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22 UNITED STATES DISTRICT COURT
 23 EASTERN DISTRICT OF CALIFORNIA

24 UNITED STATES OF AMERICA,
 25 Counterclaim-Plaintiff,
 26 v.
 27 DUARTE NURSERY, INC.; JOHN DUARTE
 28 Counterclaim-Defendants.

No. 2:13-CV-02095-KJM-DB
CONSENT DECREE

1 WHEREAS, Counterclaim-Plaintiff United States of America has filed a Counterclaim in
2 this action alleging that Counterclaim-Defendants John Duarte and Duarte Nursery, Inc.,
3 (collectively, “Defendants”) violated and remain in violation of the Clean Water Act (“CWA”)
4 section 301(a), 33 U.S.C. § 1311(a);

5 WHEREAS, the Counterclaim alleges that Defendants’ CWA violations resulted from
6 activities on real property near Paskenta Road and Coyote Creek in Tehama County, California
7 (“the Site”) in 2012;

8 WHEREAS, the Counterclaim alleges that Defendants’ activities resulted in the
9 unauthorized discharge of dredged or fill material into waters of the United States that are
10 hydrologically and ecologically connected to Coyote Creek and the Sacramento River;

11 WHEREAS, the Counterclaim requests that the Court award injunctive relief and civil
12 penalties;

13 WHEREAS, Defendants do not admit the facts as alleged in the Counterclaim and do not
14 admit any liability to the United States arising out of the transactions or occurrences alleged in
15 the Counterclaim;

16 WHEREAS, the United States does not admit any liability to Defendants arising out of
17 the transactions or occurrences alleged in all claims asserted by Defendants against the United
18 States or the United States Army Corps of Engineers in this case; and

19 WHEREAS, the Parties recognize that this Consent Decree has been negotiated by the
20 Parties in good faith and will avoid further litigation among the Parties, and the Court by
21 entering this Consent Decree finds that this Consent Decree is fair, reasonable, and in the public
22 interest;

23 THEREFORE, before the taking of any testimony, and without further adjudication or
24 admission of any issue of fact or law except as provided in Section I of this Consent Decree, and
25 with the consent of the Parties by their authorized representatives, it is hereby ORDERED,
26 ADJUDGED and DECREED as follows:

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1 **I. JURISDICTION, VENUE, AND SUFFICIENCY OF COMPLAINT**

2 1. This Court has jurisdiction over the subject matter of the Counterclaim pursuant to
3 at least 28 U.S.C. §§ 1331 and 1345. Defendants withdraw their motion to dismiss for lack of
4 subject matter jurisdiction.

5 2. Venue is proper in the Eastern District of California pursuant to 28 U.S.C.
6 §§ 1391(b) and (c).

7 3. For purposes of this Consent Decree, including any action to enforce this Consent
8 Decree, Defendants consent to personal jurisdiction and venue; and

9 4. For purposes of this Consent Decree, including any action to enforce this Consent
10 Decree, the Parties agree, and the Court finds, that the Counterclaim states claims upon which
11 relief can be granted pursuant to CWA sections 301(a) and 309(d), 33 U.S.C. §§ 1311(a) and
12 1319(d).

13 **II. APPLICABILITY**

14 5. This Consent Decree applies to and is binding upon the United States, and upon
15 Defendants and any successors, assigns, or other persons otherwise bound by law whether or not
16 such person has notice of this Consent Decree.

17 6. No transfer of ownership or control of the Site, of any portion of the Site, or of
18 any less-than-fee-simple interest in the Site or a portion thereof (such as an easement or lease)
19 shall relieve Defendants of any of their obligations in this Consent Decree. As a condition of any
20 such transfer, Defendants shall reserve all rights necessary to comply with this Consent Decree.
21 At the time of such transfer, Defendants shall provide a copy of this Consent Decree to the
22 transferee, shall obtain the transferee's acknowledgement thereof, and shall provide written
23 notice of the transfer and a copy of such acknowledgment to the United States and to the Corps
24 at the addresses specified in Section XI of this Consent Decree. Any attempted or actual transfer
25 of any interest in the Site without complying with this Paragraph constitutes a violation of this
26 Consent Decree.

