UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, GRAND TRAVERSE BAY WATERSHED INITIATIVE, INC., AND ELK-SKEGEMOG LAKES ASSOCIATION,

Plaintiffs,

v.

BURNETTE FOODS, INCORPORATED,

Defendant.

Case No. 1:23-cv-00589

Hon. Jane M. Beckering

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS LACK OF SUBJECT-MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

(Oral Argument Requested)

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

I. INTRODUCTION 1

II. BACKGROUND 3

III. LAW AND ARGUMENT 9

A. APPLICABLE STANDARDS 9

1. Rule 12(b)(1) 9

2. Rule 12(b)(6) 11

B. THE COURT MUST DISMISS PLAINTIFFS' SUIT BECAUSE THEIR PRE-SUIT NOTICE WAS DEFICIENT. 12

1. Plaintiffs Failed to Identify a Specific CWA Standard, Limitation, or Order. 14

2. Plaintiffs' Pre-Suit Notice Did Not Adequately Allege Activity That Constituted a CWA Violation. 16

C. PLAINTIFFS TWC AND ESLA LACK STANDING TO BRING THEIR CLAIMS. 17

D. PLAINTIFFS' FAILURE TO IDENTIFY THE RELEVANT GOVERNING LAW MEANS THEY HAVE FAILED TO SUFFICIENTLY PLEAD THAT THE WETLAND AREAS ARE "WATERS OF THE UNITED STATES" OR TO RECONCILE THEIR CLAIMS WITH THE OBJECTIVE FACTS. 20

E. PLAINTIFFS' CWA CLAIM FAILS FOR LACK OF A POINT-SOURCE DISCHARGE. 26

1. Plaintiffs Have Failed to Plead a Point-Source Discharge. 26

2. The Spray Fields Do Not Contain a Point-Source Discharge. 27

F. IF THE COURT DISMISSES PLAINTIFFS' CWA CLAIM FOR ANY OF THE FOREGOING REASONS, IT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER PLAINTIFFS' MEPA CLAIM. 27

IV. CONCLUSION 28

INDEX OF AUTHORITIES

Cases

Arkansas v. Oklahoma,
503 U.S. 91 (1992) 12

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 11, 12

Askins v. Ohio Dep't of Agriculture,
809 F.3d 868 (6th Cir. 2016) 12, 13

Assoc. of Am. Physicians & Surgeons v. United States Food & Drug Admin.,
13 F.4th 531 (6th Cir. 2021) 19

Bd. of Tr. of Painesville Twp. v. City of Painesville, Ohio,
200 F.3d 396 (6th Cir. 1999) 10

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 11

Buchholz v. Meyer Njus Tanick, PA,
946 F.3d 855 (6th Cir. 2020) 17

Cagayat v. United Collection Bureau, Inc.,
952 F.3d 749 (6th Cir. 2020) 10

Canadian Silica Indus., Inc. v. Sand Prod. Corp.,
Case No. 1:20-cv-1229, 2022 WL 17225174 (W.D. Mich. Nov. 26, 2022) 10

Friends of the Earth, Inc. v. Laidlaw Environmental Srvs (TOC), Inc.,
528 U.S. 167 (2000). 18

Gamel v. City of Cincinnati,
625 F.3d 949 (2010) 28

Gast Manufacturing v. ByoPlanet Int'l, LLC,
Case No. 1:21-cv-597, 2022 WL 16636451 (W.D. Mich. May 5, 2022) 11

Green v. Reilly,
956 F.2d 593 (6th Cir. 1992) 13

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,
484 U.S. 49 (1987) 13

HDC, LLC v. City of Ann Arbor,
675 F.3d 608 (6th Cir. 2012) 12

Hollingsworth v. Perry,
570 U.S. 693 (2013) 19

Loren v. Blue Cross & Blue Shield of Mich.,
505 F.3d 598 (6th Cir. 2007) 9

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 18

Nat. Res. Defense Council, Inc. v. Muszynski,
268 F.3d 91 (2nd Cir. 2001) 27

Nat'l Wildlife Fed'n v. Consumers Power Co.,
862 F.2d 580 (6th Cir. 1988) 12

Ohio Nat'l Life Ins. Co. v. United States,
922 F.3d 320 (6th Cir. 1990) 10

Parker v. Scrap Metal Processors, Inc.,
386 F.3d 993 (11th Cir. 2004) 26

Protect Our Parks, Inc. v. Chicago Park Dist.,
971 F.3d 722 (7th Cir. 2020) 20

Rapanos v. United States,
547 U.S. 715 (2006) 21, 23

RMI Titanium Co. v. Westinghouse Elec. Corp.,
78 F.3d 1125 (6th Cir. 1996) 10, 11

Sackett v. EPA,
143 S. Ct. 1322 (2023) ..... passim

Sierra Club v. Hamilton Cnty. Bd. of Cnty. Comm'rs,
504 F.3d 634 (6th Cir. 2007) 13

South Side Quarry, LLC v. Louisville & Jefferson County Metropolitan Sewer Dist.,
28 F.4th 684 (6th Cir. 2022) ..... passim

Spokeo, Inc. v. Robins,
578 U.S. 330 (2016) 17, 18

Starlink Logistics, Inc. v. ACC, LLC,
Case No. 1:12-cv-11, 2022 WL 17178302 (M.D. Tenn. Nov. 23, 2022) 10, 14

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 19

Tenn. Clean Water Network v. Tenn. Valley Auth.,
905 F.3d 436 (6th Cir. 2018) 20

Thompson v. Bank of Am., N.A.,
773 F.3d 741 (6th Cir. 2014) 11

Trustees for Alaska v. EPA,
749 F.2d 549 (9th Cir. 1984) 27

United States v. Andrews,
2023 WL 4361227 (D. Conn. June 12, 20230) 22

Statutes

28 U.S.C. § 1367(a) 28

28 U.S.C. § 1367(c)(1) 28

28 U.S.C. § 1367(c)(2) 28

28 U.S.C. § 1367(c)(3) 28

28 U.S.C. § 1367(c)(4) 28

33 U.S.C. § 1251 12

33 U.S.C. § 1311 1

33 U.S.C. § 1311(a) ..... passim

33 U.S.C. § 1342 ..... 6, 14

33 U.S.C. § 1342(a) 20

33 U.S.C. § 1362(12) 6, 14

33 U.S.C. § 1362(14) 26, 27

33 U.S.C. § 1365 ..... 12, 14, 17

33 U.S.C. 1365(b) 13

Mich. Comp. Laws § 324.3101 6

Mich. Comp. Laws Annot. § 324.1701 8

Mich. Comp. Laws Annot. § 324.2101 7

Mich. Comp. Laws Annot. § 324.3101 14

Rules

Fed. R. Civ. P. 8(a)(2) 11

Fed. R. Civ. P. 12(b)(1) ..... passim

Fed. R. Civ. P. 12(b)(6) ..... passim

Regulations

40 C.F.R. § 135.3(a) 13, 17

I. INTRODUCTION

Although all lawsuits require pre-filing legwork, suits filed by environmental organizations in federal court under the Clean Water Act ("CWA") require more than most. Some of these requirements come from the statute itself; for example, before an organization can file a citizen-suit (like this one), the CWA requires it to notify the defendant of the specific water standard it believes is being violated and its factual basis for that belief. Other requirements come from Article III of the United States Constitution: if an environmental group wishes to sue based on its members' interests, it must first identify specific members who have individual standing to bring the claim. Still other requirements come from the nature of CWA claims. Courts are constantly honing the law surrounding the CWA, and the governing standards today are not what they were even a few short months ago. Environmental plaintiffs must be aware of this ever-changing law when deciding whether litigation is appropriate. And, given the fact-specific nature of CWA claims (where applying the law often requires expert reports on various water features), putative plaintiffs must investigate the facts-on-the-ground to determine whether a CWA claim is even viable.

