

INDIAN AND ENVIRONMENTAL LAW GROUP



Wednesday, November 23, 2016

Via Certified Mail – Return Receipt Requested No.

Bartlesville Development Authority
c/o Mr. David Wood
201 SW Keeler
Bartlesville, OK 74003

Via Certified Mail – Return Receipt Requested No.

GBT Realty Corporation
9010 Overlook Boulevard
Brentwood, TN 37027

Via Certified Mail – Return Receipt Requested No.

Bartlesville Investment Partners, L.L.C.
c/o Matthew L. Christensen
Two West Second St
Tulsa, OK 74103
Suite 700

Re: Notice of Intent to Sue Bartlesville Development Authority, GBT Realty Corporation, and Bartlesville Investment Partners, L.L.C. for Violations of the Clean Water Act

To whom it may concern:

This letter serves as a sixty-day notice of intent to file a citizen's suit under Section 505 of the Clean Water Act (herein "CWA"), 33 U.S.C. § 1251 *et seq.*, for violations detailed below and is brought on behalf of Mr. Joel Rabin.

Mr. Rabin is a resident of Bartlesville, Oklahoma and is an avid outdoorsman and enjoys the various natural and scenic elements which Washington County and the rest of Oklahoma provide. In addition to regularly hiking through the woods and along the waterways of the area, Mr. Rabin is a long-time fishing enthusiast. Mr. Rabin frequently fishes the waters within Oklahoma including the waters close to Bartlesville. The Caney River bisects the City of Bartlesville in a general north-south direction. On this river, and in compliance with the terms of his fishing license, Mr. Rabin has fished and expects to

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Tulsa, Oklahoma 74103
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fish in the future. The Caney River provides substantial value to Mr. Rabin due to its recreational and scenic opportunities. The waters flowing through Bartlesville afford Mr. Rabin and countless other community members a unique chance to experience and explore nature's beauty within their own hometown. In addition to fishing on the Caney River, Mr. Rabin also enjoys hiking along its banks and generally enjoying the experience which flowing water affords; providing a chance to clear his mind and escape to nature. Mr. Rabin hopes and intends to continue his enjoyment of the Caney River in the future.

After flowing through Bartlesville in a generally southern direction, the Caney River joins the Verdigris River near Claremore, Oklahoma. The Verdigris continues in a southern direction and serves the Port of Catoosa before meeting the Arkansas River near Muskogee, Oklahoma. The waters flowing through Bartlesville are, themselves, directly connected to interstate commerce. There are numerous tributaries of the Caney River which pass through or originate within Bartlesville and the actions of individuals and public and private entities have a significant impact on these tributaries.

One recent project within Bartlesville, The Silver Lake Village development, stands to adversely impact these waters. The project, located southeast of the intersection of Adams Boulevard and Silver Lake Road, has been structured as a phased Planned Unit Development (herein "PUD"). The entirety of the project lies within a Zone AE floodplain – meaning that the entire area is subject to a 1-percent-annual-chance of flooding and subject to certain floodplain management standards. Along the southern edge of the PUD, there is an unnamed tributary that flows directly to the Caney River. The PUD, covering approximately 115 acres, contains numerous wetlands and ephemeral streams. The proposed development plans call for impacting many of these wetlands and streams. Due to the proximity of these water bodies to the tributary along the south side of the PUD and the likelihood of flooding, Mr. Rabin contends all of these wetlands and streams are, themselves, Waters of the United States or that they have a significant nexus to such waters. *See Rapanos v. United States*, 547 U.S. 715 (providing the authority as to what constitutes a "significant nexus" to Waters of the United States). As such, the filling of these water bodies is subject to Section 404 of the Clean Water Act.

The Bartlesville Development Authority, GBT Realty Corporation, and Bartlesville Investment Partners, L.L.C. are currently impacting and damaging the ecological and aquatic habitats within the PUD and thereby degrading Waters of the United States through dredge and fill as well as general grading activities within Phase 1 of the PUD. Upon belief and information, Mr. Rabin understands there are, or at least were, no fewer than three wetlands and approximately 500 linear feet of ephemeral streambed present in the first Phase of the PUD that have been filled, or will soon be filled according to the plans. Further, the proposed plans for later Phases within the PUD call for additional impairments through even more dredge and fill activities. In total,

more than 14 acres of wetlands and 1,000 linear feet of ephemeral streambed are present within the PUD and subject to the Section 404 regulation.

