result of your Communication? Is it presently your position, as stated in the Communication, that my client undertaking routine farming practices in order to simply care for his \$50,000.00 investment in a wheat crop may result in his facing “fines, penalties, and imprisonment?”

Your position in this Communication is even more bewildering considering my client’s property in Tehama County has a history of farming. In 1977, Congress passed amendments to the Clean Water Act to eliminate unequivocally most applications of the section 404 permit program to farming. Congress “emphatically did not want the law to impede these bucolic pursuits.”<sup>3</sup> The lengthy legislative history vigorously and repetitiously explains that Section 404 was amended in 1977 to allow, *without a permit*, normal farming and ranching activities such as plowing, seeding, cultivating, and harvesting for the production of food and fiber.<sup>4</sup> Senator Muskie, in presenting the conference report to the Senate, could not have made this point any more cogently stating:

The conferees have adopted the Senate’s explicit approach for clarifying that plowing, seeding, cultivating, harvesting . . . were not intended to require section 404 permits. Such exemptions were provided by the Corps of Engineers’ regulations under the current law.<sup>5</sup>

Senator Wallop explained that section 404 as amended would relieve agriculture “of irrelevant or unnecessary burdens,” referring to a farmer not having to obtain a 404 permit to plow his fields.<sup>6</sup>

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<sup>3</sup> *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399, 1405 (D.C. Cir. 1998)

<sup>4</sup> 33 U.S.C. § 1344(f)(1)(A).

<sup>5</sup> 3 1977 Leg. History at 348.

<sup>6</sup> 3 1977 Leg. History at 530, 533.

March 21, 2013

(b) (6)

Page 3 of 3

In light of these facts, your Communication is, at best, baffling. The fact that this Communication was used to “solicit[ ] the views of the appropriate Federal, State, and local agencies, which may also have jurisdiction regarding this unauthorized activity” makes it appear the Communication in nothing more than an attempted “strong-arming of regulated parties into ‘voluntary compliance’” without any due process. The Supreme Court recently weighed in these types of tactics when enforcing the Clean Water Act, and in a unanimous decision, placed a much needed check to your agency’s strong-arm tactics in the form of judicial review under the Administrative Procedures Act.<sup>7</sup>

Lastly, without any administrative proceeding or hearing, without any evidence whatsoever, without any basis in law, you have labeled my client a violator of the Clean Water Act, ordered him to cease and desist, threatened him with penalties and slandered his name and character. My client has to work with all of the agencies that received a copy of your baseless and harmful allegations against him. The sharing of this Communication, without any evidence or administrative process to protect my client’s rights and defend his lawful actions, results in the possible harm to his business and his reputation and a clear violation of his constitutional right to due process. It also violates California Civil Code §§ 44 and 46, *et seq.* Immediately retract this Communication and make all agencies who received it aware that there has been no proceeding or official finding regarding my client in this context.

I further demand to know all available administrative remedies and proceedings are available to my client at this time. Once I am in receipt of the documents and materials requested in this letter and have been give adequate time to review the materials, we will participate in your “evaluation” of this situation.

Sincerely,



RONDA AZEVEDO LUCAS  
Attorney at Law

cc: Mr. John Duarte

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<sup>7</sup> *Sackett v. EPA*, 566 U.S. \_\_\_\_ (2012) (slip opinion).