In this case, Plaintiffs have fallen far short of their pre-suit obligations and, as a result, the Court must dismiss their complaint. First, Plaintiffs failed to satisfy a mandatory condition precedent to suit because their notice of intent-to-sue was insufficient. Plaintiffs' pre-suit notice does not identify a specific standard that they believe Defendant Burnette Foods, Inc., is violating, instead it only asserts that Burnette is violating the CWA's general prohibition against discharging into surface water without a permit. *See* 33 U.S.C. § 1311(a). The Sixth Circuit has squarely held that citizen suits cannot be premised on 33 U.S.C. § 1311 or the CWA's other general prohibitions. *South Side Quarry, LLC v. Louisville & Jefferson County Metropolitan Sewer Dist.*, 28 F.4th 684, 696 (6th Cir. 2022). Moreover, Plaintiffs' notice only asserts that it believed the wetlands at issue

here were "waters of the state," a term that has a specific definition under Michigan law. Plaintiffs' notice did *not* inform Burnette that they believed the wetlands at issue were "waters of the United States," so Burnette and the relevant governmental authorities were unable to properly evaluate Plaintiffs' threatened claims under the appropriate framework. Because these two flaws independently make Plaintiffs' notice insufficient, this Court lacks subject-matter jurisdiction over Plaintiffs' suit. *See id*. at 694 ("If a plaintiff fails to provide sufficient notice, a district court must dismiss the action as barred under the CWA.") (internal quotation marks omitted).

Second, Plaintiffs Grand Traverse Bay Watershed Initiative, Inc., and the Elk-Skegemog Lakes Association fail to identify an individual member of their organization who would have standing to bring their claims, so these plaintiffs lack the associational standing necessary to satisfy Article III's cases-and-controversy requirement. And to the extent these organizations attempt to assert a harm that they have suffered as entities, it is only the harm of a concerned-bystander, which does not allow for suit in federal court. Accordingly, the Court lacks subject-matter jurisdiction over the claims brought by these plaintiffs.

Third, Plaintiffs have not pleaded facts that meet the Supreme Court's new test for when wetlands are "waters the United States," as articulated in the recent case, *Sackett v. EPA*, 143 S. Ct. 1322 (2023). Plaintiffs' failure to reconcile their claims with *Sackett* means not only that they have failed to meet Rule 12(b)(6)'s pleading standard, but also demonstrates that they never tried to examine the objective, on-the-ground facts under the applicable law before bringing this suit. Burnette has done that legwork for them. Based on an expert investigation, those objective facts foreclose the conclusion that the wetlands near the spray fields are "waters of the United States." Accordingly, these wetlands fall outside the scope of this Court's jurisdiction for the purposes of the CWA, and Plaintiffs' claims should also be dismissed under Rule 12(b)(1).

Fourth, Plaintiffs have failed to plead facts that establish that Burnette's alleged pollution occurs by way of a "point source," an essential element of any CWA claim. Rather, Plaintiffs' discharge theory is that some of Burnette's wastewater "migrates" from the spray fields to the wetlands. This is insufficient to state a CWA violation. And, in any event, there is no point-source discharge to water at the Spray Fields.

For these reasons, Burnette respectfully requests that the Court dismiss Plaintiffs' Complaint and enter judgment in its favor.

II. BACKGROUND

Burnette Foods is an integrated farming and food-processing company based in Northern Michigan that grows, processes, and distributes fruit and vegetables. Burnette operates a facility in Elk Rapids, Michigan, where it washes, cuts, and transforms fruit into shelf-stable products, such as applesauce, canned apples, and—of course—canned cherries. *See, generally*, https://www.burnettefoods.com/ (last accessed July 21, 2023); Compl. ¶¶ 4, 7 (ECF No. 1, PageID.2-3).

Burnette's fruit processing creates wastewater. Compl. ¶ 7 (ECF No. 1, PageID.3). However, this wastewater is not mere refuse. Because of its prior use in fruit processing, the water contains nutrients suitable for irrigating crops. So, to both dispose of its processing byproduct and to irrigate some of its crops, Burnette transports this water about a mile south of the Elk Rapids facility and sprays it on several agricultural fields (the "Spray Fields"). There are technically four distinct Spray Fields, some of which are adjacent to each other.[1] Compl. ¶ 11. These fields are

[1] Although there are four numbered Spray Fields, it should be noted that Spray Field 36 has three subsections (South-West, South-Center, and South-East). For ease of reference, Burnette refers to these subsections collectively as one field, Spray Field 36.

designated "Field 36," "Field 37," "Field 38," and "Field 39." *Id.* Plaintiffs' Complaint only identifies alleged surface water discharges occurring from Field 36, Compl. ¶¶ 54-56; Ex. 2 to Compl. (ECF No. 1, PageID.27, ECF No. 1-2, PageID.55-59), so Burnette's description is limited to Field 36.

Spray Field 36 is adjacent to a wetland identified in the National Wetlands Inventory as "Freshwater Forested/Shrub Wetland Area" ("Wetland Area 1"). *Compare* Clean Water Act Jurisdictional Evaluation Report ("Jurisdictional Report"), Figure 2 *with* Jurisdictional Report, Ex. 1. **(Ex. A)**. Two manmade berms prevent any wastewater discharged onto Field 36 from running off into Wetland Area 1. *See* Jurisdictional Report 2. An unnamed farm road (the "Farm Road") forms Wetland Area 1's northern border. *Id.* at Ex. 1. Surface water in Wetland Area 1 can flow into a second wetland area ("Wetland Area 2") via two culverts under the Farm Road when sufficient surface water is present in Wetland Area 1 to induce flow. *Id.* at 2-3. There is no evidence of a continuous surface water connection between Wetland Area 1 and Wetland Area 2. *Id.* at 4.

Wetland Area 2 stretches north to Elk Lake Road. Surface water present in Wetland Area 2 can flow into a culvert underlying Elk Lake Road when sufficient surface water is present in Wetland Area 2 to induce flow. *Id.* at 3. The culvert underlying Elk Lake Road discharges into Spencer Creek on the east side of Elk Lake Road. There is no evidence of a continuous surface water connection between Wetland Area 2 and Spencer Creek. *Id.* at 4. Although Defendant has not been able to fully inspect Spencer Creek because it runs through private property and is not wholly visible from Elk Lake Road, Defendants believe that Spencer Creek runs from the culvert outfall on the east side of Elk Lake Road into another culvert, which discharges into Elk Lake. *Id.*

at. 3. Elk Lake is a traditionally navigable waterway, which flows into Grand Traverse Bay and then out to Lake Michigan.

