



SAVANNAH RIVERKEEPER®

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August 11, 2023

BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Rabun County Company, LLC
d/b/a Waterfall Club
Mr. Jason LeBlanc, Registered Agent
Manager of Operations under direction of
Robert T. Hewlett
1105 Waterfall Drive
Clayton, GA 30525

Mr. Robert T. Hewlett
Managing Owner of Waterfall Club
7069 Heardsville Road
Cumming, GA 30028

Darrin Giles, Administrator
Rabun County Georgia
25 Courthouse Square, Suite 201
Clayton, GA 30525

Mr. Shylan Woods, Administrator
Planning and Zoning
Rabun County Georgia
18 Old Raco High Drive, Suite 102
Clayton, GA 30525

Ms. Anna Truszczynski, Branch Chief,
Georgia Environmental Protection Division
Watershed Protection Branch
2 Martin Luther King Jr. Drive,
Suite 1152 East
Atlanta, GA 30334

BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Georgia Power Company
Ms. Kristi Dow, Registered Agent
241 Ralph McGill Boulevard, BIN 10180
Atlanta, GA 30308

Mr. Jeff Cown, Director
Georgia Environmental Protection Division
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Atlanta, GA 30334

Ms. Jeaneanne Gettle
Acting Regional Administrator
U.S. Environmental Protection Agency
Region 4
Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, GA 30303-3104

Ryan K. Buchanan, Esq. U.S. Attorney,
Northern District of Georgia
Richard Russell Federal Building
75 Ted Turner Drive, S.W., Suite 600
Atlanta, GA 30303

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Re: **Notice of Intent to Sue**
Clean Water Act § 505 – 33 U.S.C. § 1365
60-day Notice of Violations by
Rabun County Company, LLC d/b/a Waterfall Club
Robert Hewlett; Rabun County, Georgia; and Georgia Power Company

Ladies and Gentlemen:

I am writing this Notice of Intent to Sue to you on behalf of the Savannah Riverkeeper, Inc. (SRK) and its Board of Directors. This letter is written to the recipients regarding proven and acknowledged violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (“CWA”) at the property owned by Rabun County Company, LLC, the owner of the Waterfall Club Golf Course, and other facilities, located on Waterfall Drive in Clayton, Rabun County, Georgia (hereinafter the “Waterfall Club”).

Based upon our understanding from members of Waterfall Club, its majority owner Robert Hewlett and its agent for Service and Operations Manager of Waterfall Club Jason LeBlanc are responsible for the illegal actions of Waterfall Club, as detailed herein. It is my understanding that the other owners of Waterfall Club do not participate in operations decisions of Waterfall Club.

Agents of Waterfall Club Mr. Hewlett and Mr. Leblanc are targets and recipients of this letter because as aforementioned actors of operational decisions of Waterfall Club, they are likewise the responsible parties for the illegal actions that made Waterfall Club a recipient of this letter. We believe that each of the recipients of this letter, and the entities which you represent, and are appropriate recipients of this notice.

1.0 Introduction And Information About Savannah Riverkeeper (“SRK”).

“SRK” is a 501(c)(3) non-profit organization with over 800 members, including individuals and entities who reside at or use Lake Burton for fishing and recreation. SRK’s mission is to protect the water quality of the Savannah River and the integrity of its watershed, and to promote an enlightened stewardship of its unique heritage. With a paid membership of over 800 persons and entities and an online following of over 30,000 persons and entities, we work alongside our communities for the betterment of our River. Our primary goal is to effectively support communities throughout the basin by mobilizing their collective strength to protect and restore the Savannah River, while promoting strong advocacy for a clean and healthy river and surrounding communities.

With initiatives like our Veterans for Clean Water Program and the collaborative data-sharing platform Know Your River, www.knowyourriver.com, we empower citizens within

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our watershed through tools, training, and access, enabling them to actively advocate for the well-being of their river.

The activities described in this letter at the sites addressed in this Notice have negatively impacted the Savannah River headwaters at Lake Burton by increasing stormwater runoff, contributing large amounts of sedimentation into the lake and feeder creeks, harming aquatic species' habitats, including a trout stream, destroying important wetlands by willfully failing to obtain required permits, and failing to control sediment depositing into the waters of Lake Burton and its headwaters. These activities damage these waters and properties nearby, have discouraged recreational and fishing use of the creeks, and will damage Lake Burton where affected, perhaps permanently.

In accordance with the contents of this Notice, Waterfall Club has persistently and knowingly violated the CWA by not obtaining permits, where required, and through its construction and operational activities upon its property at an elevation directly above the waters and feeder streams leading into Lake Burton. Waterfall Club's construction activities have and continue to result in significant unlawful discharge of sediment-laden stormwater and fill material from the Waterfall's construction and operational activities into tributaries connected to the Tallulah River and Lake Burton. This ongoing misconduct has created a continuing, abatable nuisance for which the Waterfall Club has exclusive responsibility for erosion from Waterfall Club into Stanton Creek and other areas of Lake Burton. Furthermore, the other recipients of this letter have failed to address the aforementioned issues, as mandated by state and federal laws.

The homeowners residing in the vicinity of Stanton Cove, a section of Lake Burton, have discovered the enduring and continuing abatable nuisances described in this letter.

