

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
10

11 DUARTE NURSERY, INC., a  
12 California Corporation; and  
13 JOHN DUARTE, an individual,

14 Plaintiffs,

15 v.

16 UNITED STATES ARMY CORPS OF  
17 ENGINEERS, et al.,

18 Defendants.

No. CIV. S-13-2095 LKK/DAD

**ORDER**

19 Plaintiffs own the property that is the subject of this  
20 action, and operate it as a nursery growing and selling nursery  
21 stock to farmers and others. Complaint (ECF No. 1) ¶ 7.

22 On February 25, 2013, defendant U.S. Army Corps of Engineers  
23 ("Corps") wrote to plaintiff, stating that it had "determined  
24 that you have discharged dredged or fill material into ... waters  
25 of the United States, without a [required] Department of the Army  
26 (DA) permit," in violation of Section 404, 33 U.S.C. § 1344, of  
27 the Clean Water Act ("the Act"). See Exhibit A (ECF No. 1-1) of  
28

1 the Complaint.<sup>1</sup> The Corps "directed" plaintiff to "cease and  
2 desist all work in waters of the United States until this  
3 violation is resolved." Exh. A at 2.

4 The Corps went on to warn plaintiffs of the "[p]otential  
5 enforcement actions" that could ensue, and attached an "extract  
6 of the law" as an Appendix. Id.; Id., Appendix A (ECF No. 1-1)  
7 at 4. Two of the enforcement actions the Corps warned of were  
8 "fines" and "imprisonment." Exh. A at 2. In apparent support  
9 of these warnings, the Corps cited, in its "extract of the law,"  
10 33 U.S.C. § 1319(c)(1)(A) and (c)(2)(A), both of which refer to  
11 "fine[s]" and "imprisonment" for violations of 33 U.S.C. § 1311.  
12 See Appendix A at 4.

13 The third enforcement action the Corps warned of was  
14 "penalties." Exh. A at 2. In apparent support of this warning,  
15 the Corps' "extract of the law" cited 33 U.S.C. § 1319(d), which  
16 provides for "penalties" for violation of "any order issued by  
17 the Administrator," as well as for any violations of 33 U.S.C.  
18 § 1311. See Appendix A at 4.<sup>2</sup>

19 The Corps did not explain in the CDO or the "extract" what  
20 law authorized it to "direct" plaintiffs to "cease and desist"  
21 their activities in the first place. However, it is undisputed

---

22 <sup>1</sup> Exhibits to the Complaint are a part of the Complaint for all  
23 purposes. Fed. R. Civ. P. 10(c).

24 <sup>2</sup> In fact, the CDO is not an "order issued by the Administrator,"  
25 and plaintiffs do not challenge the Corps' assertion that there  
26 are no legal consequences - specifically, no "penalties" - for  
27 failing to obey the CDO. Plaintiffs do not assert that they were  
28 misled by the Corps' inclusion of the "penalty" citation.  
Nevertheless, it seems strange that the Corps would include such  
apparently misleading language in its CDO and "extract."

1 that the Corps issued this document pursuant to its authority to  
2 formally notify a person that he is in violation of the Clean  
3 Water Act. See 33 C.F.R. § 326.3(c). The applicable regulations  
4 instruct the Corps to issue the notification "in the form of a  
5 cease and desist order prohibiting any further work" until the  
6 violation is resolved. Id. (emphases added).<sup>3</sup> Since the  
7 regulations instruct the Corps to issue this notification in the  
8 form of a "cease and desist order," the court will henceforth  
9 refer to it as such.<sup>4</sup>

10 On March 21, 2013, plaintiffs asked the Corps to set forth  
11 the factual basis of its determination. Complaint ¶ 52. The  
12 Corps provided a "partial response" on April 18, 2013.<sup>5</sup> Id.,  
13 ¶ 53.

14 On April 23, 2013, California's Central Valley Regional  
15 Water Quality Control Board ("Board") issued a "Notice of

---

16 <sup>3</sup> The regulation provides:

17  
18 Once the district engineer has determined  
19 that a violation exists, he should take  
appropriate steps to notify the responsible  
parties.

20 (1) If the violation involves a project that  
21 is not complete, the district engineer's  
22 notification should be in the form of a cease  
23 and desist order prohibiting any further work  
pending resolution of the violation in  
accordance with the procedures contained in  
this part.

24 33 C.F.R. § 326.3(c).

25 <sup>4</sup> The U.S. refers to the document as a "cease and desist letter."  
26 Plaintiffs refer to it as a "cease and desist order."

27 <sup>5</sup> Neither side has provided either plaintiffs' request or the  
28 response.

1 Violation" ("NoV") to plaintiffs. See Exhibit B (ECF No. 1-2) of  
2 the Complaint. The NoV asserts that plaintiffs "are in  
3 violation" of Section 301, 33 U.S.C. § 1311, of the Act, in that  
4 they were "discharging dredged or fill materials" into waters of  
5 the United States, including Coyote Creek, without the required  
6 permit from the Corps. Exh. B at 2. It also states that  
7 plaintiffs are in violation of Section 402 of the Act, 33 U.S.C.  
8 § 1342, and Section 13376 of the California Water Code, "for  
9 discharging pollutants to Coyote Creek without a permit." Id.  
10 The NoV does not order plaintiffs to stop their violations, but  
11 it does notify them that the cited violations subject them to  
12 civil liability, and tells them to submit a plan for mitigation  
13 of the violation. Id.