Burnette irrigates the Spray Fields with wastewater in accordance with a groundwater permit issued by the State of Michigan's Department of Environment, Great Lakes, and Energy ("EGLE") ("the Groundwater Permit."). Compl. ¶¶ 6, 9. The Groundwater Permit allows Burnette to discharge 425,000 gallons of wastewater per day and 15,000,000 gallons per year into the Spray Fields. *Id*. at ¶ 6.

Over the years, EGLE has sent letters to Burnette regarding alleged violations of its Groundwater Permit. Plaintiffs' Complaint presents these alleged violations as a parade of horribles. Compl. ¶¶ 45-53 (ECF No. 1, PageID.12-26). However, to the extent these alleged violations can be established, they relate to Burnette's state-issued Groundwater Permit. **None implicates the CWA's prohibition on discharges into surface water of the United States**. Rather, they implicate Burnette's application of water onto the grounds of the Spray Fields. Burnette has worked with EGLE regarding these alleged violations. *See* Compl. ¶¶ 16-26 (describing various EGLE investigations that occurred in or before 2021).

Plaintiffs are three entities that, apparently, believe that this Court is better-suited to regulate Burnette's wastewater than EGLE is. Plaintiff Grand Traverse Band of Ottawa and Chippewa Indians ("GTB") is a "federally-recognized Indian tribe . . . with a six-county primary service area" that includes the Spray Fields, the Wetland Areas, and Elk Lake. Compl. ¶ 33 (ECF No. 1, PageID.8). GTB asserts that, by virtue of an 1836 treaty, it has "off-river fishing rights in portions of the Great Lakes (including the Grand Traverse Bay area of Lake Michigan adjacent to Elk Lake)." *Id*. This treaty also allegedly reserved certain usufructuary rights with GTB, including "fishing, hunting, trapping and gathering rights in inland portions of [Northern Michigan]." *Id.*

These rights are, in GTB's view, "property rights protected by the United States Constitution" which are "likely to be adversely impaired by [Burnette's] continuing illegal discharges into both air and water." *Id.*

Plaintiff Grand Traverse Bay Watershed Initiative, Inc., d/b/a the Watershed Center Grand Traverse Bay ("TWC") is a nonprofit organization that "protects water quality by advocating, educating, monitoring, and patrolling Grand Traverse Bay and its watershed." *Id.* at ¶ 34. TWC is a self-appointed private enforcer of water standards; it sues entities with the purported goal of "ensur[ing] wetlands, lakes, rivers, beaches, and streams within the Grand Traverse Bay watershed meet all substantive water quality standards guaranteed by federal, state, and local statutes and regulations." *Id.*

Plaintiff Elk-Skegemog Lakes Association ("ESLA") is also a non-profit organization that "promotes an understanding and appreciation of the rights and responsibilities of riparian landowners and takes necessary or desirable actions to protect and preserve the environment of the Elk-Skegemog watershed with a focus on water quality." *Id.* at ¶ 35.

On November 17, 2022, Plaintiffs sent a notice of intent to sue Burnette for claims under the CWA. Notice of Intent to Sue, (ECF No. 1-1) ("Pre-Suit Notice"). With respect to the alleged CWA violations, Plaintiffs claimed that Burnette's wastewater sometimes "pools" on its Spray Fields and then "discharges" to the wetlands." Pre-Suit Notice 11 (ECF No. 1-1). Plaintiffs noted that the CWA "prohibits the 'discharge of any pollutant' into 'navigable waters' from any 'point source, except when authorized by a permit issued under the National Pollutant Discharge Elimination System (NPDES)." *Id.* (quoting 33 U.S.C. §§ 1311(a), 1342, 1362(12)). In Michigan, NPDES permits are administered by EGLE under Part 31 of the National Resources and Environmental Protection Act, Mich. Comp. Laws § 324.3101 *et seq*.

Plaintiffs' Pre-Suit Notice asserted, as to the Spray Fields, that "[a]lthough Burnette holds a state permit issued under Part 21 (permit to discharge wastewater to ground or groundwater) [i.e. the Groundwater Permit], **it lacks a NPDES permit issued by EGLE under Part 31 (permit to discharge wastewater to surface water).**" Notice at 11 (ECF No. 1-1, PageID.44) (emphasis added).[2] Plaintiffs therefore concluded that Burnette was in violation of a general prohibition on unpermitted discharges into surface waters:

> Burnette's discharge to the ground that pools and discharges to wetlands is a point source discharge that requires a permit issued under Part 31. Burnette's discharge into wetlands is a discharge into surface waters of the state that is subject to the Clean Water Act and rules implementing it in Michigan. Burnette's unpermitted discharges to wetlands are discharges into waters of the state that violate the Clean Water Act.

Id. at 11-12 (ECF No. 1-1, PageID.45). Notably, the Pre-Suit Notice used the term "surface waters of the state," not the term "waters of the United States." Plaintiffs defined the term "surface waters of the state" using EGLE's regulatory definition: "Surface waters of the State" means all of the following, but does not include drainage ways and ponds used solely for wastewater conveyance, treatment, or control: (i) The Great Lakes and their connecting waters. (ii) All inland lakes. (iii) Rivers. (iv) Streams. (v) Impoundments. (vi) Open drains. (vii) Wetlands. (viii) other surface bodies of water within the confines of the state." *Id*. at 12 n.5 (quoting Mich. Admin. Code R. 323.1044(u)).

[2] This excerpt of Plaintiffs' Pre-Suit Notice refers to "Part 21." Burnette is uncertain of what this term is referencing. Part 21 of Michigan Natural Resources and Environmental Protection Act relates to the State's General Real Estate Powers and is not relevant to the groundwater regulation. *See* Mich. Comp. Laws Annot. § 324.2101 *et seq*. Burnette suspects that this is a reference to "Part 22" regulations, *see* Mich. Admin. R. 323.2201 *et seq*., which authorize the issuance of groundwater discharge permits. But Burnette cannot be certain of which provision Plaintiffs intended to reference.

On June 7, 2023, Plaintiffs filed this lawsuit, bringing two claims against Burnette: (1) a claim under Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a); and (2) a corresponding claim under Michigan's Environmental Protection Act ("MEPA"), Mich. Comp. Laws Annot. § 324.1701. Plaintiffs identify three instances between 2019 and 2021 in which it appeared that Burnette's "wastewater effluent" had "run off" or "ponded" in the Wetlands: once on July 24, 2019; once on August 4, 2020, and once on July 27, 2021. *Id*. at ¶¶ 54-56.[3]

Plaintiffs' base their suit on various interests in the watershed around Burnette's Elk Rapids facility. They collectively assert that their members (whoever they are) "use Elk Lake for a variety of recreational activities, including boating, fishing, kayaking, canoeing, and swimming." *Id*. at ¶ 38. They also collectively assert that they have a "reasonable fear of pollution." *Id*. at ¶ 42. ESLA asserts that its anonymous members are "riparian owners who own property along Elk Lake [and the surrounding water system]" and that the "[t]he property value of such riparian property is dependent on the ecological integrity of those waters." *Id*. at ¶ 38. GTB asserts its treaty rights to "hunt, fish, and gather." *Id*. at ¶ 39.