The purpose of this letter is to notify and emphasize from SRK the necessity of conducting investigations, and, if required, obtaining federal court order(s), regarding all areas of Lake Burton, including numerous coves and regions situated below the mountain where the Waterfall Club is situated.

We intend to seek mandatory injunctions from the United States District Court, compelling Waterfall Club to investigate all areas of Lake Burton affected by sediment flows originating from Waterfall Club property.

Waterfall Club must immediately undertake the removal of siltation from the Stanton Cove area, and any other unexplored locations, to assure elimination of the ongoing impact on Lake Burton and the Tallulah River resulting from the sedimentation and increased stormwater flow rates caused by activities on the Waterfall Club property, including illegally not containing stormwater runoff, illegal construction, and failure to obtain other permits where lawfully required, including stormwater management permits. It is important to note that siltation

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continues to migrate and increased stormwater continues to compromise streambanks, likely posing a risk of long-term damage to areas of Lake Burton beyond Stanton Cove. Additionally, I share concerns regarding the impact on the trout stream elements of Lake Burton, among other related environmental, water quality and wildlife habitat issues.

2.0 The United States Clean Water Act (“CWA”).

This letter serves as notice pursuant to §§ 505(a)(1) and (b)(1) of the CWA that, following expiration of the 60-day notice period, I, Tonya Bonitatibus, as The Savannah Riverkeeper, intend to bring suit against Waterfall Club and other responsible persons for the violations addressed in this letter pursuant to the citizen suit provisions of the CWA.

Pursuant to § 505(b) of the CWA, notice is hereby given of Waterfall Club’s CWA violations, some of which are set forth herein. We are concerned that, from ongoing investigations, we will likely find additional areas that have been impacted by uncontrolled water and sediments flowing from the Waterfall Club property.

The citizen suit provision of the CWA provides that “any citizen” may commence a suit “against any person,” including a corporation, “alleged to be in violation of an effluent standard or limitation under this chapter.” 33 U.S.C. § 1365(a)(1). Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source to waters of the United States except in compliance with, among other conditions, an NPDES permit issued pursuant to § 402 of the CWA, 33 U.S.C. § 1342. The CWA defines “point source” as “any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure ... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). *See also, U.S. v. Lambert*, 915 F. Supp. 797 (4th Cir. 1996) (Bulldozers, backhoes, draglines, and other earthmoving equipment are all point sources as defined in 33 U.S.C.A. § 1362(14)). The CWA defines “pollutant” to include solid waste, dredged spoil, sediment, rock, and sand. 33 U.S.C. § 1362(6); 40 C.F.R. 122.2; *see also U.S. v. Wilson*, 133 F.3d 251, 259 (4th Cir. 1997) (“Dredged materials, including the native soils excavated by construction and ditching activities, may constitute a pollutant within the meaning of the Clean Water Act.”)

According to federal and State of Georgia laws, stormwater discharge from a construction site that is one acre or greater in size constitutes a point source discharge. *See* 40 C.F.R. § 122.26.

Some owners of properties geographically located below the Waterfall Club property filed suit on October 7, 2021, to hold Waterfall Club accountable for huge volumes of silt, etc., moving downgradient from the Waterfall Club, and into Lake Burton, beginning in 2017 and likely earlier, and continuing until the present date. *See 183 Magnolia Place, LLC et al. v. Rabun County Company, LLC, et al.*, Rabun County Superior Court, Civil Action File No. 2021-CV-0272.

On May 31, 2022, Waterfall Club, represented by its consultant, Kimley Horn, submitted a Stream Buffer Variance Application with the Georgia Environmental Protection Division of the Georgia Department of Natural Resources (the “EPD”). Subsequently, on September 27, 2022, William L. Hall, an Environmental Engineer with NewFields Companies (“Newfields”), prepared and submitted a response to the variance request by Waterfall Club to the EPD and Rabun County, on behalf of the Plaintiffs in the lawsuit. The NewFields response revealed a consistent pattern exhibited by responsible persons for Waterfall Club, where they have neglected regulatory requirements for stormwater permitting for numerous years, specifically in relation to their construction and land disturbance activities across various sections of the golf course, resulting in soil erosion. Throughout these extensive land disturbance activities, Waterfall Club, Robert Hewlett, and employees of Waterfall Club knowingly and repeatedly failed to develop and implement required Erosion and Sedimentation Control Plans (ESCPs), including obtaining permits and associated Best Management Practices (BMPs), as mandated by applicable statutes and regulations. In addition to these recurring violations, Waterfall Club disregarded stream buffers and filled in wetlands, specifically made them dry, disregarding objections raised by their own contractors regarding the elimination of wetlands, as directed by the majority owner of Waterfall Club, Robert Hewlett. Surprisingly, the United States Environmental Protection Agency (“EPA”), Georgia Environmental Protection Division (“EPD”), Rabun County, and Georgia Power have taken no action to ensure the rectification of these legal violations that have caused the filling of at least one downgradient cove. This lack of intervention sets a dangerous precedent for the residents and the general public, as the damage to Lake Burton and its surrounding environment is likely to persist and increase all around the lake, if not addressed by the application of so many laws.