14 In October 2013, plaintiffs filed this suit against the  
15 Corps, and against seven officers of the Board in their official  
16 capacities. Six of the individuals are "members" of the Board,  
17 and one is its Executive Officer. The individual defendants are  
18 sued "under the doctrine set forth in Ex parte Young, 209 U.S.  
19 123 (1908)" and Cardenas v. Anzai, 311 F.3d 929, 934-38 (9th  
20 Cir. 2002).<sup>6</sup>

21 The plaintiffs allege that the federal and state defendants  
22 deprived them of property or property rights protected by the Due  
23 Process clauses of the Fifth and Fourteenth Amendments.  
24 Specifically, because of the federal cease and desist order

---

25 <sup>6</sup> "Under the Ex parte Young doctrine, a plaintiff may maintain a  
26 suit for prospective relief against a state official in his  
27 official capacity, when that suit seeks to correct an ongoing  
28 violation of the Constitution or federal law." Cardenas, 311  
F.3d at 934-35 (emphasis in text).

1 ("CDO"), and the state NoV, plaintiffs left their wheat crop  
2 unattended, losing \$50,000 in planting costs. Second, with those  
3 documents in effect, plaintiffs would have to disclose them to  
4 potential buyers, and thus the defendants have effectively placed  
5 a lien on plaintiffs' property. Plaintiffs further allege that  
6 defendants acted in contravention of plaintiffs' Fifth and  
7 Fourteenth Amendment Due Process rights by issuing the CDO and  
8 the NoV without affording plaintiffs a hearing before or after  
9 issuing the documents.

10 For remedies, plaintiffs ask for (1) declaratory judgments  
11 that the failure to provide hearings is unconstitutional, (2) an  
12 injunction against further enforcement proceedings based upon the  
13 CDO and NoV, (3) an injunction requiring defendants to notify  
14 those to whom the CDO and NoV were sent, that they are invalid,  
15 and (4) a declaratory judgment that the regulations at 33 C.F.R.  
16 Part 326 are unconstitutional.

17 The Corps moves to dismiss the claims against it (Claims 1,  
18 2 and 5), on the grounds that (1) the claims are not ripe for  
19 judicial review, and (2) plaintiffs have failed to state a claim  
20 for violation of the Fifth Amendment.

21 The State defendants move to dismiss the claims against them  
22 (Claims 3 and 4), on the grounds that the claims (1) are not ripe  
23 for judicial review, and (2) are barred by Eleventh Amendment  
24 sovereign immunity.

25 For the reasons that follow, the court will deny the Army  
26 Corps' motion to dismiss, and grant the State's.

27 ////

28 ////

## II. STANDARDS

### A. Dismissal for Lack of Federal Jurisdiction.

It is well established that the party seeking to invoke the jurisdiction of the federal court has the burden of establishing that jurisdiction exists. KVOS, Inc. v. Associated Press, 299 U.S. 269, 278 (1936); Assoc. of Medical Colleges v. United States, 217 F.3d 770, 778-779 (9th Cir. 2000). On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), the standards that must be applied vary according to the nature of the jurisdictional challenge.

When a party brings a facial attack to subject matter jurisdiction, that party contends that the allegations of jurisdiction contained in the complaint are insufficient on their face to demonstrate the existence of jurisdiction. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). In a Rule 12(b)(1) motion of this type, the plaintiff is entitled to safeguards similar to those applicable when a Rule 12(b)(6) motion is made. See Sea Vessel Inc. v. Reyes, 23 F.3d 345, 347 (11th Cir. 1994), Osborn v. United States, 918 F.2d 724, 729 n.6 (8th Cir. 1990); see also 2-12 Moore's Federal Practice - Civil § 12.30 (2009). The factual allegations of the complaint are presumed to be true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction. Savage v. Glendale Union High Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003), Miranda v. Reno, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001). Nonetheless, district courts "may review evidence beyond the complaint without converting the

1 motion to dismiss into a motion for summary judgment" when  
2 resolving a facial attack. Safe Air for Everyone, 373 F.3d at  
3 1039.

4 **B. Dismissal for Failure To State a Claim.**

5 A dismissal motion under Fed. R. Civ. P. 12(b)(6) challenges  
6 a complaint's compliance with the federal pleading requirements.  
7 Under Fed. R. Civ. P. 8(a)(2), a pleading must contain a "short  
8 and plain statement of the claim showing that the pleader is  
9 entitled to relief." The complaint must give the defendant  
10 "'fair notice of what the ... claim is and the grounds upon which  
11 it rests.'" Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007)  
12 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

13 To meet this requirement, the complaint must be supported by  
14 factual allegations. Ashcroft v. Iqbal, 556 U.S. 662, 678  
15 (2009). Moreover, this court "must accept as true all of the  
16 factual allegations contained in the complaint." Erickson v.  
17 Pardus, 551 U.S. 89, 94 (2007).<sup>7</sup>