Plaintiffs seek declaratory and injunctive relief, attorney fees and costs, and the CWA's statutory maximum in civil penalties: $64,618 per day, per violation. Compl., Relief Requested (ECF No. 1, PageID.30-31).

[3] Again, Plaintiffs spend page-after-page detailing alleged violations of pollutant and discharge limits contained in Burnette's Groundwater Permit. Compl. ¶¶ 45-53 (ECF No. 1, PageID.12-26). To be clear, these violations do not implicate the CWA; rather they are limited solely to the terms of the state-issued Groundwater Permit. The three alleged "unpermitted wastewater effluent discharges" are the only alleged acts that could form the basis for a CWA claim. *Id*. at ¶¶ 54-56.

III. LAW AND ARGUMENT

Plaintiffs' suit suffers from numerous compounding flaws, each of which is fatal in its own right. First, their Pre-Suit Notice did not allege a specific standard that they believed Burnette was violating, nor did it sufficiently put Burnette on notice that they believed the wetland areas were "waters of the United States." Binding precedent makes clear that these faults require the Court to dismiss the Complaint. Second, Plaintiffs TWC and ESLA fail to establish that any of their members have Article III standing, which deprives them of associational standing to bring these claims. Moreover, these entities' alleged organizational harm is not cognizable in federal court. Third, Plaintiffs fail to plead facts that establish necessary elements of a CWA claim, specifically that the Wetland Areas are "waters of the United States" and that Burnette is discharging through a "point source." Nor could they: Burnette's expert investigation confirms that the Wetland Areas do not fall within the CWA's jurisdiction and that there is no point source. And, finally, because Plaintiffs' CWA claim fails, the Court should decline to exercise supplemental jurisdiction over the state-law MEPA claim.

A. APPLICABLE STANDARDS

Burnette brings this motion to dismiss under two Federal Rules of Civil Procedure: Rule 12(b)(1) and Rule 12(b)(6).

1. Rule 12(b)(1)

Burnette's arguments that Plaintiffs' Pre-Suit Notice is deficient; that Plaintiffs TWC and ESLA lack Article III standing; and that the Wetland Areas are not "waters of the United States" seek dismissal for lack of subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1); *see Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 607 (6th Cir. 2007) ("If Plaintiffs cannot establish constitutional standing, their claims must be dismissed for lack of subject matter jurisdiction."); *Starlink Logistics, Inc. v. ACC, LLC*, -- F. Supp.3d --, Case No. 1:12-cv-11, 2022

WL 17178302, at *23 (M.D. Tenn. Nov. 23, 2022) ("[C]ompliance with the notice requirement for citizen suits is a matter of subject-matter jurisdiction.") (quoting *Bd. of Tr. of Painesville Twp. v. City of Painesville, Ohio*, 200 F.3d 396, 399 (6th Cir. 1999)). This Court recently explained that there are two types of 12(b)(1) motions: facial attacks and factual attacks. *Canadian Silica Indus., Inc. v. Sand Prod. Corp.*, Case No. 1:20-cv-1229, 2022 WL 17225174, at *3 (W.D. Mich. Nov. 26, 2022). Defendants' motion brings both kinds of attacks.

The Court need only read Plaintiffs' Complaint to see that Plaintiffs did not comply with their notice requirements and that TWC and ESLA lack Article III standing, which requires this Court to dismiss the Complaint on its face for lack of subject-matter jurisdiction. For this attack, the Court applies the Rule 12(b)(6) standard. *Id.* (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.3d 320, 325 (6th Cir. 1990)).[4] This standard is articulated in detail below. *See, infra.*, Sec. III.A.2.

Moreover, the facts on the ground at the Wetland Areas confirm that they do not qualify as waters of the United States for purposes of the CWA's jurisdiction, so Burnette also brings a factual attack on subject-matter jurisdiction. *See Canadian Silicia*, 2022 WL 17225174, at *3 ("Factual attacks challenge the actual existence of matters affecting jurisdiction"). If the Court looks to the facts, no presumption of truth applies to Plaintiffs' allegations. *Id.* (citing *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996)). The Court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. The existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of

[4] Burnette also notes that, because Plaintiffs attached their Pre-Suit Notice to the Complaint as an exhibit, the Court can consider it under Rule 12(b)(6). *See Cagayat v. United Collection Bureau, Inc.*, 952 F.3d 749, 755 (6th Cir. 2020) ("[A] court may consider the complaint and any exhibits attached thereto in determining whether dismissal under Rule 12(b)(6) is proper.")

jurisdictional claims." *Id*. (internal ellipses and brackets omitted). Plaintiffs bear the burden of proof to establish subject-matter jurisdiction. *Id*.

2. Rule 12(b)(6)

Burnette's argument that Plaintiffs have failed to allege facts to establish necessary elements for a plausible claim under the CWA (namely "waters of the United States" and a point-source discharge) arises under Rule 12(b)(6), which authorizes a court to dismiss a claim if it "fail[s] to state a claim upon which relief can be granted[.]" Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must present "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "Although the plausibility standard is not equivalent to a 'probability requirement, it asks for more than a sheer possibility that a defendant has acted unlawfully.'" *Gast Manufacturing v. ByoPlanet Int'l, LLC*, Case No. 1:21-cv-597, 2022 WL 16636451, at *3 (W.D. Mich. May 5, 2022) (quoting *Iqbal*, 556 at 678). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." *Iqbal*, 556 at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

In deciding Burnette's 12(b)(6) challenge, the Court must construe the complaint in the light most favorable to the Plaintiffs and accept all well-pleaded factual allegations in the complaint as true. *Thompson v. Bank of Am., N.A.*, 773 F.3d 741, 750 (6th Cir. 2014). The Court need not, however accept as true "legal conclusions or unwarranted factual inferences." *HDC,*

LLC v. City of Ann Arbor, 675 F.3d 608, 611 (6th Cir. 2012). Conclusory statements are also not entitled to a presumption of truth. *Iqbal*, 556 U.S. at 678.

B. THE COURT MUST DISMISS PLAINTIFFS' SUIT BECAUSE THEIR PRE-SUIT NOTICE WAS DEFICIENT.

The CWA is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 582 (6th Cir. 1988) (quoting 33 U.S.C. § 1251). The "cornerstone" of the CWA's implementation is the NPDES permit program. *South Side Quarry, LLC v. Louisville & Jefferson County Metropolitan Sewer Dist.*, 28 F.4th 684, 689 (6th Cir. 2022). "With a permit, a person may discharge pollutants so long as he stays within the permit's limits. But without a permit, a discharge is unlawful." *Id*. at 690 (ellipses, brackets, and internal quotation marks omitted).

The NPDES permit program operates through a system of "cooperative federalism." *Id*. at 690. Although the federal government—through the EPA—approves permits, the states possess the "primary responsibilities and rights" to oversee the permitting process and enforce any permit or discharge violations. *See id*. at 690. Together, the CWA and the NPDES "create a patchwork of 'effluent limitations' that limit the discharge of pollutants." *Id*. "These effluent limitations 'restrict the quantities, rates and concentrations' of pollutants discharged by a permit holder." *Id*. (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992)). "If a person discharging a pollutant fails to meet an effluent limitation or standard found in a regulation or permit—or fails to get a permit—he violates the CWA." *Id*. And "[w]hen violations occur, the EPA and states form the first line of defense. They retain the 'primary power to 'enforce' the CWA." *Id*. (quoting *Askins v. Ohio Dep't of Agriculture*, 809 F.3d 868, 875 (6th Cir. 2016)).