3.0 Waterfall Club Misrepresents that its Movement of Soils and Sediments, Without Permits, has a Minimal Impact.

Kimley Horn, an environmental company on behalf of the Waterfall Club, states on page 4 of the variance application:

*During the winters of 2019 and 2020, the Waterfall Club (“TWC” or “applicant”) performed maintenance activities that involved replacing Bermuda grass with Zoysia grass on the fairway approaches of various course holes. This project involved **minor** land disturbance, grading, and grassing (emphasis added).*

This statement contains inaccuracies, misrepresentations of facts, and contradicts the rules and regulations established by the EPA and the EPD. In the work product provided by Kimley Horn dated October 29, 2021, it is clearly stated that approximately 10 acres of fairways were subject to clearing and grading at the same time and at the direction of the Waterfall Club. Table 4 in the Kimley Horn report specifically identifies and shows the areas where fairways

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were cleared. Within these 10 acres, there were significant portions of steep mountainside that were cleared of groundcover and understory vegetation, without any proposed or implemented soil, sedimentation, and stormwater controls for an extended period, with no land disturbing permit requests made to and obtained from the EPD or the EPA.

As of the current date, neither Georgia Power, Rabun County, EPA, nor the EPD have made any determinations regarding the impact of soil, sedimentation, and other soil mobilization activities that occurred on the Waterfall Club property and that impacted Lake Burton and its surrounding areas. The sedimentation in Stanton Cove is solely attributed to Waterfall Club property.

One of my primary concerns is that other property owners and developers may have followed Waterfall Club's poor example and disregarded regulatory requirements pertaining to stormwater runoff from their own properties.

It is evident that representatives of Rabun County, EPA, EPD, and Georgia Power have chosen to overlook these obvious risks and existing damages to Lake Burton, apparently caused by politics all around.

The available records, including charts and photographs, incontrovertibly demonstrate multiple instances of vegetation clearing that served as protective measures against erosion on the Waterfall Club property and elsewhere around the Lake. For example, Waterfall Club, led by Robert Hewlett and Jason LaBlanc, stripped the creek banks of all vegetation along 1,000 feet of the stream channel leaving the Waterfall Club property and lined it with riprap. This activity is a clear admission by Waterfall Club that its property is the source of sediment continually filling Stanton Cove. Recently, legally defective permits were issued to attempt to right that wrong, but recent rains have proven that torrents of water are still going into Stanton Cove and Lake Burton from Waterfall Club property. Apparently, the damage originally done to the creek has not been resolved by the recent limited activity.

Kimley Horn, representing Waterfall Club, has acknowledged the requirement for stormwater permitting and associated ESCP and BMPs for construction sites exceeding 1 acre. In Table 1 of the Kimley Horn report, Waterfall Club itself acknowledges that construction areas larger than one acre were present during the golf course construction activities. Furthermore, on page 4 of the Kimley Horn report, Kimley Horn refutes and dismisses the erroneous argument, put forth by Waterfall Club and its attorneys, regarding the less than one-acre threshold as follows:

The National Pollutant Discharge Elimination System Permit (NPDES) in Georgia defines permit coverage eligibility, including size of disturbance area. Since the golf course is linear in nature, and the disturbance took place in sections, the project applies to the eligibility requirements of the linear NPDES

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permit, which covers discharges of stormwater that will result in contiguous land disturbances equal to or greater than one (1) acre.

Contrary to the unsupported and incorrect findings in the EPD's grant of the variance, EPD guidelines do not specify that **most** of the disturbance area on a construction site should be below 1 acre to avoid the need for a stormwater permit. That attempt by the EPD to rewrite and misstate the EPA and EPD statutory and regulatory controlling language is outrageous and directly creates questions about the integrity of the EPD officials who attempt to ignore clear statutory and regulatory mandates.

For clarification of what is required, the EPD Fact Sheet¹ for Stormwater Permitting states:

NPDES General Permits No. GAR100001, No. GAR100002 and No. GAR100003 will authorize the discharge of stormwater from sites where construction activities will result in contiguous land disturbances equal to or greater than one (1) acre or tracts of less than one (1) acre that are part of a larger common plan of development with a combined disturbance one (1) acre or greater.

The following is an excerpt from Newfields' Report on behalf of owners of property adjacent to Stanton Cove, dated January 31, 2022:

Waterfall Club's Misrepresentation: There was no need for permits, erosion and sediment control plans or dredge and fill permitting under the Clean Water Act or Section 404 because individual areas were all less than 1-acre.

NewFields Response: It is abundantly clear from currently existing visual evidence that there is significant data, including extensive photographic evidence, that conclusively prove that there have been, and continue to be, numerous and significant land disturbance activities, much greater than 1-acre individually, and much greater than five acres, collectively without erosion controls, that have resulted in the siltation of Stanton Cove and Lake Burton during the period of 2018 through 2021. (See NewFields Report dated October 4, 2021 Section 7.3). The KH report itself identifies individual areas greater than 1-acre and a total area disturbed greater than five acres (KH report dated October 29, 2021, pages 3 and 4, Table 1). Even these numbers are a serious underestimate of disturbed areas as discussed in NewFields Report dated October 4, 2021, section 6, and this letter). WGC's alleged exemption from permitting is a manufactured justification for its failure to perform basic due diligence and good management practices.

¹ Fact Sheet Application for General National Pollutant Discharge Elimination System Permits No. GAR100001, No. GAR100002, and No. GAR100003 for Storm Water Discharges Associated with Construction Activity, May 4, 2018.