27 7. Defendants shall provide a copy of this Consent Decree to all officers and agents
28 whose duties might reasonably include compliance with any provision of this Consent Decree,

1 including any contractor or consultant retained to perform remedial work or monitoring and
2 maintenance required under this Consent Decree. To the extent that Defendants retain any
3 contractor or consultant to perform remedial work, monitoring and maintenance, or any other
4 obligation required under this Consent Decree, Defendants shall condition any such contract
5 upon performance that conforms to the terms of this Consent Decree.

6 8. In any action to enforce this Consent Decree, Defendants shall not raise as a
7 defense the failure by any of its officers, directors, employees, agents, contractors, or consultants
8 to take any actions necessary to comply with this Consent Decree.

9 **III. DEFINITIONS**

10 9. Terms used in this Consent Decree that are defined in the CWA or in regulations
11 promulgated pursuant to the CWA shall have the meanings assigned to them in the CWA or such
12 regulations, unless otherwise provided in this Consent Decree.

13 10. Whenever the terms set forth below are used in this Consent Decree, the
14 following definitions shall apply:

15 “Balance of the Site” shall mean all areas of the Site except for the areas identified as
16 “waters of the United States” on the United States’ expert team delineation, marked Trial
17 Exhibits 59 and 60 and attached hereto as Appendix 1, and the Conservation Reserve.

18 “Counterclaim” shall mean the affirmative claim filed by the United States in this action
19 on May 7, 2014, and attached hereto as Appendix 2;

20 “Conservation Reserve” shall mean the entirety of the following areas within the Site:
21 (1) as much of the main stem of Coyote Creek that Defendants own or control, including all
22 areas at or below its Ordinary High Water Mark (“OHWM”) as identified by the United States’
23 expert team delineation identified on Trial Exhibits 59 and 60, as well as a setback of 75 feet
24 beyond the OHWM; and (2) as much of Stream 2 that Defendants own or control, including all
25 areas at or below its OHWM as identified in the United States’ expert team delineation identified
26 on Trial Exhibits 59 and 60, as well as a setback of 75 feet beyond the OHWM.

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1 “Corps” shall mean the United States Army Corps of Engineers and any of its successor
2 departments or agencies. Unless the context shows otherwise, all references to the United States
3 herein shall include the Corps.

4 “Day,” whether capitalized or not, shall mean a calendar day unless expressly stated to be a
5 business day. In computing any period of time under this Consent Decree, where the last day would
6 fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the
7 next business day.

8 “Defendants” shall mean John Duarte and Duarte Nursery, Inc.

9 “Effective Date” shall mean the date on which this Consent Decree is entered by the
10 Court.

11 “Parties” shall mean the United States, the Corps, and Defendants.

12 “Site” shall mean the real property at issue in this case that is currently owned or
13 controlled by Duarte Nursery, Inc., bounded on the north by the main stem of Coyote Creek,
14 situated along Paskenta Road, comprising approximately 450 acres, located in rural Tehama
15 County, California, and having Assessor’s Parcel Numbers 037-070-351 and 037-070-371.

16 **IV. SCOPE, EFFECT, AND RESERVATION OF RIGHTS**

17 11. This Consent Decree resolves (a) the civil claims of the United States for the
18 violations of the CWA alleged in the Counterclaim, subject to Defendants’ compliance with this
19 Consent Decree; and (b) all claims that Defendants brought, or could have brought, against the
20 United States related to the Counterclaim (including, but not limited to, the claims set forth in
21 Duarte’s Complaint, First Supplemental Complaint, and Second Amended Complaint). All
22 Parties waive any and all rights of appeal.