18 "While legal conclusions can provide the framework of a  
19 complaint," neither legal conclusions nor conclusory statements  
20 are themselves sufficient, and such statements are not entitled  
21 to a presumption of truth. Iqbal, 556 U.S. at 679. Iqbal and  
22 Twombly therefore prescribe a two-step process for evaluation of  
23 motions to dismiss. The court first identifies the non-

---

24  
25 <sup>7</sup> Citing Twombly, 550 U.S. at 555-56, Neitzke v. Williams, 490  
26 U.S. 319, 327 (1989) ("What Rule 12(b)(6) does not countenance  
27 are dismissals based on a judge's disbelief of a complaint's  
28 factual allegations"), and Scheuer v. Rhodes, 416 U.S. 232, 236  
(1974) ("[I]t may appear on the face of the pleadings that a  
recovery is very remote and unlikely but that is not the test"  
under Rule 12(b)(6)).

1 conclusory factual allegations, and then determines whether these  
2 allegations, taken as true and construed in the light most  
3 favorable to the plaintiff, "plausibly give rise to an  
4 entitlement to relief." Iqbal, 556 U.S. at 679.

5 "Plausibility," as it is used in Twombly and Iqbal, does not  
6 refer to the likelihood that a pleader will succeed in proving  
7 the allegations. Instead, it refers to whether the non-  
8 conclusory factual allegations, when assumed to be true, "allow[]  
9 the court to draw the reasonable inference that the defendant is  
10 liable for the misconduct alleged." Iqbal, 556 U.S. at 678.

11 "The plausibility standard is not akin to a 'probability  
12 requirement,' but it asks for more than a sheer possibility that  
13 a defendant has acted unlawfully." Id. (quoting Twombly, 550 U.S.  
14 at 557).<sup>8</sup> A complaint may fail to show a right to relief either  
15 by lacking a cognizable legal theory or by lacking sufficient  
16

---

17  
18 <sup>8</sup> Twombly imposed an apparently new "plausibility" gloss on  
19 the previously well-known Rule 8(a) standard, and retired the  
20 long-established "no set of facts" standard of Conley v. Gibson,  
21 355 U.S. 41 (1957), although it did not overrule that case  
22 outright. See Moss v. U.S. Secret Service, 572 F.3d 962, 968  
23 (9th Cir. 2009) (the Twombly Court "cautioned that it was not  
24 outright overruling Conley . . .," although it was retiring the "no  
25 set of facts" language from Conley). The Ninth Circuit has  
26 acknowledged the difficulty of applying the resulting standard,  
27 given the "perplexing" mix of standards the Supreme Court has  
28 applied in recent cases. See Starr v. Baca, 652 F.3d 1202, 1215  
(9th Cir. 2011) (comparing the Court's application of the  
"original, more lenient version of Rule 8(a)" in Swierkiewicz v.  
Sorema N.A., 534 U.S. 506 (2002) and Erickson v. Pardus, 551 U.S.  
89 (2007) (per curiam), with the seemingly "higher pleading  
standard" in Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336  
(2005), Twombly and Iqbal), cert. denied, 132 S. Ct. 2101 (2012).  
See also Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011)  
(applying the "no set of facts" standard to a Section 1983 case).



1 facts alleged under a cognizable legal theory. Balistreri v.  
2 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

### 3 **III. ARMY CORPS OF ENGINEERS**

4 Plaintiffs allege that this court may exercise jurisdiction  
5 over their Due Process claims against the Corps pursuant to  
6 (1) Section 10(a) of the Administrative Procedure Act ("APA"), 5  
7 U.S.C. § 702, which provides for judicial review of agency  
8 actions, and (2) 28 U.S.C. § 1331, which provides for  
9 jurisdiction over claims arising under the Constitution and laws  
10 of the United States. See Complaint ¶ 1. The Corps moves to  
11 dismiss based upon its assertion that the claims against it are  
12 not ripe for judicial review. See Corps Notice of Motion (ECF  
13 No. 10) at 1. In the alternative, the Corps moves to dismiss  
14 plaintiffs' claims for failure to state a claim.

15 There are three distinct jurisdictional issues the court  
16 must therefore address. First, whether a federal statute confers  
17 subject matter jurisdiction on this court for these claims. Even  
18 where there is federal jurisdiction, since this is a suit against  
19 an agency of the United States, the court must consider, Second,  
20 whether the United States has waived its sovereign immunity for  
21 these claims.<sup>9</sup> If so, the court must consider, Third, whether  
22 the claims are ripe for judicial review.

23 ////

---

24  
25 <sup>9</sup> Section 1331 "grants district courts original jurisdiction over  
26 'all civil actions arising under the Constitution, laws or  
27 treaties of the United States,' but it does not waive sovereign  
28 immunity." U.S. v. Park Place Associates, Ltd., 563 F.3d 907,  
923-24 (9th Cir. 2009) (citing Hughes v. United States, 953 F.2d  
531, 539 n.5 (9th Cir. 1992)).

