California Wheat Farmer "Reluctantly" Settles Clean Water Act Case

Tiffany Dowell Lashmet, Texas A&M University

This week, it was announced that the parties have reached a settlement agreement in the *Duarte Nursery v. Army Corps of Engineers.* This case has been a high-profile concern for landowners and agricultural producers across the United States.

Background

In 2012, Duarte Nursery purchased 450 acres land in Tehama County, California with the intent to farm the land, initially by sowing winter wheat. The property, north of Sacramento, consists of rolling grassland. Prior to 1988, the land had been farmed, but from 1988 until the Duarte purchased in 2012, the land had been used for grazing. Due to the clay soil, water collects after rainfall in what are referred to as vernal pools.

Duarte hired a local wheat farmer to plant, care for, and harvest wheat on the property. The farmer was instructed to till the soil 12″ or less, and did so using a Case IH tractor and a Wilcox ripper with 36″ shanks. He was told to avoid vernal pools on the land. The farmer avoided some, but not all, of the vernal pool areas, but none of the pools were destroyed.

In November 2012, an Army Corps of Engineers ("COE") employee drove by the property and observed farming activities and equipment present. He took photographs of what he believed to be a Clean Water Act violation. He returned again in December and observed tilling of the land. He then contacted the owner of Duarte Nursery to inform him that the tilling activities required a permit under the Clean Water Act. Duarte argued it did not need a permit as it was avoiding areas considered wetlands and, therefore, "waters of the United States."

In February 2013, the COE sent a cease and desist letter to Duarte. The letter stated that the COE believed Duarte discharged dredged or fill material into waters of the United States without a permit as required by Section 404 of the Clean Water Act. Specifically, the discharge allegedly occurred into "seasonal wetlands, vernal pools, vernal swales, and intermittent and ephemeral drainages."

In March 2013, Duarte's counsel responded to the letter, seeking any and all documentation used by the COE to support the allegations that Duarte was in violation of the Clean Water Act. They also pointed out that Section 404 of the Clean Water Act exempted certain agricultural activities.

Eventually, the case was transferred to the Environmental Protection Agency ("EPA") for enforcement.

In October 2013, Duarte filed suit against the COE, alleging due process violations. In response, the COE filed a counterclaim alleging a violation of the Clean Water Act by Duarte. The COE sought over $45 in penalties

Trial Court Decision

In June 2016, the trial court judge found in favor of the COE on the Clean Water Act issue. First, the court found that by plowing the land–by moving soil and creating furrows in the field–Duarte discharged dredge and fill material, which is a "pollutant" under the Clean Water Act. Second, the court determined that using a plow to disturb soil is a "point source discharge" as required to trigger Clean Water Act provisions. Third, the court found that this discharge was made into a "water of the United States." The court reasoned that because there were "vernal pools" on the property that are hydrologically connected to Coyote Creek, which is a tributary of the Sacramento River, the vernal pools constituted a water of the United States. Finally, the court held that an exemption to the Clean Water Act for "normal farming activities" on an "established farming operation" did not apply. Because the property was not farmed from 1988-2012, when cattle were run on the land, it was not an established farming operation as required by the exemption. To read a full blog post on the trial court decision, click here. Shortly after the ruling was issued, Duarte's attorneys announced that he planned to appeal this decision.

Penalty Trial

This week, the penalty phase of Mr. Duarte's trial was set to begin and a jury was to consider the proper civil penalty to be imposed for the Clean Water Act violations. Interestingly, earlier this month, the landowner filed a Motion to Dismiss

the suit altogether, arguing that under the Clean Water Act, violations must be enforced by the EPA Administrator, not by the COE as was the case here.

Settlement

On the eve of trial, the parties reached a settlement and trial was cancelled. As John Duarte explained, "This has been a difficult decision for me, my family, and the entire company, and we have come to it reluctantly. But given the risks posed by further trial on the government's request for up to $45 million in penalties, and the catastrophic impact that any significant fraction of that would have on our business, our hundreds of employees, our customers and suppliers, and all the members of my family, this was the best action I could take to protect those for whom I am responsible."

Under the agreement, Duarte will not admit liability but will pay the government $330,000 in civil penalties, and purchase $770,000 in vernal pool mitigation credits. Additionally, he has agreed to limit use on 44 acres of his property that the COE considers to be a WOTUS for the next 10 years, allowing only "moderate non-irrigated cattle grazing and weed, pest, or invasive species control." He also agreed to submit a plan to the COE to "smooth" all disturbed soil surfaces and return to the grade and hydrology prior to plowing. Both sides will pay their own attorney's fees. The Court will approve the settlement in 45 days.

Take Away Points

First, sometimes principle is too expensive to afford. Unfortunately, this a lesson learned often in our legal system. In this case, although Duarte believed he was correct and that the Clean Water Act should not apply, in the end, he was not willing to face potentials of a multi-million penalty if the appellate court sided with the COE.

Second, keep in mind that this case was analyzed under the pre-2015 WOTUS jurisprudence. This is a good reminder that the repeal of the 2015 WOTUS Rule does not mean the Clean Water Act is not still enforced and broadly interpreted in some instances by the government and the courts. The Clean Water Act is still very much alive and the definition of what is a WOTUS is still far from clear. [Read more

on WOTUS here.]

Third, landowners need to be aware of the Clean Water Act provisions related to agriculture and to consider whether their property may contain a WOTUS and, if so, whether their actions could potentially run afoul of the Act. [Read prior blog post here.]

Finally, questions remain. For example, if this issue comes up for another farmer, will the court analyze the "normal farming operation" exception the same way with regard to prior grazing land? Time will tell.