Citizens may, however, sue alleged polluters pursuant to 33 U.S.C. § 1365—but only in "limited circumstances." *Id*. "Such suits 'serve only as backup, permitting citizens to abate

pollution when the government cannot or will not command compliance." *Askins*, 809 F.3d at 875 (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987)). Because citizen suits (like the one Plaintiffs seek to bring here) are only a "back-up" to government enforcement or self-correction, the CWA has a 60-day pre-suit notice requirement, which gives the government the opportunity to go first and the alleged polluter the opportunity to change their conduct:

> No action may be commenced—
>
> (1) under subsection (a)(1) of this section—
>
> (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order[.].

33 U.S.C. 1365(b). The pre-suit notice "shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice." 40 C.F.R. § 135.3(a). These mandatory details "allow the alleged violator to identify any violation, bring its conduct into compliance with the law, and avoid the suit." *South Side Quarry*, 28 F.4th at 698; *see also Sierra Club v. Hamilton Cnty. Bd. of Cnty. Comm'rs*, 504 F.3d 634, 644 (6th Cir. 2007) (stating a plaintiff's pre-suit notice should "contain sufficient information to allow Defendants to identify all pertinent aspects of its [alleged] violations without extensive investigation").

The CWA's notice provision for citizen suits "**is not a mere technical wrinkle of statutory drafting or formality to be waived by the federal courts.**" *Green v. Reilly*, 956 F.2d 593, 594 (6th Cir. 1992) (emphasis added). Rather, the notice is a "statutory condition[] precedent to suit,"

with which plaintiffs must "strictly comply." *South Side Quarry*, 28 F.4th at 690. A plaintiff's failure to "strictly comply" with the notice requirements compels the Court to dismiss the suit. *Id.* at 694 ("If a plaintiff fails to provide sufficient notice, a district court must dismiss the action as barred under the CWA."). Indeed, absent a compliant notice, federal courts lack subject-matter jurisdiction over a CWA citizen suit. *See Starlink Logistics*, 2022 WL 17178302, at *23.

Here, Plaintiffs purport to have sent a compliant notice on November 11, 2022, roughly eight months before they filed their CWA claim. However, Plaintiffs' Pre-Suit Notice was insufficient for two reasons: (1) it failed to identify a "specific standard, limitation, or order" that Burnette is alleged to have violated; and (2) it failed to inform Burnette that Plaintiffs considered the Wetland Areas "waters of the United States."

1. Plaintiffs Failed to Identify a Specific CWA Standard, Limitation, or Order.

Plaintiffs' Pre-Suit Notice makes clear that their theory for a CWA violation is that Burnette is discharging water into the Wetland Areas without a permit, which violates 33 U.S.C. § 1311(a). This is not enough to sustain a citizen suit under § 1365.

Take the relevant portion of the Pre-Suit Notice step-by-step. Plaintiffs begin by noting that the CWA "prohibits the discharge of any pollutant into navigable waters from any point source except when authorized by a permit issued under [NPDES]." Pre-Suit Notice 11 (ECF No. 1-1, PageID.44). To support this assertion, Plaintiffs cite 33 U.S.C. §§ 1311(a), 1342, and 1362(12). *Id.* These provisions provide the CWA's framework for regulating water: § 1311(a) is the CWA's general prohibition on discharging pollutants; § 1342 outlines the NPDES system; and § 1362(12) defines the term "discharge of a pollutant." Plaintiffs then note that EGLE administers the NPDES system in Michigan, under "Part 31 of the Natural Resources and Environmental Protection Act." Pre-Suit Notice 11 (ECF No. 1-1, PageID.44); *see also* Mich. Comp. Laws Annot. § 324.3101 *et*

seq. Plaintiffs next assert that "EGLE has not issued an . . . NPDES permit authorization for Burnette's direct discharge of effluent into surface waters of the state in and around the site of the spray irrigation fields." Pre-Suit Notice 11, (ECF No. 1-1, PageID.44). Plaintiffs then conclude that "Burnette's discharge to the ground that pools and discharges to wetlands is a point source discharge that **requires a permit issued under Part 31**." *Id*. (emphasis added).

Notably, Plaintiffs' Pre-Suit Notice specifically disavows any notion that a CWA claim is (or could be) premised on Burnette's state-issued Groundwater Permit. *See* Pre-Suit Notice 11, PageID. 44) ("Although Burnette holds a state permit issued under Part 21 (permit to discharge wastewater to ground or groundwater) it lacks a NPDES permit issued by EGLE under Part 31 (permit to discharge wastewater to surface water).") This makes clear that Plaintiffs' claims are based on the lack of an NPDES permit, not a violation of the Groundwater Permit.

So what then is the "standard, limitation, or order" that Plaintiffs' Pre-Suit Notice accuses Burnette of violating? The only possible answer to that question is § 1311(a)'s general prohibition against unpermitted water discharges. But the Sixth Circuit has squarely held that § 1311(a)'s permit requirement cannot form the basis for a citizen suit:

> South Side's notice contends that MSD is violating the CWA's "general prohibition on the dumping of pollutants into U.S. waters." It cites 33 U.S.C. § 1311, which prohibits the "discharge of any pollutant by any person" without a permit, to make its point. *See also* 33 U.S.C. § 1342. **But the CWA's citizen-suit provision doesn't authorize citizen suits for violating some general prohibition**. Instead, it authorizes suits for violating "effluent standard[s] or limitation[s]" found in the CWA or orders about those standards and limitations. *See Askins*, 809 F.3d at 872–73. . . . [W]ithout a specific allegation that MSD violated a permit's effluent standards or limitations, South Side can't satisfy the notice requirement, much less make out a CWA claim. *Accord* 33 U.S.C. § 1342(k) ("[C]ompliance with a permit issued pursuant to [the NPDES program] shall be deemed compliance, for purposes of [citizen suits], with sections 1311, 1312, 1316, 1317, and 1343."). **So South Side's appeal to the CWA's "general prohibition," without more, can't bypass the notice requirement and move South Side past the citizen-suit starting line**.

South Side, 28 F.4th at 684. Plaintiffs' failure to identify any "specific standard, limitation, or order" relevant to the CWA means that they did not "strictly comply" with the CWA's citizen-suit notice provision. Accordingly, this Court must dismiss their CWA claim. *Id*. at 694.

2. Plaintiffs' Pre-Suit Notice Did Not Adequately Allege Activity That Constituted a CWA Violation.

Plaintiffs' notice suffers from a second flaw: it failed to allege that the Wetland Areas were "waters of the United States," an essential element of a CWA claim. The section of the Pre-Suit Notice titled "Violations of Clean Water Act (Federal and State Law)," asserts only that Burnette's wastewater entered "the waters of the state":

> Burnette's discharge to the ground that pools and discharges to wetlands is a point source discharge that requires a permit issued under Part 31 [of Michigan's Natural Resources and Environmental Protection Act, M.C.L.A. 324.3101 et seq.]. Burnette's discharge into the wetlands is a discharge into **surface waters of the state** that is subject to the Clean Water Act and rules implementing it in Michigan. Burnette's unpermitted discharges to wetlands are discharges **into waters of the state** that violate the Clean Water Act.