23 12. Defendants’ release shall extend to all claims whether or not claimed or suspected
24 and constitute a waiver of each and all the provisions of the California Civil Code, Section 1542
25 (to the extent it would be applicable), which reads as follows:

26 A general release does not extend to claims which the creditor does not know or
27 suspect to exist in his or her favor at the time of executing the release, which if
28 known by him or her must have materially affected his or her settlement with the
debtor.

1 Defendants have read and understood the foregoing, are represented by counsel, and indicate
2 their understanding by signing here: _____ (John Duarte individually);
3 _____ (for Duarte Nursery, Inc. by its President).¹

4 13. It is the express purpose of the Parties in entering this Consent Decree to further
5 the objectives set forth in CWA section 101, 33 U.S.C. § 1251.

6 14. Defendants' obligations under this Consent Decree are joint and several.

7 15. The Parties acknowledge that, as of the Effective Date of this Consent Decree,
8 Nationwide Permit 32, 77 Fed. Reg. 10,184 (Feb. 21, 2012), provides CWA section 404
9 authorization for the discharge of dredged or fill material insofar as such discharge is necessary
10 to fulfill the remedial requirements set forth in Paragraph 24 of this Consent Decree, with such
11 authorization being subject to the conditions provided in Nationwide Permit 32 and this Consent
12 Decree.

13 16. This Consent Decree is not and shall not be interpreted to be a permit, or
14 modification of any permit, under any federal, state, or local laws or regulations. Defendants are
15 responsible for compliance with all applicable federal, state, and local laws, regulations, and
16 permits; and Defendants' compliance with this Consent Decree shall be no defense to any action
17 commenced pursuant to any such laws, regulations, or permits, except as set forth in this Consent
18 Decree. The United States does not warrant that Defendants' compliance with any aspect of this
19 Consent Decree will result in compliance with any provisions of federal, state, or local laws,
20 regulations, or permits. Further, in any future Clean Water Act permit application, Defendants
21 may not rely upon (a) any provision of this Consent Decree, including on-Site remediation work
22 or preservation, as part of any avoidance and minimization measures demonstration; or (b) any
23 provision of this Consent Decree, including off-Site compensatory mitigation, as part of any
24 compensatory mitigation proposal.

25
26
27 _____
28 ¹ Proposed Consent Decree filed by the parties contains signatures.

1 17. Except as provided in Paragraph 15, nothing in this Consent Decree shall limit the
2 ability of the Corps to issue, modify, suspend, revoke, or deny any individual permit or any
3 nationwide or regional general permit, nor shall this Consent Decree limit the United States
4 Environmental Protection Agency’s ability to exercise its authority pursuant to CWA section
5 404(c), 33 U.S.C. § 1344(c).

6 18. This Consent Decree in no way affects the rights of the United States as against
7 any person not a party to this Consent Decree.

8 19. The United States reserves all legal and equitable remedies available to enforce
9 this Consent Decree and applicable law, except as expressly stated in Paragraph 11 of this
10 Consent Decree. This Consent Decree shall not be construed to limit the rights of the United
11 States to obtain remedies under the CWA or its implementing regulations, or under other federal
12 laws, regulations, or permit conditions, except as expressly specified in Paragraph 11 of this
13 Consent Decree.

14 **V. REMEDIAL PROVISIONS**

15 **A. CIVIL PENALTY**

16 20. Within one-hundred eighty (180) Days of the Effective Date of this Consent
17 Decree, Defendants shall pay a civil penalty to the United States in the amount of three-hundred
18 thirty thousand dollars (\$330,000).

19 21. Payment to the United States shall be made in accordance with written
20 instructions to be provided to Defendants by the United States Department of Justice following
21 entry of this Consent Decree. Upon payment, Defendants shall provide written notice to the
22 United States at the addresses specified in Section XI of this Consent Decree.