The below excerpt can be found in the Kimley Horn Soil Loss Report dated October 29, 2021 at pages 3 and 4:

Field Assessment and Disturbance Sites

A visual field assessment of the Waterfall Club golf course, the receiving streams, and Vickers Road took place on August 24, 2021. During this field visit, Kimley-Horn scientists visually inspected the areas of the fairways that were previously disturbed and stabilized (approaches to greens), walked the receiving streams that drain the golf course and lead into the subject coves, and observed the condition of Vickers Road, within the section of the road that drains towards the subject cove.

According to a review of recent aerial data and following conversation with Waterfall Club ownership, land disturbing activity took place on various fairways across the course. Each site's disturbance was limited to the approach to the green portion of each fairway (Figure 6). The work involved stripping off the existing grass/vegetation, lightly grading and amending the soils and then stabilizing the disturbance with new sod. Most of the fairway approaches were disturbed for up to one (1) month during the winter of 2019/2020, one fairway was disturbed for one month during the winter of 2018/2019 and one fairway was disturbed for one month during the winter of 2020/2021. The sites where disturbance occurred are listed below in Table 1 and illustrated on Figure 6.

Fairway Number	Time of construction	Acreage (ac)	Approximate Time of Disturbance
1	2019/2020	0.24	1 month
9	2019/2020	0.57	1 month
10	2019/2020	0.42	1 month
11	2019/2020	0.37	1 month
12	2019/2020	0.52	1 month

Georgia defines permit coverage eligibility, including size of disturbance area. Since the golf course is linear in nature, and the disturbance took place in sections, the project applies to the eligibility requirements of the linear NPDES permit, which covers *discharges of stormwater that will result in contiguous land disturbances equal to or greater than one (1) acre*. As such, most of the disturbance areas on TWC would not require coverage under the NPDES permit.

As stated in the guidance for NPDES general stormwater permits, the Waterfall Club property, including the golf course areas, was subject to the stormwater permitting and ESCP requirements under both stated conditions: (1) disturbed areas greater than 1 acre; and (2) disturbed areas less than one acre that are part of a larger, contiguous, common plan of development with a combined disturbance of one (1) acre or greater. Waterfall Club did not obtain the required permits or prepare and implement ESCP and BMPs for any of its golf course construction activities. It did not develop a stormwater management plan until after the lawsuit was filed by impacted property owners and after it applied for a stream buffer variance to partially mitigate the damage from its previous construction activities. Rather, Waterfall Club restricted its BMPs to the tiny area of its incursion into the stream buffer, less than 1% of the total area of clearing and grading, soil dumping, wetlands elimination and vegetation stripping that actually occurred.

4.0 Waterfall Club's Fairway Land Disturbances.

The fairway land disturbance activity, including the clearing of mountainside and floodplain vegetation and stripping and lining stream channels, with no evaluation of the effects upon Lake Burton at the circumference bottom of The Waterfall Club mountain, indicates the possibility that there are likely to be large deposits of soil and siltation into Lake Burton from the Waterfall Club's mountain top non-permitted land disturbance activities.

5.0 Failure to Meet Stormwater Pollution Mitigation Requirements.

In the stream buffer variance request dated May 31, 2022, Kimley Horn, on behalf of Waterfall Club, admitted that the motivating factor for the variance request was the claims made by the Stanton Cove property owners about sedimentation coming from the Waterfall Club property and the need to "remedy this situation," years after the ongoing siltation of Stanton Cove was reported to Waterfall Club by the property owners around Stanton Cove:

Three downstream homeowners, all of whom reside on a cove in Lake Burton, approached TWC with claims there has been an increase in sedimentation and water velocity into the Lake. According to the homeowners, these changes have impacted their use of boats and boathouses on the lake. Currently, the Waterfall Club ownership and the three homeowners are in discussions about what took place and how to remedy it. Of the proposed options to remedy this situation, TWC proposes to stabilize eroding banks of a buffered tributary to the cove within the golf course property and reduce velocity/dissipate the energy of stormflows with the adjacent low-lying wetland area. The intent of this project is to reduce erosion by stabilizing the stream banks and reduce velocities of stormflows with the inclusion of vegetation and the use of an adjacent wetland to receive and dissipate stormflows in the stream.

The above statement, made years after the property owners made claims that siltation from Waterfall Club property was filling Stanton Cove, was an acknowledgement and admission by Waterfall Club of its responsibility for removal of siltation from Stanton Cove and repair of all areas of the Cove that have been damaged by the ongoing erosion situation. The repeated complaints and the pending lawsuit about Stanton Cove began long before any inadequate actions were taken by Waterfall Club to address the sedimentation that was discharged and deposited into the cove next to downstream property owners. The evidence is stronger than conclusive that Waterfall Club impacted waters of the state during many recent years by filling wetlands, stripping all banks along the creek of all vegetation and natural erosion controls, clearing areas on the golf course, and exposing at least 10 acres of soil without obtaining required permits as well as eliminating all vegetation along the creek bed which takes siltation from the Waterfall Club property, which continues to go into Stanton Cove at the bottom of the stream.