(ECF No. 1-1, PageID. 44-45) (emphasis added). Plaintiffs' Pre-Suit Notice even went so far as to define the term "surface waters of the state" using EGLE's regulatory definition: "Surface waters of the State" means all of the following, but does not include drainage ways and ponds used solely for wastewater conveyance, treatment, or control: (i) The Great Lakes and their connecting waters. (ii) All inland lakes. (iii) Rivers. (iv) Streams. (v) Impoundments. (vi) Open drains. (vii) Wetlands. (viii) other surfaces bodies of water within the confines of the state." *Id*. at 12 n.5 (quoting Mich. Admin. Code R. 323.1044(u)). As explained in more detail below, Plaintiffs and EGLE's definition of "surface water of the state," is not synonymous with the CWA's definition of "waters of the United States" as applied to wetlands. *See, infra.*, Sec. III.D. Put simply, the term "surface waters of the state is broader, and sweeps in many wetlands/water features that are not "waters of the United States." This glaring mismatch between the Pre-Suit Notice's language and the required

elements of Plaintiffs' CWA claim means that the Pre-Suit Notice did not provide the necessary notice "of the alleged violation" (i.e. that Plaintiffs sought to bring a claim for breach of § 1311(a)), 33 U.S.C. § 1365 or of "the activity alleged to constitute a violation," (i.e. that Plaintiffs were alleging discharges into 'waters of the United States'), 40 C.F.R. § 135.3(a).

To be clear, Plaintiffs' Pre-Suit Notice was not just *deficient* because of its use of the phrase "surface waters of the state," ***it was actively misleading***. The language and definition provided by Plaintiff specifically referenced a standard for jurisdiction under state law; it did not establish that Plaintiffs believed that they had a valid basis to assert jurisdiction under the CWA. Burnette and the government were therefore deprived of the statutory pre-suit notice. Accordingly, Plaintiffs' suit must be dismissed. *South Side Quarry*, 28 F.4th at 694.

C. PLAINTIFFS TWC AND ESLA LACK STANDING TO BRING THEIR CLAIMS.

Plaintiff TWC and Plaintiff ESLA's ability to bring this suit faces three insurmountable hurdles: Article III of the United States Constitution; the Supreme Court's jurisprudential requirements for associational standing; and the Supreme Court's rejection of concerned-bystander standing.

Article III "limits the judicial power to resolving actual 'Cases' and 'Controversies,' not theoretical questions." *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 860 (6th Cir. 2020) (quoting U.S. Const. Art. III, § 2). For a dispute to meet Article III's case-or-controversy requirement, a party must "have standing" to bring a claim. *Id.* "Although the term 'standing' does not appear in Article III, our standing doctrine is 'rooted in the traditional understanding of a case or controversy' and limits 'the category of litigants empowered to maintain a lawsuit in federal court. The effect is to confine 'the federal courts to a properly judicial role.'" *Id*. at 861 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016)). Article III standing has three elements: a plaintiff

"must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 578 U.S. at 338. "[A]t the pleading stage, the plaintiff must clearly allege facts demonstrating each element." *Id*. (ellipses and quotation marks omitted).

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id*. at 339 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Id*. (internal quotation marks omitted). To be concrete, the injury must "actually exist." *Id*. "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened." *Friends of the Earth, Inc. v. Laidlaw Environmental Srvs (TOC), Inc.*, 528 U.S. 167, 183 (2000).

Although the injury-in-fact requirements for environmental plaintiffs are relatively lax, Plaintiffs' organizational status raises further standing requirements. Plaintiffs TWC and ESLA are associations that are seeking to sue over injuries that their members have suffered or will suffer. *See* Compl. ¶¶ 34, 35, 38. The doctrine of "associational standing" sometimes allows these kinds of representational suits. "An organization may sue on behalf of its members if it shows that: (1) its 'members would otherwise have standing to sue in their own right'; (2) the 'interests' that the suit 'seeks to protect are germane to the organization's purpose'; and (3) 'neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Assoc. of*

Am. Physicians & Surgeons v. United States Food & Drug Admin., 13 F.4th 531, 537 (6th Cir. 2021).[5]

To satisfy the first element of associational standing, an organization "must do more than identify a likelihood that the defendant's conduct will harm an unknown member in light of the organization's extensive size or membership base." *Id*. at 543 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009)). "The organization must instead identify a member who has suffered (or is about to suffer) a concrete and particularized injury from the defendant's conduct." *Id*. (citing *Summers*, 555 U.S. at 498-99).

Neither TWC nor ESLA identify any individual member who would have standing to bring a CWA claim or a MEPA claim. Instead, they only generically and collectively refer to their "members." Compl. ¶¶ 38, 42. These allegations fall well short of the associational-standing doctrine's requirements.

Of course, TWC and ESLA could sue for concrete injuries that they suffered as organizations. But the only so-called "organizational interests" that they claim have been injured are their interests in "[t]he protection and improvement of the environment and water quality of the Waterbodies" and their goal of "ensuring compliance with federal and statement environmental laws and regulations." Compl. ¶ 43. This is precisely the kind of concerned-bystander injury that the Supreme Court has held to be non-particularized and non-concrete (and therefore insufficient to create Article III standing). *See Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) ("Article III standing is not to be place in the hands of 'concerned bystanders,' who will use it simply as a

[5] Notably, the Sixth Circuit has questioned whether the associational-standing doctrine squares with the Supreme Court's recent caselaw on standing. *Am. Physicians*, 13 F.4th at 537-543. Still the lower federal courts must apply associational standing unless and until the Supreme Court reconsiders the doctrine. *Id*. at 542.

vehicle for the vindication of value interests. No matter how deeply committed petitioners may be to upholding [water quality] or how zealous their advocacy, that is not a particularized interest sufficient to create a case or controversy under Article III."); *Protect Our Parks, Inc., v. Chicago Park Dist.*, 971 F.3d 722, 731-32 (7th Cir. 2020) (an advocacy group opposing private construction on public land were "not entitled to press their claims in federal court.").

Because TWC and ESLA have established neither direct standing nor associational standing, they must be dismissed from this suit.

D. PLAINTIFFS' FAILURE TO IDENTIFY THE RELEVANT GOVERNING LAW MEANS THEY HAVE FAILED TO SUFFICIENTLY PLEAD THAT THE WETLAND AREAS ARE "WATERS OF THE UNITED STATES" OR TO RECONCILE THEIR CLAIMS WITH THE OBJECTIVE FACTS.

The CWA prohibits the discharge of any pollutant into "waters of the United States" from a point source, except in compliance with a federally issued permit. 33 U.S.C. §§ 1311(a), 1342(a); *see also Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 438 (6th Cir. 2018) (discussing the CWA's framework). The Supreme Court has repeatedly grappled with the meaning of the statutory term "waters of the United States," most recently in *Sackett v. EPA*, 143 S. Ct. 1322 (2023). Throughout the years, this exercise in statutory interpretation has been "a contentious and difficult task" that has "sparked decades of agency action and litigation." *Id*. at 1332. Luckily for this Court, it need not get too far into the weeds of the water-of-the-United-States precedent because *Sackett* answers the precise question in this case: when is a wetland considered a water of the United States? *Id*.