23 **B. INJUNCTIVE RELIEF**

24 22. Except as necessary to fulfill the requirements of Paragraph 24 below, Defendants
25 and their agents, successors, and assigns and all persons having actual or constructive notice of
26 this decree are enjoined from disturbing approximately 44 acres of waters of the United States on
27 the Site as identified in the United States’ expert team delineation in Trial Exhibits 59 and 60
28 (Appendix 1 hereto), plus a 35-foot setback, by any dredging, filling, land clearing, tillage,

1 agricultural activities, construction work, or any pollutant discharge or earthmoving activities for
2 a period of ten (10) years beginning the Effective Date of this Consent Decree. Nevertheless,
3 Defendants and their agents, successors, and assigns may use the foregoing 44 acres for
4 moderate non-irrigated cattle grazing and weed, pest, or invasive species control. The
5 obligations of this paragraph shall run with the land and bind Defendants' successors and
6 assigns, and shall be enforceable by the United States or the Corps (by any appropriate legal
7 proceeding, including but not limited to enforcement of this Consent Decree). The Balance of
8 the Site is not affected by this Paragraph.

9 *Provided*, that at any time after two (2) years from the Effective Date of this Consent
10 Decree, Defendants may seek from the Corps a revised jurisdictional determination for the Site.
11 In making such determination, the Corps shall apply the then-applicable definition of "waters of
12 the United States" and shall otherwise act in accordance with then-governing law. Defendants
13 may thereafter conduct activities otherwise consistent with then-governing law in areas
14 determined by such revised determination (as may be modified on judicial review thereof) not to
15 be "waters of the United States." This proviso does not apply to the Conservation Reserve.

16 23. Except as necessary to fulfill the requirements of Paragraph 24 below, Defendants
17 and their agents, successors, and assigns and all persons having actual or constructive notice of
18 this decree are permanently enjoined from disturbing the Conservation Reserve by any dredging,
19 filling, land clearing, tillage, agricultural activities, construction work, or any pollutant discharge
20 or earthmoving activities. Nevertheless, Defendants and their agents, successors, and assigns
21 may use the Conservation Reserve for moderate non-irrigated cattle grazing and weed, pest, or
22 invasive species control. The obligations of this paragraph shall run with the land and bind
23 Defendants' successors and assigns, and shall be enforceable by the United States or the Corps
24 (by any appropriate legal proceeding, including but not limited to enforcement of this Consent
25 Decree). The Balance of the Site is not affected by this Paragraph.

26 24. Defendants shall, within thirty (30) Days of the Effective Date of this Consent
27 Decree, submit to the Corps a plan to (a) smooth all disturbed soil surfaces and reasonably match
28 the pre-November 2012 grade and hydrology within impacted waters of the United States on the

1 Site, approximately 22 acres as identified in Trial Exhibit 61 and attached hereto as Appendix 3;
2 (b) stabilize bare mineral soils by planting a native grass and seed mix or taking other
3 appropriate erosion and sediment control measures; and (c) complete the foregoing steps
4 promptly but under a seasonally appropriate schedule such as completing all smoothing near the
5 end of the first available dry season and installing any plants near the beginning of the wet
6 season that follows. Defendants shall obtain approval of a detailed remediation plan covering
7 the aforementioned work by the Corps prior to implementation, which approval shall not be
8 unreasonably withheld. Defendants shall implement the plan as approved by the Corps.

9 25. Within fourteen (14) Days of completion of remedial work required in Paragraph
10 24 above, Defendants shall provide written notice to the United States, including the Corps,
11 under Section XI of this Consent Decree.

12 26. Within 30 days of the Effective Date, Defendants shall record a certified copy of
13 this Consent Decree with the Tehama County, California, recorder's office. Within 30 Days of
14 such recording, Defendants shall provide written notice of such completion, along with a copy of
15 the recorded instrument, to the United States and the Corps at the addresses specified in Section
16 XI of this Consent Decree.