1           **A.     Federal Jurisdiction.**

2           Plaintiffs allege that the issuance of the Corps' cease and  
3 desist order violates their rights under the Due Process Clause  
4 of the Fifth Amendment to the U.S. Constitution. Plaintiffs also  
5 allege that 33 C.F.R. § 326.3(c), as applied to them, violates  
6 the Due Process Clause. This court plainly has jurisdiction to  
7 hear and adjudicate these claims, pursuant to the general grant  
8 of federal court jurisdiction set forth at 28 U.S.C. § 1331.  
9 See, e.g., Bell v. Hood, 327 U.S. 678, 685 (1946) ("Thus, the  
10 right of the petitioners to recover under their complaint will be  
11 sustained if the Constitution and laws of the United States are  
12 given one construction and will be defeated if they are given  
13 another. For this reason the district court has jurisdiction");  
14 Verizon Maryland, Inc. v. Public Service Com'n of Maryland, 535  
15 U.S. 635, 643 (2002) ("Verizon's claim thus falls within 28  
16 U.S.C. § 1331's general grant of jurisdiction," because its right  
17 to recover "will be sustained if the Constitution and laws of the  
18 United States are given one construction and will be defeated if  
19 they are given another") (citations and internal quotation marks  
20 omitted); U.S. v. Park Place Associates, Ltd., 563 F.3d 907,  
21 923-24 (9th Cir. 2009) ("For example, 28 U.S.C. § 1331 grants  
22 district courts original jurisdiction over 'all civil actions  
23 arising under the Constitution, laws or treaties of the United  
24 States'").

25           **B.     Waiver of Sovereign Immunity.**

26           "Absent a waiver, sovereign immunity shields the Federal  
27 Government and its agencies from suit.'" Department of Army v.  
28

1 Blue Fox, Inc., 525 U.S. 255, 260 (1999) (quoting FDIC v. Meyer,  
2 510 U.S. 471, 475 (1994)). Section 702 (Section 10(a) of the  
3 APA) provides that waiver of sovereign immunity for suits seeking  
4 relief "other than money damages." See, e.g., Bowen v.  
5 Massachusetts, 487 U.S. 879, 891-892 (1988) ("the 1976 amendment  
6 to § 702 was intended to broaden the avenues for judicial review  
7 of agency action by eliminating the defense of sovereign immunity  
8 in cases covered by the amendment"). It provides:

9           A person suffering legal wrong because of  
10          agency action, or adversely affected or  
11          aggrieved by agency action within the meaning  
12          of a relevant statute, is entitled to  
13          judicial review thereof. An action in a  
14          court of the United States seeking relief  
15          other than money damages and stating a claim  
16          that an agency or an officer or employee  
            thereof acted or failed to act in an official  
            capacity or under color of legal authority  
            shall not be dismissed nor relief therein be  
            denied on the ground that it is against the  
            United States ...

17 5 U.S.C. § 702. Here, plaintiffs seek injunctive and declaratory  
18 relief for an alleged legal wrong inflicted by the Corps'  
19 issuance of the CDO.<sup>10</sup> Accordingly, the claims against the Corps  
20 are covered by the sovereign immunity waiver.

---

22 <sup>10</sup> In addition, plaintiffs must be challenging "agency action" for  
23 their claims to be within the waiver of sovereign immunity. See  
24 Lujan v. Nat'l Wildlife Federation, 497 U.S. 871, 882 (1990).  
25 "Agency action" is defined to include "the whole or a part of an  
26 agency rule, order, license, sanction, relief, or the equivalent  
27 or denial thereof, or failure to act." 5 U.S.C. § 551 (emphasis  
28 added); Lujan, 497 U.S. at 882. Plaintiffs identify the cease  
and desist order as the agency action they are challenging.  
Defendants do not challenge this identification, and the court  
finds that issuance of the cease and desist order is "agency  
action" within the meaning of the waiver statute.

1           **C.    Ripeness.**

2           The Corps argues that this case is not "ripe" for judicial  
3 review. "Whether a claim is ripe generally turns on the fitness  
4 of the issues for judicial decision and the hardship to the  
5 parties of withholding court consideration." Richardson v. City  
6 and County of Honolulu, 124 F.3d 1150, 1160 (9th Cir. 1997)  
7 (citing PG&E v. State Energy Resources Conserv. & Devel. Comm'n,  
8 461 U.S. 190, 201 (1983)), cert. denied, 525 U.S. 871 (1998). As  
9 the Corps points out, "[t]he 'central concern [of the ripeness  
10 inquiry] is whether the case involves uncertain or contingent  
11 future events that may not occur as anticipated, or indeed may  
12 not occur at all.'" Richardson, 124 F.3d at 1150 (quoting 13A  
13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal  
14 Practice and Procedure § 3532 at 112 (2d ed. 1984)).

15          The Corps argues that plaintiffs' claims have not "'matured  
16 sufficiently to warrant judicial intervention,'" because the CDO  
17 "imposes no legal obligations or liability on its own [and thus]  
18 Plaintiffs suffer no cognizable injury from its issuance."  
19 Memorandum of Points and Authorities in Support of Federal  
20 Defendant's Motion To Dismiss Complaint ("Corps Motion") (ECF  
21 No. 10-1) at 14. Specifically, the CDO is not enforceable on its  
22 own, there are no separate penalties for violating it, and it can  
23 only be enforced through a separate enforcement action. Rather,  
24 the Corps argues, the CDO "is merely a mechanism to notify an  
25 alleged violator of the legal obligations imposed by the CWA, the  
26 Corps belief that those obligations have been violated, and of  
27 the potential consequences of such violations." Id.

