

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

1. JOEL RABIN,)	
)	
Plaintiff,)	Civil Case No.
)	
v.)	
)	
1. BARTLESVILLE DEVELOPMENT)	
AUTHORITY,)	
2. BARTLESVILLE INVESTMENT)	
3. PARTNERS, LLC, and)	
GBT REALTY CORPORATION)	
)	
Defendants.)	

COMPLAINT

1. This is a civil action brought under the citizen suit provisions, 33 U.S.C. §1365, of the Federal Water Pollution Control Act (commonly known as the Clean Water Act and hereinafter referred to as the “CWA”) 33 U.S.C. §§ 1251 *et seq.* Based upon information and belief, Plaintiff contends that Defendants have discharged pollutants into waters of the United States without a permit, in violation of § 301(a) of the CWA, § 33 U.S.C. § 1311(a).

2. Plaintiff seeks a declaratory judgment, injunctive relief, remedial relief, and the award of costs, including attorney and expert witness fees.

INTRODUCTION

3. This Court has subject matter jurisdiction over the claims specified in this Complaint pursuant to 33 U.S.C. § 1365(a) and 28 U.S.C. §1331. The relief requested is authorized pursuant to 33 U.S.C. §§ 1319 and 1365(a) and 28 U.S.C. §§ 2201 and 2202.

4. In compliance with 33 U.S.C. § 1365(b)(1)(A), on November 23, 2016, Plaintiff gave notice of the violations specified in this Complaint and of Plaintiff's intent to file this lawsuit as required by 40 CFR § 135.2. A copy of the notice letter is attached hereto as Exhibit A.

5. Sixty days have passed since the notice was received by the appropriate agent of each Defendant. The violations complained of in the notice letter are believed to be continuing at this time and are likely to continue into the future. As such, the Defendants remain in violation of the CWA.

6. No agency—federal or state—is diligently prosecuting the violations of the CWA.

7. Venue is appropriate pursuant to Section 505(c)(1) of the CWA, 33 U.S.C. § 1365(c)(1), because the sources of all violations complained of have occurred in the District.

PARTIES

8. Plaintiff, Joel Rabin (herein "Plaintiff" or "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. On this River, and in compliance with the terms of his fishing license, Mr. Rabin has fished and expects to 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.

9. Defendants' discharges and dredge and fill activities have adversely affected and continue to adversely affect Rabin's above-described use and enjoyment of the lands and waters around the community of Bartlesville.

10. Wetlands help protect the integrity of the Nation's waters as they provide countless environmental services including, among others: improving water quality through contaminant filtration; mitigating flood events through stormwater storage; providing breeding, spawning, and feeding habitat; and reducing sediment entry into navigable waterways.

11. Enforcement of the CWA will help restore and preserve water quality, thereby protecting Rabin's interests by maintaining and improving the vitality and stability of the aquatic ecosystems within Bartlesville and throughout waters of the United States.

12. Defendant Bartlesville Investment Partners, LLC, (herein "BIP") is a Foreign Limited Liability Company registered with the Oklahoma Secretary of State to lawfully conduct business in Oklahoma. The Company was formed in 2016 and principally based out of Georgia, USA.

13. Defendant GBT Realty Corporation (herein “GBT”) is a foreign business entity not registered with the Oklahoma Secretary of State to conduct business in Oklahoma. GBT’s principal place of business is in Tennessee.

14. Based upon information and belief, Mr. Rabin understands that GBT formed BIP to lawfully conduct business within Oklahoma and, separate business structures notwithstanding, BIP is but a branch of GBT.

15. The Bartlesville Development Authority (herein “BDA”) is a Public Trust registered with the Oklahoma Secretary of State.

16. Together BIP, GBT, and the BDA have collaborated in the development of the Silver Lake Village project. Silver Lake Village has been structured as a phased Planned Unit Development (herein “PUD”) to be constructed southeast of the intersection of Adams Boulevard and Silver Lake Road in Bartlesville, Oklahoma. In total, the development is to encompass approximately 115 acres. The development is proposed to include roadways, parking lots, commercial retail buildings, residential buildings, and substantial land grading activities.

BACKGROUND AND FACTS

17. The Caney River bisects the City of Bartlesville in a north-south manner. 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.