17 27. No later than one (1) year from the Effective Date of this Consent Decree,
18 Defendants shall effect off-site compensatory mitigation by expending seven-hundred seventy
19 thousand dollars (\$770,000) in some combination of the following: (1) purchasing vernal pool
20 establishment credits from one or more Corps-approved mitigation banks that serve the Coyote
21 Creek or Oat Creek watersheds; (2) purchasing credits from the National Fish and Wildlife
22 Foundation's In Lieu Fee Program for the Northeastern Sacramento Valley Vernal Pool Service
23 Area; or (3) effecting such mitigation in another manner approved by the Corps. Within fourteen
24 (14) Days of completion of the requirements of this Paragraph, Defendants shall provide written
25 notice to the United States and the Corps under Section XI of this Consent Decree.

26 **VI. SUBMISSIONS**

27 28. Each submission by Defendants under this Consent Decree shall be signed by an
28 official of the submitting party and include a certification to the effect of the following:

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I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I have no personal knowledge that the information submitted is other than true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

29. The reporting requirements of this Consent Decree do not relieve Defendants of any reporting obligations otherwise required by federal, state, or local law, regulation, permit, or other requirement.

30. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

VII. RETENTION OF RECORDS AND ACCESS

31. Until three (3) years after the termination of this Consent Decree pursuant to Section XV, Defendants shall retain, and shall instruct their contractors, consultants, and other agents to preserve, all non-identical copies of all documents, records, or other information (including electronically stored information) in their or their contractors' or other agents' possession or control, or that come into their contractors' or other agents' possession or control, that relate in any manner to Defendants' performance of its obligations under this Consent Decree. At any time during this information-retention period, upon request by the United States, Defendants shall provide copies of any documents, records, or other information required to be maintained under this Paragraph. If Defendants assert that any information is protected from disclosure under any privilege or protection recognized by federal law, and the United States disputes such assertion, the dispute may be resolved in accordance with Section VIII of this Consent Decree.

32. The United States and the Corps shall have the right to access all or part of the Site at all reasonable times, with reasonable advance notice, in order to

- a. monitor the progress of activities required under this Consent Decree;

- 1 b. verify any data or information submitted to the United States or the Corps
2 in accordance with the terms of this Consent Decree;
3 c. obtain samples;
4 d. obtain documentary evidence, including photographs and similar data; and
5 e. assess Defendants’ compliance with this Consent Decree.

6 Nothing in this Consent Decree is intended to alter the otherwise governing law of premises
7 liability.

8 33. This Consent Decree in no way limits or affects the United States’ otherwise
9 existing rights of entry and inspection or right to obtain information, nor does it limit or affect
10 any duty or obligation of Defendants to maintain documents, records, or other information.

11 **VIII. DISPUTE RESOLUTION**

12 34. Unless otherwise expressly provided for in this Consent Decree, the Parties shall
13 attempt to resolve any and all disputes arising under or with respect to this Consent Decree
14 through the dispute resolution procedures of this Section (“Dispute Resolution”).

15 35. A dispute shall be considered to have arisen when a written Notice of Dispute is
16 transmitted to the opposing party at the addresses specified in Section XI. Such Notice of
17 Dispute shall state clearly the matter in dispute.

18 36. If after 30 Days of transmittal of the Notice of Dispute, the complainant concludes
19 that the Parties have reached an impasse, then the complainant may seek resolution of the dispute
20 by the Court. The Parties may continue to attempt to resolve the Notice of Dispute while the
21 matter is pending before the Court.

22 37. The invocation of Dispute Resolution procedures under this Section shall not, by
23 itself, extend, postpone, or affect in any way any obligation of Defendants under this Consent
24 Decree. Stipulated penalties and interest, if applicable to the disputed matter, shall continue to
25 accrue from the first Day of violation, but payment shall be stayed pending resolution of the
26 dispute as provided in Section X. If Defendants do not prevail on any disputed issue, stipulated
27 penalties, and interest, if applicable, are to be assessed and paid as provided in Section X. If
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1 determined by the Court that Defendants did not violate the Consent Decree, no stipulated
2 penalty or interest shall be assessed against Defendants.