1       The court cannot agree. Even assuming that the CDO does not  
2 impose any legal "obligations" or "liabilities," the Corps'  
3 argument underestimates the force of a command from the United  
4 States or its agency, the Army Corps of Engineers, and the injury  
5 it can cause. If the Corps, instead of issuing the CDO, had  
6 burned plaintiffs' nursery to the ground in an effort to protect  
7 the waters of the U.S., plaintiffs surely would have suffered an  
8 injury, even though the Corps still would not have imposed any  
9 legal "obligation" or "liability" on plaintiffs.

10       Having been commanded by the U.S. Government to stop their  
11 activities, plaintiffs reasonably believed that they were  
12 required to stop their farming activities, and thereby lost their  
13 crop. Plaintiffs reasonably interpreted the CDO to be an order  
14 issued by the United States Government, not merely a suggested  
15 course of conduct, nor a request for a voluntary cessation of  
16 activities. The Corps asserts that plaintiffs did not have to  
17 obey the order it issued. If plaintiffs were free to ignore an  
18 unconditional command of the U.S. Government, or its agency, the  
19 Corps, then the CDO should have said so.<sup>11</sup> Conversely, if the CDO  
20 were simply a "notification" to plaintiffs, then it should have  
21 said so, rather than clothing itself as an "order" which carried  
22 with it the authority to "prohibit" plaintiffs from continuing  
23 their activities. See 28 C.F.R. § 326.1(c).

---

24  
25  
26 <sup>11</sup> In essence, the government argues that although it  
27 (figuratively) held a gun to plaintiff's head and ordered him to  
28 stop farming, plaintiff should have relied on the unstated fact  
that the gun could not be fired.

1 In its main brief, the Corps cites four cases in support of  
2 its view that the CDO had no legal effect and therefore is not  
3 yet subject to judicial review. None of them are applicable to  
4 this case. In Fairbanks North Star Borough v. U.S. Army Corps of  
5 Engineers, 543 F.3d 586 (9th Cir. 2008), cert. denied, 557 U.S.  
6 919 (2009), plaintiffs sought "judicial review of a Corps'  
7 'approved jurisdictional determination,' which is a written,  
8 formal statement of the agency's view that Fairbanks' property  
9 contained waters of the United States and would be subject to  
10 regulation under the CWA." The case did not involve any order  
11 "directing" anyone to "cease and desist" from any activity, or  
12 "prohibiting" any activity, as the CDO in this case does. Nor  
13 did plaintiff challenge the Corps' action as unconstitutional.  
14 Fairbanks accordingly considered only whether the jurisdictional  
15 determination was "final agency action" under the APA, and  
16 determined that it was not. Id., 543 F.3d at 591.<sup>12</sup> "Final  
17 agency action" is not at issue in this case.<sup>13</sup>

---

19 <sup>12</sup> Fairbanks determined that "the Corps' issuance of an approved  
20 jurisdictional determination finding that Fairbanks' property  
21 contained waters of the United States did not constitute final  
22 agency action under the APA for purposes of judicial review."  
23 Id., 543 F.3d at 591. Although the jurisdictional determination  
24 was "final," it did not determine any rights or obligations, nor  
25 would any "legal consequences" flow from it. Id., at 593.  
26 Specifically, the determination "does not itself command  
Fairbanks to do or forbear from anything; as a bare statement of  
the agency's opinion, it can be neither the subject of 'immediate  
compliance' nor of defiance." Id., at 594-95. In contrast, the  
CDO at issue here plainly commands plaintiff to forbear from  
doing something.

27 <sup>13</sup> "Final agency action" is an issue for cases brought under 5  
28 U.S.C. § 704, not, as here, Section 702.

1        Route 26 Land Dev. Ass'n v. U.S., 753 F. Supp. 532 (D.  
2 Del. 1990), aff'd mem., 961 F.,2d 1568 (3rd Cir. 1992), the  
3 second case, was also a challenge to the Corps' jurisdictional  
4 "designation of two reaches of the Santa Cruz River in Arizona as  
5 'traditional navigable waters.'" This case too, turned on  
6 whether the determination was "final agency action" within the  
7 meaning of the APA. The district court held that it was not, and  
8 therefore declined review. As noted, this case does not turn on  
9 the existence of "final agency action," and thus Route 26  
10 provides no guidance.