Beginning in 2019, while the Waterfall Club's land clearing, buffer violations, and wetlands eliminations were underway, downgradient property owners and contractors alerted management and ownership of Waterfall Club of the impact of the golf course changes upon the Stanton Cove, the houses surrounding Stanton Cove, and Lake Burton. The General Stormwater Permit,² Section III.D.3, stipulates the responsibilities of an owner or operator of the source of illegal stormwater siltation, including someone who has a permit and someone who should have a permit, in the event of sediment deposition into waters of the State, including in the following references:

Whenever a permittee finds that a BMP has failed or is deficient (beyond routine maintenance) and has resulted in sediment deposition into waters of the State, the permittee shall immediately take all reasonable steps to address the condition, including cleaning up any contaminated surfaces so the material will not discharge in subsequent storm events. The permittee shall submit a summary of the violations to EPD in accordance with Part V.A.2. of this permit and shall correct such BMP as follows: ...

Historical documents show that Waterfall Club was, and continues to be, clearly aware of its legal shortcomings as proven when Waterfall Club hired a dredging contractor, River Sand Incorporated in March of 2021, to perform a sediment survey of one of the impacted coves of Lake Burton. Waterfall Club's own contractor found that approximately 800 cyds of sediment in the cove could be considered "recent." Despite the clear evidence of the impact of Waterfall Club's failures during many years to comply with numerous laws, Waterfall Club continued with its construction activities, with no efforts whatsoever to obtain required permits or prepare and implement an ESCP and BMPs.

Waterfall Club's destabilization of the stream banks, removal of vegetation within the 25-foot buffer and elimination of floodplain storage, also destabilized downstream reaches into Stanton Cove, with the consequence of deposition of likely well over 750 cubic yards of sediments in this one small cove of Lake Burton that has been examined by experts. Waterfall Club knew the consequences of its lack of effective BMPs, as demonstrated by the data that it collected on one of the receiving water bodies. Waterfall Club's modest proposal of a stream buffer incursion to mitigate a tiny portion of the overall problems is woefully insufficient because it does not address at all remedial actions that are necessary to return Stanton Cove to its condition prior Waterfall Club's negligent and extensive violations of Georgia law, many of which are chronicled in this letter.

² General National Pollutant Discharge Elimination System Permits No. GAR100001, No. GAR100002, and No. GAR100003 for StormWater Discharges Associated with Construction Activity

Waterfall Club has resisted meaningful mitigation of its construction-related erosion, sediment and stormwater impacts, caused by continuing ongoing land disturbance activities with no permits or ESCP for over five years.

Waterfall Club ignored the requirements for acquiring NPDES permits for discharges of stormwater and sediment from construction activity disturbing more than one acre. *Id.*

The NPDES permitting requirement for construction site discharges (the “NPDES construction permit”) is intended to ensure that proper stormwater controls are in place on a construction site so that land disturbing activities can proceed in a manner that protects a community’s clean water and the surrounding environment.

Regulation of sediment-laden stormwater runoff from construction sites is a matter of vital public importance. According to the EPA, sediment is the greatest source of pollution to rivers and streams in the United States and also has significant economic impacts, causing over \$16 billion in environmental damage annually. Natural erosion processes produce about 30% of the sediment entering streams, but accelerated erosion from human activities, including construction, accounts for the other 70%. During storms, construction sites without proper stormwater controls become a continuing source of sediment-laden runoff, which can overwhelm a small stream channel’s capacity, resulting in streambed scour, streambank erosion, and destruction of near-stream vegetative cover. When left uncontrolled, sediment-laden runoff has been shown to result in the loss of in-stream habitats for fish and other aquatic species, increased difficulty in filtering drinking water, the loss of drinking water reservoir storage capacity, and negative impacts on the navigational capacity of waterways. In sum, siltation and the contribution of other pollutants from unregulated construction sites causes irreparable physical, chemical, and biological harm to our nation’s waters.

To prevent this harm, the NPDES construction permit program, which was not followed by Waterfall Club for its recent golf course soil reconstruction project, requires a permit seeker to implement and enforce a plan to reduce stormwater and its pollutants leaving from the construction site. 40 C.F.R. § 122.34(b)(4). This requirement mandates erosion and sedimentation controls, site plan reviews that take account of water quality impacts, site inspections, and the implementation of erosion, sedimentation, and waste management best management practices. *Id.* Finally, an NPDES construction permit, which was never obtained by Waterfall Club, must include the design, implementation, and maintenance of post-construction stormwater structures in order to control and improve stormwater discharges over the long term operation of the site. *Id.* at § 122.34(b)(5).

In addition to regulating discharge of sediment in stormwater from a construction site, which was never done by Waterfall Club, the CWA also regulates the placement of fill material into Waters of the United States. Specifically, § 404 of the CWA requires that a permit be obtained for the discharge of dredged or fill material into “navigable waters.” 33 U.S.C. §

1344(a). In contrast to sediment that runs off from a site as a result of unmanaged stormwater, “fill material” means any material “used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody.” 33 C.F.R. § 323.2(k). Discharge of fill material regulated under § 404 includes the “[p]lacement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States” and “the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction.” 33 C.F.R. § 323.2(f). Any addition of fill material to waters of the United States without a valid § 404 permit or an exemption constitutes a violation of the CWA. 33 U.S.C. §§ 1344(a)-(f). Clearly, the activities of Waterfall Club constitute violations of the CWA, from beginning to end.

