

**UNITED STATES DISTRICT COURT
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.

Civil Action No. 1:23-CV-00589
Hon. Jane M. Beckering

BURNETTE FOODS, INCORPORATED

Defendant,

**COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF, AND
ASSESSMENT OF CIVIL PENALTIES**

Plaintiffs Grand Traverse Band of Ottawa and Chippewa Indians, Grand Traverse Bay Watershed Initiative, Inc. doing business as The Watershed Center Grand Traverse Bay, and Elk-Skegemog Lakes Association (collectively, “Plaintiffs”) complain of defendant Burnette Foods, Inc., as follows:

I. INTRODUCTION

Plaintiffs bring this lawsuit out of necessity – their last resort – because less burdensome and more efficient opportunities to resolve the issues at the heart of this Complaint have failed. This case is about protecting invaluable water resources from Defendant’s illegal discharges of polluted wastewater that have been ongoing for decades. Burnette Foods, Inc. (“Burnette” or “Defendant”) has been cited for thousands of violations through the years by state regulators for

the mismanagement and illegal discharge of polluted wastewater from its fruit processing facility (“Facility”) onto open fields (“Spray Fields”) located at or near 11100 Elk Lake Road. The illegal discharges of wastewater effluent pollute a local wetland complex (“Wetlands”), Spencer Creek, and Elk Lake. The effluent contains unnaturally high concentrations of phosphorus and other pollutants that create excessive levels of biological oxygen demand (“BOD”) that are flowing into the Wetlands, Spencer Creek, and Elk Lake resulting in very low levels of dissolved oxygen (“DO”) in those waterbodies. Fish and other aquatic life need adequate levels of DO to survive and thrive. In addition, wastewater effluent has been shown to increase dangerous *E. coli* bacteria and arsenic in the local waters. This pollution has impacted riparian residents’ use and enjoyment of Elk Lake and Spencer Creek. The pollution creates fear of health issues arising from swimming or coming in contact with the polluted water. The pollution causes discoloration, unnatural foams, and odors in the creek and lake. The pollution could reduce rental incomes and property values for residents. Yet Burnette has refused to abate the behavior. Defendant continues to discharge excessive amounts of its polluted wastewater, in violation of the Clean Water Act and Michigan law, in utter disregard of the numerous violation notices it has received from state regulators. Burnette’s longstanding mismanagement of its fruit processing wastewater has resulted in significant harm to the environment and to the Plaintiffs.

Despite numerous violation notices from state regulators over the years and complaints from residents, Burnette has been unwilling to take responsibility for the environmental harm linked to its illegal discharges. As a result, Plaintiffs – three entities who represent people who depend upon clean water in the impacted waterbodies to sustain invaluable fishing resources; who recreate in and around the impacted water resources; and whose investments in boats, homes, property, and quality of life are impaired and threatened by Defendant’s illegal discharges – have

no choice but to bring this Clean Water Act citizen suit in an effort to force Defendant to comply with the law. For these reasons, as described more fully below, Plaintiffs seek declaratory and injunctive relief, civil penalties, litigation costs, and other relief that may be ordered by the Court to bring Burnette into compliance with the Clean Water Act, its groundwater permit, and the Michigan Environmental Protection Act.

Plaintiffs bring these Clean Water Act (“CWA”) citizen enforcement and Michigan Environmental Protection Act (“MEPA”) suits pursuant to the Federal Water Pollution Control Act citizen suit provision, 33 U.S.C. § 1365 (the “Clean Water Act” or “CWA”) and Section 1701 of the Natural Resources and Environmental Protection Act, MCL 324.1701(1) (commonly referred to as the “Michigan Environmental Protection Act” or “MEPA”) against Burnette Foods, Inc., to redress and prevent ongoing violations of Section 301(a) of the CWA, to preserve the Grand Traverse Band’s treaty-reserved rights, and to protect water and other natural resources of Michigan, and the public trust in those resources, from pollution, impairment, or destruction caused by Burnette’s illegal discharges of wastewater at its Facility located in Elk Rapids, Michigan in accordance with Section 1701(1) of MEPA.

II. JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over the parties and subject matter jurisdiction of this action pursuant to Section 505(a)(1) of the Clean Water Act, 33 U.S.C. § 1365(a)(1), 28 U.S.C. § 1331 (a civil action arising under the Constitution and laws of the United States), 28 U.S.C. § 1362 (a civil action brought by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior arising under the Constitution, laws, or treaties of the United States), and 28 U.S.C. § 1367(a) (a civil action with other claims that are so related to

claims in action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution).

2. At least one Plaintiff has standing to maintain this suit and, therefore, this court may adjudicate the merits of the claims without analyzing the standing of each Plaintiff. *Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977).

3. Plaintiffs have complied with the statutory notice requirements under Section 505(a)(1) of the CWA, 33 U.S.C. § 1365(a), and the corresponding regulations at 40 C.F.R. 135.2.

4. On November 17, 2022, Plaintiffs provided all requisite parties with notice of their intention to file suit for violations of the CWA at the Facility by sending a 60-day notice of intent letter (“NOI”) via certified mail pursuant to 33 U.S.C. § 1365(a)(1) and 40 C.F.R. § 135.2(a)(2). *See* Exhibit 1, Clean Water Act Notice of Intent to Sue/60-day Notice Letter (Nov. 17, 2022).

5. The NOI informed Burnette, in accordance with Section 505 of the CWA, that its discharges of wastewater effluent into the Wetlands, as “surface waters of the state that is subject to the Clean Water Act,” per the dates noted in the Violation Notices issued by EGLE, violate the Section 301(a) effluent limitation of the CWA since Burnette does not have a NPDES permit. *Id.* at 11-12.

6. The NOI provided “sufficient information” with enough specificity for Burnette to determine that its discharges of the Facility’s wastewater effluent, via the spray and drip systems, into the Wetlands and Spencer Creek on the dates noted by EGLE inspectors constitute violations of the CWA that could be abated to bring Burnette’s actions into compliance with the law and avoid this suit. *See generally* 40 C.F.R. § 135.3(a).

7. A copy of the 60-day NOI letter was sent to the Administrator of the United States Environmental Protection Agency (“EPA”), the Administrator of EPA Region 5, U.S. Attorney

General, and the Director of the Michigan Department of Environment, Great Lakes, and Energy (“EGLE”) pursuant to CWA, 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. § 135.2(a)(2).

8. Venue is proper under 33 U.S.C. § 1365(c)(1) because the Burnette Foods, Inc. Facility, where the events giving rise to this action take place, is located in this judicial district.

9. More than 60 days have elapsed since the 60-day notice letter was properly served on the parties and upon information and belief, neither the EPA nor the State of Michigan has commenced or is diligently prosecuting a civil action to address the violations alleged in this complaint. 33 U.S.C. § 1365(b)(1)(B).

III. PARTIES

10. Plaintiff Grand Traverse Band of Ottawa and Chippewa Indians (“GTB”) is a federally recognized Indian tribe (*see* 88 Fed. Reg. 2112, at 2113 (January 12, 2023)) headquartered in Leelanau County with a six-county primary service area consisting of Antrim, Benzie, Charlevoix, Grand Traverse, Leelanau, and Manistee Counties. The historic Grand Traverse bands were signatory to the March 28, 1836, Treaty of Washington (7 Stat. 491) (“1836 Treaty”).

11. Plaintiff Grand Traverse Bay Watershed Initiative, Inc., d/b/a The Watershed Center Grand Traverse Bay (TWC) is a Michigan nonprofit corporation. The mission of TWC is to advocate for clean water in Grand Traverse Bay and act to protect and preserve its watershed. TWC’s Grand Traverse Bay WATERKEEPER® (Waterkeeper) is one of over 300 WATERKEEPER® organizations representing the international WATERKEEPER® ALLIANCE. The Waterkeeper protects water quality by advocating, educating, monitoring, and patrolling Grand Traverse Bay and its watershed. TWC and the Waterkeeper advocate for policies and actions that protect and preserve water quality, including the use of litigation and

administrative challenges to ensure 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. The office of TWC and the Waterkeeper is located at 13170 South West Bay Shore Drive, Suite 102, Traverse City, MI 49684.