3 **IX. FORCE MAJEURE**

4 38. “Force majeure,” for purposes of this Consent Decree, is defined as any event
5 arising from causes beyond the control of Defendants, of any person controlled by Defendants,
6 or of Defendants’ contractors or consultants that delays or prevents the performance of any
7 obligation under this Consent Decree despite Defendants’ best efforts to fulfill the obligation.

8 39. If any event occurs or has occurred that may delay the performance of any
9 obligation under this Consent Decree, whether or not caused by a force majeure event,
10 Defendants shall provide notice to the United States, at the addresses specified in Section XI,
11 within a reasonable time after Defendants first knew or should have known that the event might
12 cause a delay. Defendants shall also provide an explanation and description of the reasons for
13 the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or
14 minimize the delay; a schedule for implementation of any measures to be taken to prevent or
15 mitigate the delay or the effect of the delay; Defendants’ rationale for attributing such delay to a
16 force majeure event if it intends to assert such a defense; and a statement as to whether, in the
17 opinion of Defendants, such event may cause or contribute to an endangerment to public health,
18 welfare, or the environment. Defendants shall include with any written notice required by this
19 Section all available documentation.

20 40. If the United States agrees in writing that the delay or anticipated delay is
21 attributable to a force majeure event, the time for performance of the obligations under this
22 Consent Decree that are affected by the force majeure event may be extended for such time as is
23 necessary to complete those obligations.

24 41. If the United States does not agree that the delay or anticipated delay has been or
25 will be caused by a force majeure event, or does not agree to the extension of time sought by
26 Defendants, then Defendants may invoke Dispute Resolution under Section VIII of this Consent
27 Decree.

1 42. If Defendants invoke Dispute Resolution under Section VIII of this Consent
2 Decree, Defendants shall have the burden of demonstrating that the delay or anticipated delay
3 has been or will be caused by a force majeure event; the number of Days of delay or anticipated
4 delay that was or will be caused by such force majeure event; that the duration of the delay or the
5 extension sought was or will be warranted under the circumstances; that Defendants could not
6 have foreseen and prevented such delay; that Defendants exercised best efforts to prevent, avoid,
7 minimize, and mitigate the delay and its effects; and that Defendants complied with the
8 requirements of this Section.

9 **X. STIPULATED PENALTIES**

10 43. Defendants shall be liable for stipulated penalties to the United States for
11 violations of this Consent Decree in accordance with this Section, unless excused under Section
12 IX (Force Majeure). A violation includes failing to perform any obligation required by this
13 Consent Decree, including but not limited to any remedial work plan or schedule approved under
14 this Consent Decree, within the specified time schedules established by or approved under this
15 Consent Decree. *Provided*, however, that an insubstantial violation that is cured within seven (7)
16 days of Defendants' receiving written notice from the United States or the Corps shall not incur
17 penalties greater than ten thousand dollars (\$10,000).

18 44. Stipulated penalties shall accrue for violating this Consent Decree in the amount
19 of two thousand five hundred dollars (\$2,500) per Day.

20 45. Stipulated penalties under this Section shall begin to accrue on the Day that a
21 violation occurs and shall continue to accrue until the violation ceases.

22 46. Except as provided in this Section, Defendants shall pay any stipulated penalty
23 within thirty (30) Days of receiving the United States' written demand. Defendants shall make
24 any such payment in accordance with written instructions to be provided by the United States.
25 Upon any such payment, Defendants shall provide written notice to the United States at the
26 addresses specified in Section XI of this Consent Decree.

27 47. The United States may, in the unreviewable exercise of its discretion, reduce or
28 waive stipulated penalties otherwise due it under this Consent Decree.