11        The two cases the government cites as specifically  
12 precluding judicial review of the Corps' cease and desist orders  
13 were decided under 5 U.S.C. § 704, not Section 702, and rule as  
14 they do because the CDO does not constitute "final agency  
15 action." See Banks v. Page, 768 F. Supp. 809 (S.D. Fla. 1991),  
16 vacated mem., 963 F.2d 385 (11th Cir. 1992); Howell v. U.S. Army  
17 Corps of Engineers, 794 F. Supp. 1072 (D.N.M. 1992). Neither of  
18 these cases involved a federal constitutional challenge to agency  
19 action. In this case, "final agency action" is not required for  
20 the court to address agency action that allegedly caused  
21 plaintiff to suffer a federal constitutional injury.<sup>14</sup>

---

23        <sup>14</sup> In any event, the latter two cases are not persuasive. The  
24 cited district court decision in Banks was "vacated" by the  
25 Eleventh Circuit, and therefore it is not clear that it should be  
26 cited at all. See Banks v. Page, 963 F.2d 385 (11th Cir. 1992),  
27 vacating mem., 768 F. Supp. 809 (S.D. Fla. 1991). As for Howell,  
28 a central premise of its reasoning was that the Clean Water Act  
precluded review of "compliance" orders. However the Supreme  
Court has since held that compliance orders are subject to  
judicial review. Sackett v. EPA, 566 U.S. \_\_\_, 132 S. Ct. 1367  
(2012).

1       The only case the court was able to find that addressed  
2 whether issuance of a Corps cease and desist order presented a  
3 "ripe" controversy (outside the context of Section 704) is  
4 Swanson v. U.S., 600 F. Supp. 802 (D. Idaho 1985), aff'd, 789  
5 F.2d 1368 (9th Cir. 1986). In Swanson, as here, plaintiff  
6 received a letter from the Corps that "directed" her to "desist  
7 from any further work." Plaintiff there filed suit immediately,  
8 citing "federal jurisdiction pursuant to 28 U.S.C. § 1331 and 28  
9 U.S.C. § 2201." The district court found that the matter was  
10 ripe for judicial review:

11               In reference to the first dispute, the court  
12 has little difficulty finding that the issues  
13 raised are ripe for judicial determination.  
14 Swanson has constructed improvements on a  
15 portion of the lake in dispute and defendants  
16 have asserted their regulatory authority in  
17 the form of the "stop work" letter sent to  
18 Swanson. These facts give rise to an actual  
19 and present controversy concerning the  
20 authority of the Corps to regulate the outer  
21 perimeter of Lake Pend Oreille. Since  
22 defendants have actually asserted their  
23 jurisdiction and Plaintiff Swanson has  
24 opposed it, the matter is ripe for judicial  
25 determination.

26 Swanson, 600 F. Supp. at 806.

27       In its Reply brief, and at oral argument, the Corps cited  
28 Guatay Christian Fellowship v. County of San Diego, 670 F.3d 957  
(9th Cir. 2011), cert. denied, 133 S. Ct. 423 (2012), in support  
of its ripeness argument. As the Corps points out, the Court  
there did opine on the lack of consequences for not obeying a  
cease and desist order issued by the County:

      In this case, although strongly worded, the  
County's NOV and cease-and-desist order did



1 not themselves deprive the Church of any  
2 interests. The County would have had to  
3 bring an enforcement action in court in order  
4 to actually enforce the zoning regulations –  
5 and it in fact notified the Church of that in  
6 its May 2008 letter. Without bringing the  
7 Church to court, the County had no power to,  
8 for example, padlock the building doors or  
9 make arrests, nor did it take any such  
10 action. Had the County brought the Church to  
11 court, the Church would have received notice,  
12 an opportunity to be heard, and an  
13 opportunity to present evidence; at the very  
14 least, we would have a record upon which to  
15 make a judgment about whether the Church had  
16 received sufficient process.

17 Guatay, 670 F.3d at 984.

18 Simply put, Guatay does not control this case. The critical  
19 distinguishing facts underlying Guatay are that (1) plaintiffs  
20 there could have sought a permit allowing them to keep their  
21 church where it was, and (2) they had available an administrative  
22 appeal of the cease and desist order. See Guatay, 670 F.3d at  
23 965 (“The Church did not attempt to obtain a Use Permit before  
24 doing so [filing the lawsuit]. Nor did it attempt to avail  
25 itself of the appeals process, as provided in the County’s  
26 code”).

27 In this case, unlike the situation in Guatay, nothing in the  
28 Corps’ CDO notified plaintiffs that the Corps could not take  
action based upon the CDO alone, for example, shut down the farm  
entirely. Moreover, nothing in the Corps’ CDO suggests that  
plaintiffs had the option of seeking an after-the-fact permit.  
To the contrary, the CDO is clear that the only course open to

1 plaintiffs is "[p]rompt voluntary restoration of the site." CDO  
2 at 2. The CDO also makes no mention of any appeals process.

3 The Corps' regulations, meanwhile, do permit after-the-fact  
4 permits, but only "[f]ollowing the completion of any required  
5 initial corrective measures." 33 C.F.R. § 326.3(e)(1). Whether  
6 this means that plaintiffs must promptly restore the site before  
7 they can seek a permit is not clear. Guatay certainly shows the  
8 Corps how its CDO procedure could be modified to comply with Due  
9 Process standards. As that process was not used in this case,  
10 however, Guatay does not help the Corps.

11 This court does not doubt that the Corps needs the  
12 flexibility to "notify" landowners that they are in violation of  
13 the law, without having to go to court first. Had they issued a  
14 "notification," they would be in the same position as the State  
15 defendants, and could now argue successfully that the matter was  
16 not ripe for judicial review. However, the Corps did not  
17 "notify" plaintiffs they were operating in violation of the law,  
18 it commanded plaintiffs to stop their activities. Since the  
19 Corps did so without granting plaintiffs any ability to challenge  
20 this command, either before or after issuance of the CDO - other  
21 than requiring plaintiffs to wait around indefinitely to see if  
22 the Corps would file an enforcement action - plaintiffs are  
23 entitled to judicial review now.