Authority for administering the CWA’s NPDES construction permit program has been delegated to the states and, in most cases, to the particular municipality where a construction project is sited. Georgia’s NPDES construction permit program requires that anyone engaged in clearing, grading, and/or excavating activities disturbing more than one (1) acre obtain an NPDES construction permit *prior to beginning any land disturbing activities*. Permit coverage requires submission of a Notice of Intent (“NOI”) and approval of the applicant’s Stormwater Pollution Prevention Plan (“SWPPP”).

Waterfall Club did not seek an NPDES permit by submitting its NOI and ESCP. Again, on the theme of deception, Waterfall Club has repeatedly misrepresented its numerous land disturbance activities, without permits, that began in 2017 and likely earlier.

6.0 Basis for NPDES Citizen Suit.

This section incorporates all of the previous sections of this letter. As this timeline reflects, hundreds of individual discharges of soil and stormwater have entered Waters of the United States from the Waterfall Club property during, at a minimum, the last six years. Each of these discharges constitutes a separate violation of the Clean Water Act as separate unpermitted discharges of pollutants from a point source. Moreover, these discharges from the site continue to occur during rain events producing stormwater, because Waterfall Club has still not obtained an NPDES construction permit for its land disturbance activities nor installed temporary BMPs, permanent stormwater structures, or site stabilization measures in accordance with the permitting requirements. Time and belligerence have not relieved the Waterfall Club of these obligations.

Lastly, major downstream impacts from Waterfall Club’s long-term noncompliance with the CWA persist, including on property owned by Lake Burton and multiple other persons. The sediment that has been dumped into Stanton Cove by Waterfall Club has no doubt migrated beyond the Stanton Cove on an ongoing basis, creating a continuing abatable nuisance according to Georgia law. Neither Waterfall Club nor the afore-mentioned regulatory entities have contacted impacted properties’ owners upon and/or adjacent to Lake Burton in relation to these impacts, much less taken action to correct them. Impacts upon downstream and down mountain

resources require remediation of offsite harm caused by Waterfall Club's noncompliance with the Act.

The circumstances at play here are particularly similar to those in *Driscoll v. Adams*, 181 F.3d 1285, 1286 (11th Cir. 1999). Driscoll and Adams were neighbors in the north Georgia mountains when Adams undertook development of his 76-acre wooded property. *Id.* at 1286. Just like here regarding Waterfall Club's inaction, "Adams failed to seek the proper approval from any federal, state, or local government agency before starting to work on his property." *Id.* Consequently, sediment discharged in stormwater from Adams' property that flowed downstream and across the Driscoll's property. *Id.* at 1287. The Court's recitation of facts are strikingly similar to those at play here:

"The harvest and development caused erosion of mud, sand, spring of 1996, after the erosion had already caused a considerable amount of damage to the plaintiffs' properties. He says his delay in taking preventive measures was the result of inclement weather and winter cold."

Id. Under these circumstances, the United States Eleventh Circuit Court of Appeals unequivocally affirmed the Driscolls' basis for maintaining their CWA citizen suit. *Id.* at 1291; *see also, N. Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC*, 357 N.C. 1429 (E.D. N.C. 2003) (tract qualified as "point source" for discharge of stormwater, a pollutant, into navigable waters, such that discharge permit was required under the CWA, since landowners' ditching activities on tract were construction activities.) *See also H&L Farms, LLC, et al. v. Silicon Ranch Corporation*, United States District Court, Middle District of Georgia, Civil Action File No. 4:21-CV-00134-CDL where the jury awarded \$135.5 million to the plaintiffs for defendants' intentional pollution of downstream property with soil and sedimentation.

7.0 Inadequacy of Enforcement.

Despite experts who were hired by the Stanton Cove property owners having made, and documented, results of multiple visits to Waterfall Club property, and documenting major erosion problems on the site for many years, through photographic history, the EPD, the EPA, Rabun County, and Georgia Power representatives essentially ceded their stormwater authority over this site to Waterfall Club's management, its attorneys, and its experts, and did not require compliance with the CWA. These illegal avoidance maneuvers, designed to avoid the application of local, state and federal laws by Waterfall Club and government agencies, are illegal conduct. Further, these maneuvers were, and continue to be, knowingly designed to avoid responsibility, and conveniently ignore the clear legal mandates. The goals of these knowing violations of multiple laws, was to thereby eliminate any consequences for Waterfall Club's years of flagrant violations and disregard of mandatory protective laws, including the CWA.

Rabun County, Georgia Power and the EPD did not intervene whatsoever, despite being notified for years of significant soil erosion and sedimentation problems by property owners and ongoing violations of multiple laws. All of these entities, whether government or not, have been totally passive in forcing long overdue remedial and proactive steps from Waterfall Club and its owners. Meanwhile, downstream impacts continue to accrue and migrate into the Stanton Cove and into lake Burton. Neither the EPD nor Rabun County nor Georgia Power has taken any enforcement action that would legally bar this citizen suit or render it otherwise unnecessary.