Due to lying wholly within the floodplain, significant grading work has been proposed for the PUD. The public has expressed concern over the grading plans which, among other environmentally damaging issues, call for much of the land in the eastern portion of the PUD to be carved away. This landside is to be cut away and reduced to fill material to be used throughout the PUD to elevate the buildings and roadways above the base flood elevation. These substantial modifications to the terrain will undoubtedly cause direct and indirect impacts to the wetlands and ephemeral streams within the tract. Mr. Rabin contends the filling of the wetlands and ephemeral streambeds which has already occurred, or will occur shortly, within Phase 1 is in violation of the Clean Water Act and intends to bring appropriate actions after this sixty-day notice has matured. Even if the streambeds and wetlands have been entirely destroyed, restoration and re-establishment of the water bodies is not impossible and such a claim would not be moot. *See Hoosier Envtl. Council v. United States Army Corps of Eng'rs*, 722 F.3d 1053, 1058 (holding that even after a highway had been built through wetlands, it was still *possible* to remove the highway and re-establish the filled wetlands and, as such, the case was not moot). Additionally, Mr. Rabin intends to bring appropriate actions to prevent the fill or impairment of any Waters of the United States which are proposed to occur pursuant to the PUD plans that were submitted by, or on behalf of, 1) Bartlesville Development Authority, 2) GBT Realty Corporation, or 3) Bartlesville Investment Partners, L.L.C. At this time, it is unknown to Mr. Rabin which, if any, of the wetlands and streambeds within the PUD have already been altered or impaired.

The Clean Water Act

Congress enacted the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA imposes an absolute prohibition on discharges of pollutants into Waters of the United States without a permit issued through either federal or state agencies. 33 U.S.C. § 1311(a). A pollutant includes, *inter alia*, rock, sand, chemical wastes, biological materials, and industrial waste. 33 U.S.C. § 1362(6). Under § 404, discharges of dredged or fill material into Waters of the United States may only occur if permitted by the Army Corps of Engineers (herein the “ACOE”). 33 U.S.C. § 1344(a). Waters of the United States, as defined in Section 404, includes wetlands, which are areas “inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” 33 C.F.R. § 328.3(b); *see also U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 131-32 & n. 8 (1985).

Based on information and belief, Mr. Rabin understands that a wetlands delineation has been conducted for the entire PUD¹ and that certain wetlands and waterways are known to exist within the PUD. *See* Attachment 1. It is understood that Waters of the United States are at issue within each Phase of the PUD and, absent appropriate permits, the dredge or fill of such wetlands is prohibited. 33 U.S.C. § 1344(a). To the extent that Bartlesville Development Authority, Bartlesville Investment Partners, L.L.C., or GBT Realty Corporation is acting pursuant to ACOE Jurisdictional Determination 2015-573, such Jurisdictional Determination was improvidently issued based upon lack of full consideration for all water bodies within Phase 1 and upon improper segmentation of the PUD, thereby partitioning the deleterious impacts that each Phase will have on the Waters of the United States. *See* Attachments 2 and 3. Such that the ACOE may have designated Phase 1 to contain no Jurisdictional waters, this determination failed to consider the impacts of the entire PUD, let alone other similarly situated lands. *Rapanos v. United States*, 547 U.S. 715, 780 (Kennedy concurring that wetlands fall within the regulations of § 404 of when “the wetlands, either alone or **in combination with similarly situated lands** in the region, significantly affect the chemical, physical, and biological integrity of other covered waters”) (emphasis added). Within the Silver Lake Village PUD, the Army Corps failed to adequately evaluate the activities and the wetlands within the 115 acres, itself an entirely manageable tract of land to assess in one shot rather than through piecemeal partitioning. An analysis that evaluates *all* similarly situated lands in the region provides the most robust environmental assessment. However, Mr. Rabin is not asking for inclusion of the surrounding lands. Instead, Mr. Rabin suggests that, at a *minimum*, the lands within the 115 acres of the PUD be included in such assessment. “[A]lthough we evaluate the functions of the wetlands individually, the ultimate inquiry is whether the collective effect of these functions is significant.” *Precon Dev. Corp. v. United States Army Corps of Eng’rs*, 603 Fed. Appx. 149, 152 (affirming the Army Corps’ decision to aggregate wetlands from the region surrounding a development and assessed the combined impacts of 448 total acres of wetlands even though the development contained only 4.8 acres of such wetlands).