18. The Silver Lake Village PUD is within the 100-year floodplain of the Caney River and contains numerous ephemeral streams and delineated wetlands. An unnamed tributary of the Caney River passes between the PUD and the intersection of Adams Boulevard and Silver Lake Road. This tributary has been routed through various culverts and is subject to numerous engineering modifications to accommodate prior developments. The boundary of the PUD is within 200' of this tributary and multiple delineated wetlands within the proposed development lie within 300 yards of it. Along the southern boundary of the PUD passes a separate unnamed tributary to the Caney River. Numerous wetlands are adjacent to this tributary and several ephemeral streams within the PUD discharge into it.

19. The CWA serves as the cornerstone for surface water quality protection in the United States. Its foundational purpose is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251.

20. The CWA prohibits discharges of dredged or fill materials into waters of the United States without a permit. 33 U.S.C. § 1311(a); 33 U.S.C. § 1344(a).

21. Waters of the United States, as defined in § 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).

22. The Caney River is surrounded by jurisdictional wetlands and the acreage proposed to be developed within the PUD contains a substantial amount of delineated wetlands and waters.

23. Section 301 of the CWA, 33 U.S.C. § 1311(a), states that “the discharge of any pollutant by any person shall be unlawful,” unless such discharge is permitted. Section 404 permits, issued by the Army Corps of Engineers (herein “ACOE”), regulate the discharge of dredged and fill materials.

24. The CWA defines “pollutant” to include rock, sand, and biological materials. 33 § U.S.C. 1362(6). Moreover, the term “pollution” includes “man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.” 33 U.S.C. § 1362(19). Additionally, “discharge of fill material” 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).

25. Within the PUD, four discrete Phases are planned. Phase 1 is a commercial development, located towards the northwest part of the PUD. In September 2016, The Army Corps of Engineers Tulsa District provided a Jurisdictional Determination (herein “JD”) for a tract of land which included Phase 1 which ultimately concluded that the review area did not contain jurisdictional waters of the United States. Mr. Rabin understands that, upon obtaining this JD, the Defendants began grading and construction

activities within Phase 1 which have dredged and filled delineated wetlands, or which soon will do so.

26. Defendants admit that the economic viability of Phase 1 depends upon the completion of the other three phases of the PUD. Phases 2, 3, and 4 contain more than 16 acres of additional wetlands and ephemeral streams which have been deemed jurisdictional. Upon information and belief, Defendants purposefully scoped their phases in such a way as to limit the extent of any Section 404 permit they may have to acquire, despite the fact that the phases are all necessary components of their development being successful.

27. Defendants' proposed plans call for land grading activities, paving, and building within delineated waters. These activities and materials fall within the scope of 33 U.S.C. §§ 1362(6) and 1362(19), and 33 C.F.R. § 323.2(f) and cannot occur within jurisdictional waters without a permit, pursuant to 33 U.S.C. § 1311(a).

28. The Defendants do not have a permit for discharges into waters of the United States for activities within Phase 1 of the PUD and, to the extent jurisdictional waters exist within Phase 1 and have been or will be impacted, the Defendants'—or their agents'—actions are in violation of 33 U.S.C. § 1311(a); 33 U.S.C. § 1344(a).

29. Defendants have a pending application to impact other protected waters within the remaining Phases of the PUD and this current action is limited only to the impacts within Phase 1.

30. Defendants will likely claim that the JD from the ACOE protects them from CWA prosecution for dredge and fill activities within Phase 1. The JD from the ACOE binds

the agency to its determination for a period of five (5) years but, in itself, is not proof that wetlands do not exist nor that any present wetlands are not jurisdictional and citizen suits are still available under 33 U.S.C. §1365. *See United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1814 (2016) (stating that a JD binds the ACOE for a period of five years but “the property owner may still face a citizen suit” for violations of the CWA).

31. Wetlands fall within the protection of the CWA if they have a significant nexus to interstate waters. *See Rapanos v. United States*, 547 U.S. 715 (Justice Kennedy’s concurrence providing authority for what constitutes a “significant nexus”). Specifically, “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity” of navigable waters of the United States, such wetlands are considered jurisdictional under the “significant nexus” test and fall within the protections of the CWA and are considered “waters of the United States” requiring a permit under Section 404 of the CWA before a discharge can occur. *Id.* at 780. Factors such as wetland area, proximity to navigable waters or tributaries of navigable water, location within a floodplain, and presence of protected species may all contribute to a determination of a significant nexus with navigable waters.

32. Dredge and fill activities have already occurred to waters of the United States, each day that discharged materials remain within wetlands is an ongoing violation of the CWA.