1 48. Any disputes concerning the amount of stipulated penalties or the underlying
2 violation that gives rise to the assessment of stipulated penalties are subject to the Dispute
3 Resolution provisions of Section VIII. Stipulated penalties and any applicable interest shall
4 continue to accrue as provided in this Consent Decree, but need not be paid until the following:

5 a. If the dispute is resolved by agreement between the Parties, Defendants
6 shall pay the amount due under such agreement, together with any applicable interest, to the
7 United States within thirty (30) Days of the effective date of the agreement.

8 b. If the dispute is taken to the Court, Defendants shall pay all accrued
9 penalties determined by the Court to be owing, together with any applicable interest, to the
10 United States within thirty (30) Days of receiving the Court's decision, except as provided in
11 subparagraph c, below.

12 c. If any party appeals the Court's decision, Defendants shall pay all accrued
13 penalties determined to be owing, together with any applicable interest, to the United States
14 within fifteen (15) Days of receiving the final appellate decision.

15 49. If Defendants fail to pay stipulated penalties according to the terms of this
16 Consent Decree, Defendants shall be liable for interest on such penalties, as provided for in
17 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall
18 be construed to limit the United States from seeking any remedy otherwise provided by law for
19 Defendants' failure to pay any stipulated penalties.

20 50. The payment of stipulated penalties and interest, if any, shall not alter in any way
21 Defendants' obligation to complete the performance of the requirements of this Consent Decree.

22 51. Stipulated penalties are not the United States' exclusive remedy for violations of
23 this Consent Decree. Subject to the provisions of Section IV, the United States expressly
24 reserves the right to seek any other relief it deems appropriate for Defendants' violation of this
25 Consent Decree or applicable law, including but not limited to an action against Defendants for
26 statutory penalties, additional injunctive relief, mitigation or offset measures, and/or contempt.
27 However, the amount of any statutory penalty assessed for a violation of this Consent Decree
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1 shall be reduced by an amount equal to the amount of any stipulated penalty assessed and paid
2 pursuant to this Consent Decree.

3 **XI. NOTICES AND COMMUNICATIONS**

4 52. All notices and communications required under this Consent Decree shall be
5 made to the Parties through each of the following persons and addresses:

6 a. TO THE UNITED STATES:

7 i. TO THE DEPARTMENT OF JUSTICE:

8 LETITIA A. GRISHAW
9 Chief, Environmental Defense Section
10 ANDREW J. DOYLE
11 SAMARA M. SPENCE
12 United States Department of Justice
13 Environment and Natural Resources Division
14 P.O. Box 7611
15 Washington, DC 20044
16 andrew.doyle@usdoj.gov
17 samara.spence@usdoj.gov
18 DJ # 90-5-1-4-19984

14 AND

15 PHILLIP A. TALBERT
16 United States Attorney
17 GREGORY T. BRODERICK
18 Assistant United States Attorney
19 501 I Street, Suite 10-100
20 Sacramento, CA 95814
21 gregory.broderick@usdoj.gov

19 ii. TO THE CORPS:

20 A.L. FAUSTINO
21 District Counsel
22 U.S. Army Corps of Engineers
23 Sacramento District
24 1325 J Street, Room 1440
25 Sacramento, CA 95814
26 Al.Faustino@usace.army.mil

25 b. TO DEFENDANTS:

26 GERALD E. BRUNN
27 Law Offices of Brunn & Flynn
28 928 12th Street, Suite 200
29 Modesto, CA 95354
30 (209) 521-2133 (p)
31 (209) 521-7584 (f)
32 gbrunn@brunn-flynn.com

1 53. Any party may, by written notice to the Parties, change its designated notice
2 recipient or notice address provided above.

3 54. Notices submitted pursuant to this Section shall be deemed submitted upon
4 mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties
5 in writing.

6 **XII. COSTS OF SUIT**

7 55. The Parties shall bear their own costs and attorneys' fees in this action to date.
8 The Parties shall bear their own costs of this action, including attorneys' fees, except that the
9 United States shall be entitled to collect the costs (including reasonable attorneys' fees) incurred
10 in any action necessary to collect any portion of the civil penalty or any stipulated penalties due
11 but not paid by Defendants.