Any action which results in the filling of Waters of the United States must be permitted through the ACOE. 33 U.S.C. 1311(a); 33 U.S.C. 1342. Discharge of fill includes “Placement of fill that is **necessary** for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses”. 33 C.F.R. § 323.2(f) (emphasis added). To the extent that roadways or buildings are to be constructed within the PUD which, as noted previously, is entirely within the floodplain,

¹ This delineation was not performed by the Army Corps of Engineers themselves, but by a contractor hired by the Bartlesville Development Authority, GBT Realty Corporation, or Bartlesville Investment Partners, L.L.C.

emergency roadways and floors of buildings must be at least 12" above the base flood elevation. Such construction would likely require fill material to elevate above the base flood elevation. A cursory glance of the proposed project plans indicates that buildings, roadways, and/or parking lots are expected to be built over the involved water bodies. See Attachment 4. This building material itself requires permitting in accordance with § 404. See 33 C.F.R. § 323.2(f).

You are responsible for the above violations to the CWA. It is your duty to ensure that you are in compliance with all applicable state and federal regulations. Your failure to comply with the requirements of the Clean Water Act has caused, and will continue to cause, harm to the aquatic habitats within the PUD and to the Waters of the United States. The ecological health of the Caney River is dependent upon the stability and continued vitality of the many tributaries which feed into it. By conducting your dredge, fill, and grading activities within the Silver Lake Village, you have had a direct and adverse impact upon the waters in which Mr. Rabin fishes and recreates: waters under the protection of the Clean Water Act. Ceasing dredge and fill activities and restoring and re-establishing wetlands that may have already been lost will prevent such harm in the future.

During this 60-day notice period, Mr. Rabin is willing to discuss effective remedies for the violations stated in this letter. He prefers that you contact his attorneys, Jason Aamodt, Dallas Strimple, or Matt Alison at 204 Reunion Center, 9 East 4th St., Tulsa, OK 74103, or by telephone at (918) 347-6169 to begin discussions.

If you would like to resolve this matter without litigation, please initiate any discussion as soon as possible so that negotiations may be completed prior to the end of the 60-day notice period. If an agreement has not been reached by the end of the deadline, Mr. Rabin will not delay in filing a complaint seeking all available legal remedies.

Very truly yours,



Matthew D. Alison, Esq.

cc:

Via Certified Mail – Return Receipt Requested No.

Gina McCarthy, Administrator
Environmental Protection Agency

Ariel Rios Building
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Washington, DC 20460

Via Certified Mail – Return Receipt Requested No.

Ron Curry, Regional Administrator
Environmental Protection Agency, Region 6
Fountain Place 12th Floor, Suite 1200
1445 Ross Avenue
Dallas, TX 75202-2733

Via Certified Mail – Return Receipt Requested No.

Loretta E. Lynch
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Via Certified Mail – Return Receipt Requested No.

Scott Thompson, Executive Director
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Via Certified Mail – Return Receipt Requested No.

E. Scott Pruitt, Attorney General
Oklahoma Attorney General's Office
313 NE 21st Street
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Via Certified Mail – Return Receipt Requested No.

Department of the Army
Corps of Engineers, Tulsa District
1645 S. 101st E. Avenue
Tulsa, OK 74128

Via Certified Mail – Return Receipt Requested No.

City of Bartlesville
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Bartlesville, OK 74003