COUNT I

Discharge of Pollutants in Violation of Section 404 of the CWA

33. Plaintiff incorporates all preceding paragraphs by reference.

34. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of dredged or fill materials into waters of the United States, unless the ACOE has issued a permit pursuant to Section 404. 33 U.S.C. § 1311(a); 33 U.S.C. § 1344(a).

35. Defendants discharged and continue to discharge dredged and fill materials as a part of their construction activities into delineated wetlands within Phase 1 without obtaining a Section 404 permit.

36. Defendants partitioned their project so as to segment the delineated waters within the PUD and claim that—while certain wetlands within the PUD are subject to CWA protection—no permit is required to fill the wetlands within Phase 1. By advancing this position, Defendants must—necessarily—be contending that the lands within Phases 2, 3, and 4 are not “similarly situated lands” to those within Phase 1. Additionally, the Defendants must—necessarily—claim that the wetlands within Phase 1, in connection with other lands in the floodplain of the Caney River, do not “significantly affect the chemical, physical, and biological integrity” of the Caney River.

37. Plaintiff is aware of no precedent which allows a developer to segment their property and piecemeal individual wetlands into “jurisdictional” and “non-jurisdictional”. Instead, wetlands are deemed jurisdictional if “either alone or in combination with similarly situated lands in the region”, they significantly affect navigable waters. *Rapanos* at 780 (emphasis added).

38. The wetlands within Phase 1 significantly affect the biological, chemical, and physical integrity of the surrounding areas and waters and, as such, fall within the protections of the CWA and are, themselves, waters of the United States.

39. By discharging and continuing to discharge pollutants without a permit into waters of the United States as detailed herein, Defendants violated and continue to violate Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

COUNT II

Discharge of Pollutants in Violation of Oklahoma Law

40. 27a O.S. § 2-6-105 (A) provides “It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state. Any such action is hereby declared to be a public nuisance.”

41. “‘Waters of the state’ means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, storm sewers and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion thereof, and shall include under all circumstances the waters of the United States which are contained within the boundaries of, flow through or border upon this state or any portion thereof. Provided, waste treatment systems, including treatment ponds or lagoons designed to meet federal and state requirements other than cooling ponds as defined in the Clean Water Act or rules promulgated thereto and prior converted cropland are not waters of the state.” 27a O.S. § 1-1-201 (20).

43. “‘Pollution’ means the presence in the environment of any substance, contaminant or pollutant, or any other alteration of the physical, chemical or biological properties of the environment or the release of any liquid, gaseous or solid substance into the environment in quantities which are or will likely create a nuisance or which render or will likely render the environment harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, or to property.” 27a O.S. § 1-1-201 (10).

44. “‘Pollutant’ includes but is not limited to dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agribusiness waste.” 27a O.S. § 1-1-201 (9).

45. Defendants’ dredged spoil is a Pollutant. 27a O.S. § 1-1-201 (9).

46. Defendants placement of dredged spoils caused pollution because the dredged spoils removed wetlands, making them likely to render the environment harmful or be detrimental to public health, safety and welfare. 27a O.S. § 1-1-201 (10).

47. Alternatively to Count I, If the wetlands in Phase 1 are not waters of the United States, then the wetlands in Phase 1 are Waters of the State.

48. Defendants pollution of Waters of the State is a nuisance.

49. Okla. Stat. tit. 27A, § 2-6-105 does not require an agency enforcement action as a precondition to the existence of a public nuisance. *BNSF v. Grant*, 505 F.3d 1013 (10th Cir. Okla. 2007).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant Plaintiff the following relief:

- A. Issue a declaratory judgment that Defendants have violated and continue to violate the CWA;
- B. Enjoin Defendants from maintaining their ongoing violations of the CWA by requiring Defendants to remove any discharges from the protected waters;
- C. Enjoin Defendants from continuing or undertaking additional grading or construction activities which would result in discharges into protected waters;
- D. Issue a remedial injunction ordering Defendants to pay the costs of any environmental restoration or remediation deemed necessary and proper by the Court to comply with the CWA and ameliorate the water degradation caused by Defendants' violations;
- E. Alternatively, under 27a O.S. § 1-1-205 (A), Order the Defendants to abate the nuisance they have caused by causing pollution. *BNSF v. Grant*, 505 F.3d 1013 (10th Cir. Okla. 2007).
- F. Award Plaintiff his costs, including reasonable attorney and expert witness fees, as authorized by 33 U.S.C. § 1365(d); and
- G. Award such other relief as this Court deems necessary or appropriate.

Respectfully Submitted this 21st Day of
February, 2017,



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