8.0 Section 404 Permit Violations.

As discussed above, the CWA also regulates the placement of fill material into Waters of the United States, with regulatory authority given to the United States Army Corps of Engineers (“Army Corps of Engineers”) according to Section 404. At numerous points in time, including during 2017 until the present date, there has not been any enforcement of the CWA by the EPA, the EPD, or Georgia Power to stop the mass transport of sediment downstream by eliminating all vegetation from the stream banks and stream buffers without a required permit. Waterfall Club, Rabun County, and the EPD have uniformly and totally failed to take any action to require Waterfall Club to remove the massive amounts of silt that have filled Stanton Cove and other parts of Lake Burton impacted by the huge amounts of siltation. Waterfall Club has never sought approval for such action, and apparently no one has alerted the Army Corps of Engineers about the huge amount of sediment fill being ignored by all responsible parties, including Rabun County and the EPD. Accordingly, the undersigned will file a separate complaint with the Army Corps of Engineers (“the Corp”) and request that the Corp become involved with the ongoing supervision of soil disturbances around and in proximity to the waters of Lake Burton, which are also a trout stream and waters of the United States.

Nationwide Permit (“NWP”) 18 covers “Minor Discharges” and specifically authorizes certain discharges of dredged or fill materials into all waters; however, NWP 18 provides three critical limitations to coverage: (1) the quantity of discharged material and the volume of area excavated do not exceed 25 cubic yards; (2) the discharge will not cause the loss of more than 1/10-acre of waters of the United States; and (3) the discharge is not placed for the purpose of a stream diversion. NWP 18 is further modified and limited by the general conditions applicable to all Nationwide Permits. Importantly, included in these conditions are requirements related to stormwater BMPs and impoundment designs, all of which have been totally ignored by the owners of Waterfall Club, the EPD, Rabun County and Georgia Power, regarding the land disturbance activities and lack of sedimentation controls.

For several reasons, Waterfall Club, assisted by Rabun County, Georgia Power, and the EPD, have all failed for many years, and continue to fail to meet the requirements of NWP 18. The failure by these entities to correct illegal conduct for years, began illegally and remains unlawful because the responsible parties, to whom this letter is addressed, have allowed the

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sediment to illegally fill Stanton Cove, thereby destroying the ecosystem of Stanton Cove and migrate into additional areas of Lake Burton. There are likely additional areas of Lake Burton in the same condition. Notwithstanding the failure of all state and federal agencies to prevent such private parties' illegal actions, all of these areas are subject to the requirements of the CWA as a part of Lake Burton.

Waterfall Club has misrepresented the volume of fill that it knowingly placed into Lake Burton, including Stanton Cove. The irrefutable evidence, including photographs taken by property owners who live on Lake Burton, and admissions by Waterfall Club, show that silt and debris were dumped into the tributaries of Lake Burton. Upon information and belief, the total fill material discharged into the tributary exceeds the limit of 25 cubic yards by huge volumes under NPW 18, and, for the same reason, the loss of Waters of the United States exceeds 1/10 acre. The Riverkeeper and other concerned entities and persons are convinced that Lake Burton is a haven for developers and other parties to do whatever they wish to modify properties around the Lake with no accountability for the dumping of refuse and sediment threats and actual harm taking place.

Further, the limitations of NWP 18 provide that it only applies if the "discharge is not placed for the purpose of a stream diversion." Relatedly, a general condition of NWP 18 is as follows: "If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow, it must be minimized." Over a time span of many years, Waterfall Club has placed its impoundment into the Stanton Cove to divert the normal course of the stream and to impound the water and sediment flows from the Waterfall Club property elsewhere. Yet, these years long transfers of sediment from the Waterfall Club property were undertaken in such a primitive manner that it has resulted in uncontrolled and haphazard releases of flow, to the detriment of the aquatic system. On such a basis, Waterfall Club is not exempt according to NWP 18 and was, is, and at all times has been required to obtain individual permits for each land disturbance event under § 404 of the CWA, unless exempt, which the facts indicate has never been the situation here.

NWP 18 is conditioned upon the following stormwater management: "Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date." For all of the reasons discussed herein, Waterfall Club, aided and abetted by the EPD, Rabun County, and Georgia Power, have blatantly failed to meet this condition, and there is no valid attempt at NWP coverage..

Waterfall Club has violated and continues to violate the requirements of § 404 of the CWA, 33 U.S.C. § 1344.

SRK initiates this citizen suit procedure to compel Waterfall Club and others who have aided Waterfall Club in its illegal actions to secure valid Section 404 permits, and pay for all detailed remedies for its violations of the law, according to the CWA.

9.0 Violations of Georgia Statutes and Regulations Involving Trout Waters.

G.A.C. 391-3-6-.03(15)(b) lists designated primary and secondary trout waters in the State of Georgia, which are classified pursuant to the Georgia Water Quality Control Act (O.C.G.A. § 12-5-2). The entire stream and tributaries of the Tallulah River are designated as primary trout waters, except for the reach downstream of the Lake Rabun Dam to the headwaters of the Tugaloo Lake. Lake Burton is an impoundment of the Tallulah River stream and, therefore, part of the trout stream. Popcorn Creek is a recognized trout stream as well.