24 The Corps asserts that plaintiffs have another  
25 administrative option they should be required to exhaust before  
26 proceeding to court. Specifically, the Corps suggests that  
27 plaintiffs can wait until the Corps files an enforcement action.  
28 That is entirely inadequate, as plaintiffs are being deprived now

1 of the right to farm their land for an indefinite period, with no  
2 assurance that an enforcement action will ever be filed, thus  
3 completely depriving them of the opportunity to challenge the  
4 CDO.

5 Plaintiffs' claims are ripe for judicial review.

6 **D. Due Process.**

7 In order to state a claim under the Due Process clause of  
8 the Fifth Amendment to the U.S. Constitution, plaintiff must  
9 first allege facts showing that he has a "liberty" or "property"  
10 interest at stake. Mathews v. Eldridge, 424 U.S. 319, 332 (1976)  
11 ("Procedural due process imposes constraints on governmental  
12 decisions which deprive individuals of 'liberty' or 'property'  
13 interests within the meaning of the Due Process Clause of the  
14 Fifth or Fourteenth Amendment").

15 Plaintiffs allege a property and/or liberty interest in the  
16 land they own, and their right to use it for wheat farming.  
17 Complaint ¶¶ 45-47. The government does not contest this  
18 assertion.

19 Plaintiffs must then allege that they were deprived of this  
20 interest by some decision or action of the federal government.  
21 Id. As discussed above, the action alleged is that of issuing  
22 the cease and desist order. The Corps argues that the CDO did  
23 not deprive plaintiffs of their property or legal interest  
24 because the CDO:

25 is merely a mechanism to notify an alleged  
26 violator of the legal obligations imposed by  
27 the CWA, the Corps' belief that those  
28 obligations have been violated, and of the  
potential consequences of such violations.

1           The Corps' direction to comply with the  
2           requirements of the Act is only enforceable  
3           through a subsequent enforcement action.  
4           Because the Corps' letter imposes no legal  
5           obligations or liability on its own,  
6           Plaintiffs suffer no cognizable injury from  
7           its issuance.

8           U.S. Motion To Dismiss, ECF No. 10-1 at 14.

9           As discussed above, the Corps disagrees with the plain words  
10          of its own CDO. The Corps ordered plaintiffs to stop their  
11          activities, and plaintiffs complied with the order, reasonably  
12          believing that they were not free to ignore a command of the  
13          United States Government, or its agency, the Army Corps of  
14          Engineers. In so complying, plaintiffs lost their crop, and to  
15          the degree they are still complying, they have lost their right  
16          to farm or use their land.

17          The Corps' purported mechanisms for challenging its actions  
18          are, as discussed above, inadequate. Forcing plaintiffs to wait  
19          idly about while the Corps decides whether to bring an  
20          enforcement action has the effect of continuing to deprive  
21          plaintiffs of the use of their property, without end. Forcing  
22          plaintiffs to file for an after-the-fact permit makes no sense,  
23          as plaintiffs assert that they have the right to conduct their  
24          activities without the permit, the CDO gave plaintiffs no hint  
25          that this was available, and the after-the-fact permit process  
26          appears to require plaintiffs to do exactly what this lawsuit  
27          seeks to avoid, namely, forcing them to restore the site to the  
28          Corps' satisfaction.

          Plaintiffs have stated a claim under the Due Process Clause.

      ////

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

Plaintiffs allege that this court may exercise jurisdiction over their Due Process claims against the State pursuant to (1) 28 U.S.C. § 1331, which provides for jurisdiction over claims arising under the Constitution and laws of the United States, and (2) the doctrine set forth in Ex parte Young, 209 U.S. 123 (1908), which permits state officials to be sued to enjoin constitutional violations. See Complaint ¶¶ 1 & 10-16.

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

"A state's sovereign immunity from suit in federal court normally extends to suits against its officers in their official capacities." Cardenas v. Anzai, 311 F.3d 929, 934 (9th Cir. 2002). This action against California officers in their official capacities is therefore barred by sovereign immunity unless an exception applies. Plaintiffs assert that they may sue under the exception articulated in Ex parte Young, 209 U.S. 123 (1908). "Under the Ex parte Young doctrine, a plaintiff may maintain a suit for prospective relief against a state official in his official capacity, when that suit seeks to correct an ongoing violation of the Constitution or federal law." Cardenas, 311 F.3d at 934-35.

1       The Board argues that plaintiffs seek retrospective relief,  
2 not prospective relief, and therefore the claim is barred by  
3 Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 281 (1997),  
4 Edelman v. Jordan, 415 U.S. 651, 668 (1974), and Green v.  
5 Mansour, 474 U.S. 64, 68-69 (1985). The Board is incorrect. The  
6 NoV is still in effect, and whatever allegedly unconstitutional  
7 mischief it is causing, it is still causing. Plaintiffs seek to  
8 correct that on-going violation. Nothing in the cited cases says  
9 otherwise.