In *Sackett*, the petitioners had filled in wetlands on their property with rocks and dirt in preparation for building a house. *Id*. at 1331. A road separated these wetlands from an "unnamed tributary," which fed into a non-navigable creek, which in turn fed into Priest Lake, a navigable lake. *Id*. at 1332. The EPA determined that the Sacketts' wetlands were waters of the United

States because they had a "significant nexus to a traditional navigable water." *Id*. at 1331. Under the definition of "waters of the United States" in use at that time, a "significant nexus" existed when the "'wetlands, either alone or in combination with similarly situated lands in the region, significantly affect[ed] the chemical, physical, and biological integrity" of navigable waters. *Id*. at 1331 (quoting EPA guidance). To determine whether this standard was met, the EPA looked for evidence that the wetlands were hydrologically or ecologically connected to navigable waters. *See id*.

The Sacketts challenged the EPA's view that waters of the United States include any wetland with a significant hydrological nexus to a navigable water. After nearly a decade of litigation, the Supreme Court sided with the Sacketts and, in doing so, imposed a new test for when wetlands fall within the CWA's jurisdiction.

The Court began by confirming that "the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water 'forming geographical features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Sackett*, 143 S. Ct. at 1336 (quoting *Rapanos v. United States*, 547 U.S. 715, 755 (2006) (plurality op.)). However, the Court quickly acknowledged that, given "statutory context," Congress did not mean to exclude all wetlands from the CWA's scope and that "some wetlands qualify as 'waters of the United States.'" *Id*. at 1338-39. After examining the CWA's text, context, and relevant precedent, the Supreme Court settled on the following test for when wetlands are "waters of the United States":

> In sum, we hold that the CWA extends to only those wetlands that **are as a practical matter indistinguishable from waters of the United States**. This requires the party asserting jurisdiction over adjacent wetlands to establish first, **that the adjacent body of water constitutes "waters of the United States,"** (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, **that the wetland has a continuous surface connection with**

> **that water**, making it difficult to determine where the 'water' ends and the 'wetland' begins.

Id. at 1341 (emphasis added).

Plaintiffs' Complaint does not make the necessary *Sackett* showing, even when viewed through the favorable prism of Rule 12(b)(6) or a Rule 12(b)(1) facial attack. Indeed, Plaintiffs appeared to have applied the outdated "significant nexus" test for wetlands that the *Sackett* Court explicitly rejected. *See* Compl. ¶ 62 (ECF No. 1, PageID.28) ("Based on the hydrologic connectivity between the Wetlands to Burnett's Spray Fields and Spencer Creek, the wetlands are considered waters of the United States according to the Clean Water Act."). Further, the Complaint fails to allege, as required by *Sackett*, that Spencer Creek or any other surface water is a "relatively permanent body of water" or that the Wetland Areas have a continuous surface connection with Spencer Creek such that they are indistinguishable from each other. These pleading deficiencies alone mandate dismissal of Plaintiffs' CWA claim under Rule 12(b)(6).

Plaintiffs' CWA claim suffers from an even more fundamental flaw, which makes clear why they turned a blind eye to *Sackett*: the facts on the ground in Elk Rapids do not fit the *Sackett* test. As a result, Plaintiff's CWA claim was doomed before it was filed.

Start with the most fundamental requirement for wetlands to be "waters of the United States": they must be adjacent to waters of the United States. In *Sackett*, the Supreme Court explicitly held that, in the CWA context, adjacent does not equate to "neighboring" or "nearby." *See* 143 S. Ct. 1322 at 1339-40. Rather, for a wetland to be adjacent to waters of the United States, it must be "indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." *Id*. at 1339. And "[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby". *Id*. at 1340; *see also United States v. Andrews*, -- F. Supp.3d --, 2023 WL 4361227, at *9 (D. Conn. June 12, 20230) ("The

Sackett Court also limited the definition of 'adjacent' to mean contiguous, rather than near or neighboring."). Here, Wetland Area 1 is certainly distinguishable from any waters of the United States. Wetland Area 1 is separated from the nearest traditionally navigable waters (in this case Elk Lake) by no fewer than three sets of culverts: two parallel culverts under the Farm Road, another culvert under Elk Lake Road, and still more between Spencer Creek and Elk Lake Road. *See* Jurisdictional Report 2-3 **(Ex. A)**.

The presence of these culverts is directly relevant to any analysis of CWA jurisdiction under *Sackett* because they illustrate the lack of a surface water connection between the wetlands and any waters of the United States. In *Rapanos v. United States*, the Supreme Court's lead opinion specifically excluded "channels containing merely intermittent or ephemeral flow" from the statutory scope of the "waters of the United States." 547 U.S. 715, 733-34 (2006). The plurality went so far as to say that the idea that the CWA covered a "culvert" was "beyond parody." *Id.* at 734. Given this clear language from *Rapanos*'s plurality opinion—and the *Sackett* Court's later adoption of the plurality's rationale, 143 S. Ct. at 1336 ("[W]e conclude that the *Rapanos* plurality was correct: the CWA's use of waters encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes." (emphasis added))—culverts are categorically not "waters of the United States."

Thus, Wetland Area 1 is adjacent to a channel that is not a water of the United States as a matter of law—the culvert that runs under the Farm Road. This alone breaks the chain necessary for CWA jurisdiction to attach under *Sackett* because the culvert provides a clear distinction. Moreover, the next step in the journey to Elk Lake is still too far removed: Wetland Area 2 is itself cut off from the next body of water (Spencer Creek) by the culvert that runs under Elk Lake Road.

And even when you get past Elk Lake Road, there are still more culverts before Spencer Creek arrives at Elk Lake. These repeated areas of non-CWA jurisdiction mean that Wetland Area 1 and Wetland Area 2 are clearly "separate from traditional navigable waters" and therefore "cannot be considered part of those waters[.]" *See* 143 S. Ct. at 1340.

Moreover, even if the mere presence of culverts, in and of itself, was not sufficient to establish a lack of adjacency between Wetland Area 1 and Wetland Area 2 (or, for that matter, between Wetland Area 2 and Spencer Creek), the culverts at issue do not exhibit the kind of continuous surface water connection required for CWA jurisdiction under *Sackett*. There is not a continuous flow into or out of those culverts and surface water is not present in the culverts at all times. Thus, none of these culverts can serve as a continuous surface water connection to an adjoining body of water. Moreover, there is dry land separating Wetland Area 1 from Wetland Area 2, and Wetland Area 2 from Spencer Creek or other surface water. These repeated breaks in any connection between Wetland Area 1 and Elk Lake demonstrate that Wetland Area 1 is "separate from traditional navigable waters" and therefore "cannot be considered part of those waters[.]" *See* 143 S. Ct. at 1340. And, even if the same analysis were applied to all wetland areas collectively, (i.e. Wetland Area 1 and Wetland Area 2), it would cause the same result, because there is no continuous surface water connection between the wetlands and any waters of the United States.