As of 2022 fish within Lake Burton are recognized as contaminated with Thallium at a level that requires a fish consumption advisory warning. The Thallium levels within Lake Burton can be exacerbated by erosion from Waterfall Club and other sources, especially because erosion from developments that expose rock and rubble in the surrounding areas of Lake Burton contain Thallium, which is a highly toxic substance found in pyrite. The land surrounding Lake Burton has numerous known deposits of pyrite and asbestos, which is the most likely source of the aforementioned thallium recorded at potentially risky levels in the bodies of the lake's fish populations. These contaminants are well-known and Waterfall Club was negligent in its land disturbance activities, knowing they would contribute to contamination in Stanton Cove if not properly contained and properly disposed of. Waterfall Club should immediately dredge and remove sediments from Stanton Cove to reduce risk to human health and welfare as well as to reduce risk to the lake environment. Proper protocol should be followed when sediments are removed. Future land disturbance activities must be carefully monitored and controlled by site developers and construction activities to minimize the long term risk to the health of human and wildlife populations in and around the lake and its tributaries, especially when those populations clearly depend on the water for sustenance and survival.

O.C.G.A. § 12-7-6(16) states that State waters classified as trout streams must be protected by a 50-foot vegetated buffer. Buffers must be measured horizontally from the point where vegetation has been wrested by normal stream flow or wave action. No land-disturbing activities shall be conducted within a buffer and a buffer shall remain in its natural, undisturbed state of vegetation until all land-disturbing activities on the construction site are completed. Once the final stabilization of the site is achieved, a buffer may be thinned or trimmed of vegetation as long as a protective vegetative cover remains to protect water quality and aquatic habitat and a natural canopy is left in sufficient quantity to keep shade on the stream bed.

There is an exception for small springs and streams classified as trout streams which discharge an average annual flow of 25 gallons per minute or less. These small streams shall have a 25-foot buffer or they may be piped, at the discretion of the landowner, pursuant to the

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terms of a rule providing for a general variance promulgated by the board providing for notice to the division or local issuing authority of the location and extent of the piping and prescribed methodology for minimizing the impact of such piping and for measuring the volume of water discharged by the stream. Any such pipe must stop short of the downstream landowner's property, and the landowner must comply with the buffer requirement for any adjacent trout streams.

Landowners must apply to the state DNR for variances from trout stream buffers. The director may grant a variance from such a buffer to allow land-disturbing activity, provided that adequate erosion control measures are incorporated in the project plans and specifications and are implemented.

Pursuant to O.C.G.A. § 12-7-6(2), a discharge of stormwater runoff from disturbed areas where best management practices have not been properly designed, installed, and maintained, shall constitute a separate violation of any land-disturbing permit issued by a local issuing authority or of any state general permit issued by the division pursuant to O.C.G.A. § 12-5-30(f) for each day on which such discharge results in the turbidity of receiving waters being increased by more than ten nephelometric turbidity units for waters classified as trout waters.

The State of Georgia has established special water quality standards for specific designated uses (GAC 391-3-6-.03). For trout waters, Georgia has established the following special criteria: (6)(a)(ii) Dissolved oxygen: A daily average of 6.0 mg/L and no less than 5.0 mg/L at all times for waters designated as trout streams by the Wildlife Resources Division. (6)(a)(v) No elevation of natural stream temperatures.

SRK intends to conduct investigations of the impacts of non-permitted, illegal, land disturbances, such as those from Waterfall Club, upon the trout stream that is part of Lake Burton, to assure that any such illegal conduct is properly addressed by all federal, state and local responsible parties, the EPA, the EPD, Georgia Power, and the Army Corps of Engineers.

10.0 Conclusion.

The contents of this letter provide more than sufficient information to permit you to identify the specific environmental standards that have been, and continue to be, violated, the person or persons responsible for the alleged violations, the locations of the alleged violations, the date(s) of such violations and the full names, addresses, and telephone numbers of the persons giving notice. See 40 C.F.R. § 135.3(a).

Please be advised that the failure to remedy all of the violations set forth in this letter can result in a court order enjoining further violations and imposing civil penalties for each violation and each day said violation has occurred and continues to occur. In addition to the successful prosecution of this suit, I, in cooperation with the plaintiffs in related litigation, 183 Magnolia

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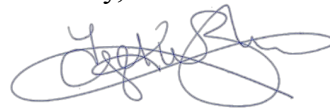
Place, LLC, et al. v. Rabun County Company, LLC, d/b/a Waterfall Club, et al., in the Superior Court of Rabun County, Civil Action File No. 2021-CV-0272, intend to seek compensation for attorneys' fees and costs under the citizen suit provisions of the Clean Water Act, 33 U.S.C. § 1365.

Pursuant to 40 C.F.R. §§ 135.2, 135.3, you are hereby notified of the name and address for the organization giving this notice as follows: Ms. Tonya Bonitatibus, Savannah Riverkeeper, Inc., P.O. Box 60, Augusta, Georgia 30903, (706) 826-8991.

If you have any questions concerning this letter or the described violations, please feel free to contact the undersigned through attorneys for SRK, Hallman & Wingate, LLC, at (404) 588-2530. During the notice period, we are available to discuss this matter with you, but suggest that if you desire to institute negotiations in lieu of litigating this civil action, you do so immediately. We do not intend to delay prosecution of a lawsuit addressing all of the issues addressed here, once the notice period has expired.

Thank you for your prompt attention to this matter.

Sincerely,



Tonya Bonitatibus
Savannah Riverkeeper

TB:kps

c: Mr. Michael S. Regan, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Ms. Elizabeth Gill
Lake Burton Association
P.O. Box 1988
Clayton, GA 30525