12 **XIII. PUBLIC PARTICIPATION**

13 56. This Consent Decree shall be lodged with the Court for a period of not less than
14 thirty (30) Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United
15 States reserves the right to withdraw or withhold its consent if the comments regarding the
16 Consent Decree disclose facts or considerations indicating that the Consent Decree is
17 inappropriate, improper, or inadequate. Defendants consent to entry of this Consent Decree
18 without further notice and agree not to withdraw from or oppose entry of this Consent Decree by
19 the Court or to challenge any provision of the Decree, unless the United States has notified
20 Defendants in writing that it no longer supports entry of the Decree. Defendants shall be free to
21 exercise their rights protected by the First Amendment to the United States Constitution.

22 **XIV. MODIFICATION**

23 57. The terms of this Consent Decree may be modified only by a subsequent written
24 agreement signed by all the Parties. Where the modification constitutes a material change to any
25 term of this Consent Decree, it shall be effective only upon the Court's approval.

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1 **XV. TERMINATION**

2 58. This Consent Decree expires ten (10) years following the Effective Date, unless at
3 that time Defendants are out of compliance with any provision, in which case the Consent
4 Decree does not expire until Defendants achieve compliance.

5 59. Termination of this Consent Decree does not extinguish the requirements of
6 Paragraph 23 above.

7 **XVI. SIGNATURES/SERVICE**

8 60. Each undersigned representative of Defendants and the United States Department
9 of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this
10 Consent Decree and to execute and legally bind the party he represents to this document.

11 61. This Consent Decree may be signed in counterparts, such counterpart signature
12 pages shall be given full force and effect, and its validity shall not be challenged on that basis.
13 Defendants agree to accept service of process by mail with respect to all matters arising under or
14 relating to this Consent Decree and to waive the formal service requirements set forth in the
15 Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not
16 limited to, service of a summons.

17 **XVII. INTEGRATION**

18 62. This Consent Decree constitutes the final, complete, and exclusive agreement and
19 understanding among the Parties with respect to the settlement embodied in the Consent Decree
20 and supersedes any prior agreements and understandings, whether oral or written, concerning the
21 settlement embodied herein. Other than Appendices hereto, and modifications made effective in
22 accordance with Section XIV of this Consent Decree, the Parties acknowledge that there are no
23 representations, agreements, or understandings relating to the settlement other than those
24 expressly contained in this Consent Decree.

25 **XVIII. FINAL JUDGMENT AND RETENTION OF JURISDICTION**

26 63. Upon its approval and entry by the Court, this Consent Decree shall constitute a
27 final judgment of the Court as to the United States and Defendants. The Parties waive any rights
28 to appeal such final judgment.

1 64. This Court retains jurisdiction over this action for the purpose of resolving
2 disputes arising under this Consent Decree, or entering orders modifying this Consent Decree, or
3 effectuating or enforcing compliance with the terms of this Consent Decree.

4 **XIX. APPENDICES**

5 65. Appendices 1 through 3 are attached to and part of this Consent Decree.

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7 IT IS SO ORDERED.

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9 Dated, entered, and made effective this 7th day of December, 2017.

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14 _____
15 UNITED STATES DISTRICT JUDGE
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Respectfully submitted,

Dated: _____, 2017

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JEFFREY H. WOOD
Acting Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division
Attorney for the United States

Dated: _____, 2017

JOHN DUARTE
Individually and as President of Duarte Nursery, Inc.

PETER PROWS
BRISCOE IVESTER & BAZEL LLP
Attorney for Duarte Nursery, Inc. and John Duarte

ANTHONY L. FRANÇOIS
PACIFIC LEGAL FOUNDATION
Attorney for Duarte Nursery, Inc. and John Duarte

² Proposed Consent Decree filed by parties contains signatures of all parties and counsel.