If there were any doubt that the Wetland Areas adjoining the Spray Fields are not waters of the United States under *Sackett*, the notable similarities between the fact pattern here and *Sackett*'s facts dispel it. The Wetland Areas at issue here are more attenuated than the wetlands at issue in *Sackett* (which the Court unanimously held were *not* waters of the United States). There, the wetlands were separated from navigable water by a road (traversed by an under-road culvert),

a non-navigable tributary, and a non-navigable creek. *Id*. at 1331-32. Here, Wetland Area 1 is separated from navigable water by an under-road culvert, another wetland, a second under-road culvert, a non-navigable creek, and at least one additional culvert. Even Wetland Area 2 is separated from navigable waters by an under-road culvert, a non-navigable creek and at least one additional culvert. Thus, if the *Sackett* wetlands were not waters of the United States, neither is Wetland Area 1 nor Wetland Area 2.

The clear distinctions between the geographic features at issue here also prevent Plaintiffs from satisfying *Sackett*'s second requirement for CWA jurisdiction over wetlands (i.e., that the wetland has a continuous surface connection with [waters of the United States], making it difficult to determine where the 'water' ends and the 'wetland' begins). *Id*. at 1341. Put simply, there is no surface connection from Wetland Area 1 to Wetland Area 2, from Wetland Area 2 to Spencer Creek, and from Spencer Creek to Elk Lake. As previously noted, there is not a continuous flow into or out of those culverts and surface water is not present in the culverts at all times. Ultimately, all Wetland Areas and surface waters downgradient of the Spray Fields are separated by surface roads and/or underground culverts. Because of this, it is actually quite easy to tell where the "water" ends and the "wetlands" begin: at the culverts and roads.

Because Plaintiffs ignore the controlling test for when wetlands are considered waters of the United States, they have failed to plead a CWA claim. And, given the facts on the ground at the Wetland Areas, they could not anyway. Accordingly, the Court must dismiss Plaintiffs' CWA claim.

E. PLAINTIFFS' CWA CLAIM FAILS FOR LACK OF A POINT-SOURCE DISCHARGE.

1. Plaintiffs Have Failed to Plead a Point-Source Discharge.

A CWA claim requires that the defendant discharge a pollutant from a point source. *See, e.g., Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1008 (11th Cir. 2004) (listing the elements of a CWA claim). A "point source" is "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Plaintiffs acknowledge that a "point source discharge is necessary to establish a violation of the CWA. *See* Compl. at ¶¶ 60-61. However, they fail to identify what the alleged point source is. This deficiency is fatal.

Moreover, the facts set forth in the Complaint are inconsistent with and beyond the definition of a point-source discharge. Plaintiffs allege that "Burnette's excessive application of wastewater effluent to its Spray Fields through its spray and drip irrigation system has caused its wastewater effluent to migrate from its Spray Fields to the Wetlands through the groundwater and through surface water runoff, which is an unpermitted discharge into waters of the United States in violation of the Clean Water Act." Compl. ¶ 65 (ECF No. 1, PageID.29).[6] In effect, Plaintiff alleges that Burnette's wastewater sometimes runs off the Spray Fields and into the Wetland Areas. But the statutory definition of a "point source" explicitly "does not include agricultural stormwater

[6] Plaintiffs also allege that "[o]n at least one occasion in the past five years, Burnette has been observed directly discharging wastewater effluent from its spray system into the Wetlands adjacent to its Spray Fields," which is an unpermitted discharge into the waters of the United States in violation of the Clean Water Act." Compl. ¶ 63. This alleged direct discharge was not, however, included in Plaintiffs notice of intent to sue as a basis for a CWA violation, so this Court lacks jurisdiction to decide any alleged direct-discharge violation. *See South Side Quarry*, 28 F.4th at 694 (6th Cir. 2022) ("Satisfying the pre-suit notice requirement is a mandatory condition precedent to bringing a citizen suit. If a plaintiff fails to provide sufficient notice, a district court must dismiss the action as barred under the CWA").

discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14). In other words, alleged runoff from an agricultural field (including a field in which irrigation is utilized) does not constitute a "point source" discharge. Courts have routinely recognized that such discharges are not regulated as point sources under the CWA. *See Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) ("Congress had classified nonpoint source pollution as runoff caused primarily by rainfall around activities that employ or create pollutants. Such runoff could not be traced to any identifiable point of discharge."); *Nat. Res. Defense Council, Inc. v. Muszynski*, 268 F.3d 91, 102 (2nd Cir. 2001) ("[N]onpoint sources . . . can consist of, for example, runoff due to the agricultural use of land adjoining a river[.]").

Because the alleged events set forth the Complaint is agricultural runoff, Plaintiffs have not pleaded a point-source discharge. Accordingly, their CWA claim must be dismissed under Rule 12(b)(6).

2. The Spray Fields Do Not Contain a Point-Source Discharge.

The only "point source" (as defined by 33 U.S.C. § 1362(14)) present at the Spray Fields is the irrigation system itself. That irrigation system discharges onto land and not into surface waters or waters of the United States. *See* Jurisdictional Report 4 (Ex. A). Thus, there is no "point source" discharge into waters of the United States. Because the Plaintiffs cannot establish a point source discharge into waters of the United States their CWA claim must be dismissed under Rule 12(b)(1).

F. IF THE COURT DISMISSES PLAINTIFFS' CWA CLAIM FOR ANY OF THE FOREGOING REASONS, IT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER PLAINTIFFS' MEPA CLAIM.

When a party brings a federal claim, this Court has supplemental jurisdiction over related state-law claims if they are "so related to claims in the action within such original jurisdiction that

they form part of the same case or controversy." 28 U.S.C. § 1367(a). The Court's exercise of supplemental jurisdiction is discretionary; it may decline jurisdiction over related state-law claim under certain enumerated circumstances. *Id*. at § 1367(c)(1)-(4). One of these circumstances is if "the district court has dismissed all claims over which it has original jurisdiction." *Id*. at 28 U.S.C. § 1367(c)(3). Courts routinely exercise their discretion to dismiss state-law claims when they have already dismissed all federal claims. *See Gamel v. City of Cincinnati*, 625 F.3d 949, 952) (6th Cir. 2010) ("When all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims, or remanding them to state court if the action was removed.").

If the Court dismisses Plaintiffs' CWA claim for any of the reasons described above, it should decline to exercise supplemental jurisdiction over Plaintiffs MEPA claim. The MEPA claim arises solely under state law and concerns Burnette's compliance with a state-issued permit. The Court should not allow itself to be turned into a bona fide state regulatory agency that decides disputes among Michigan citizens.

IV. CONCLUSION

For these reasons, Burnette respectfully requests that this Court dismiss Plaintiffs' Complaint and enter judgment in its favor.

Attorneys for Defendant
VARNUM LLP

Dated: July 21, 2023

By: */s/Neil E. Youngdahl*
Aaron M. Phelps (P64790)
Matthew B. Eugster (P63402)
Neil E. Youngdahl (P82452)
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000
neyoungdahl@varnumlaw.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with L.Civ.R. 7.2(b), includes 9,024 words, inclusive of headings, footnotes, citations and quotations, and was prepared using Microsoft Word 365 (2019).

Date: July 21, 2023

By: */s/Neil E. Youngdahl*
Neil E. Youngdahl (P82452)