10       Coeur d'Alene denied plaintiffs' claim on sovereign immunity  
11 grounds in the "particular and special circumstances" where  
12 Idaho's sovereignty was threatened by the lawsuit. It appears to  
13 have no application to this lawsuit. Edelman denied plaintiffs'  
14 claims because they required the retroactive payment of funds  
15 from the state's treasury. Here, the only requested relief is  
16 prospective injunctive relief. Green clarified that it was the  
17 "compensatory or deterrence interests" of retrospective relief  
18 that failed to overcome the state's sovereign immunity. The  
19 relief sought here is not compensatory or deterrent, it only  
20 seeks to put a halt to allegedly unconstitutional conduct.

21       Sovereign immunity does not bar the suit against the Board  
22 officials.

### 23               **B.    Ripeness.**

24       Plaintiffs assert that their receipt of the NoV caused them  
25 to abandon their crop and therefore they were deprived of their  
26 property rights. There are at least two problems with this  
27 assertion. First, in their Opposition, plaintiffs concede that  
28

1 they abandoned the crops because of their receipt of the federal  
2 CDO, not the state NoV. Plaintiffs' Combined Opposition to  
3 Federal Defendant's and State Defendants' Motions To Dismiss  
4 Complaint ("Pl. Oppo.") (ECF No. 15) at 19 ("[i]t is evident from  
5 the allegations of the Complaint and the text of the Order [the  
6 CDO] that the receipt of this document caused Duarte to abandon  
7 the wheat crop and their farming activities on the Property,  
8 depriving them of their property interests as a result"). Thus,  
9 plaintiffs' interpretation of their own complaint indicates that  
10 only the federal action deprived them of their rights, not the  
11 Board's.

12 Second, even if the court were to ignore plaintiffs'  
13 concession, and accept that the NoV caused plaintiffs to abandon  
14 their crop, plaintiffs have cited no authority that their own  
15 decision to abandon their crop is a deprivation of their property  
16 rights under the Due Process clause. Plaintiffs are attempting  
17 to convert their own conduct into state action. To prevail on  
18 the Due Process claim, plaintiffs must show that the Board or its  
19 officials deprived them of their property without due process.

20 Plaintiffs identify nothing in the NoV or the statute or  
21 regulations governing the NoV that impaired their property,  
22 stopped them from farming, or had any other legal consequences.  
23 Instead, plaintiffs assert that the very existence of the NoV  
24 impairs their property rights, and analogizes the NoV to an ex  
25 parte attachment or lien against the property, citing Connecticut  
26 v. Doeher, 501 U.S. 1, 12 (1991), and Tri-State Dev. V. Johnston,  
27 160 F.3d 528, 531 (9th Cir. 1998). Pl. Oppo. at 16.

1 Plaintiffs do not offer any explanation for why this analogy  
2 is valid. They do not argue that the NoV is a lien, attachment  
3 or encumbrance of any kind such as would impair their ability to  
4 alienate the property. Instead, they state that they would have  
5 to disclose the NoV in the event they tried to sell or lease the  
6 property. The cases plaintiffs cite, however, address legal  
7 impairments to the seller's right to his property, not the  
8 possibility that the market value of the property might be  
9 affected by required disclosures.

10 Plaintiffs buttress their argument by asserting that the NoV  
11 "depriv[es] Duarte of the vested right to use the Property in  
12 accordance with its zoning," namely wheat farming. ECF No. 15 at  
13 18. But it does no such thing. The NoV does not divest  
14 plaintiffs of anything, nor does it order them to stop doing  
15 anything.

16 The order notifies plaintiffs of the Board's view that they  
17 are in violation of the law. The only thing it commands is that  
18 plaintiffs submit a plan to mitigate the impacts of the  
19 discharges. However, (1) nothing in the letter threatens any  
20 consequences for failure to submit such a plan, (2) plaintiffs  
21 identify nothing in the law or regulations that authorizes any  
22 such consequences, and (3) plaintiffs do not allege that in fact  
23 any such consequences have occurred.

24 In short, the Board has done nothing to plaintiffs yet. The  
25 lawsuit against the Board is not ripe for adjudication in federal  
26 court.

27 ////

28 ////



1 IV. CONCLUSION

2 For the reasons stated above, the court orders as follows:


3 1. The Corps' motion to dismiss for lack of federal  
4 jurisdiction, is **DENIED**;

5 2. The Corps' motion to dismiss for failure to state  
6 a claim is **DENIED**; and

7 3. The State defendants' motion to dismiss for lack  
8 of federal jurisdiction, is **GRANTED**. This lawsuit is hereby  
9 **DISMISSED** without prejudice, as to defendants Longley, Moffitt,  
10 Constantino, Meraz, Ramirez, Schneider and Creedon, because the  
11 matter is not yet ripe for judicial review.  
12

13 IT IS SO ORDERED.

14 DATED: April 22, 2014.  
15  
16  
17

18   
19 LAWRENCE K. KARLTON  
20 SENIOR JUDGE  
21 UNITED STATES DISTRICT COURT  
22  
23  
24  
25  
26  
27  
28