12. Plaintiff Elk-Skegemog Lakes Association (ESLA) is a Michigan nonprofit corporation exempt from corporate income tax pursuant to section 501(c)(3) of the Internal Revenue Code. ESLA 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. ESLA conducts periodic scientific water quality tests of the watershed and aims to solve problems involving lake levels, water safety, greenbelts, and water pollution that could lead to the deterioration of water quality. The mailing address for ESLA is P.O. Box 8, Elk Rapids, MI 49629.

13. Defendant Burnette Foods, Incorporated is a Michigan Domestic Profit Corporation that produces and distributes locally and nationally sourced fruits and vegetables and has production facilities throughout Michigan. Burnette Foods, Inc. owns and operates a fruit processing facility (“Facility”) located at 701 US-31 South in Elk Rapids, Antrim County, Michigan. Burnette also maintains an approximate 40–50 acre parcel of land used as a land treatment system at or near 11100 Elk Lake Road in Elk Lake Township.

IV. STANDING

14. Burnette discharges polluted wastewater from its Facility onto the Spray Fields.

15. When excessive amounts of wastewater or wastewater with excessive concentrations of one or more pollutants are applied to the Spray Fields, it causes the discharge of

pollutants into the Wetlands and Spencer Creek through surface water migrations and the groundwater underlying the Spray Fields.

16. The Wetlands are headwaters for Spencer Creek, which begins on Burnette-owned property. Spencer Creek flows approximately 3,000 feet before flowing into Elk Lake.

17. Burnette has been issued a permit by the Michigan Department of Environment, Great Lakes, and Energy to discharge wastewater effluent from the Facility onto the Spray Fields pursuant to time, volume, and pollutant restrictions (“Groundwater Permit”).

18. Burnette, as discussed further in this Complaint, has violated the restrictions in the Groundwater Permit on thousands of occasions through the years.

19. The Plaintiffs’ members’ and citizens’ use and enjoyment of waterbodies impacted by the Facility have been, are being, and will continue to be adversely affected by Burnette’s failure to comply with the Clean Water Act, its Groundwater Permit, and the Michigan Environmental Protection Act. Plaintiffs’ members use Elk Lake for a variety of recreational activities, including boating, fishing, kayaking, canoeing, and swimming.

20. Burnette’s violations of the Clean Water Act, its Groundwater Permit, and the Michigan Environmental Protection Act not only affect the Wetlands, Spencer Creek, Elk Lake and its connecting waters, but also impair the usufructuary rights of GTB to hunt, fish, and gather across the 1836 Treaty-ceded territory, which includes the Wetlands, Spencer Creek, and Elk Lake and its connecting waters, as well as adjacent Lake Michigan waters. The usufructuary rights of GTB are dependent on the ecological integrity of the land and waterways within the 1836 Ceded Territory.

21. Burnette’s violations of the Clean Water Act, its Groundwater Permit, and the Michigan Environmental Protection Act, which affect the Wetlands, Spencer Creek, Elk Lake and

its connecting waters (collectively “Waterbodies”), also impair the personal and property rights and interests of ESLA and its members, who are riparian owners who own property along Elk Lake, Lake Skegemog, the Elk River, and Torch River. The property value of ESLA members’ riparian property is dependent on the ecological integrity of the Wetlands, Spencer Creek, and Elk Lake and connecting waters. Moreover, ESLA members’ use and enjoyment of the Wetlands, Spencer Creek, and Elk Lake and connecting waters are negatively impacted by Burnette’s effluent and pollutant discharges, which adversely impact aquatic species and create unnatural quantities of foam, discoloration, and settleable solids in Spencer Creek and unnatural color in Elk Lake. These impacts have contributed to a reasonable fear of pollution from Burnette and reduce the ESLA’s members’ ability to enjoy the Waterbodies.

22. ESLA members include Dennis Gretel who owns and lives on property that is riparian to Spencer Creek and Elk Lake. He also rents cottages on his riparian property. Mr. Gretel has witnessed: discoloration of Spencer Creek and Elk Lake that stains boats and swimming areas, accumulating weed growth in swim areas, and unpleasant odors emanating from Spencer Creek. Mr. Gretel’s cottage rental business depends on clean waters in Spencer Creek and Elk Lake, and he fears diminishing personal enjoyment of Elk Lake and the loss of rental income if the pollution of those waterbodies continues from Burnette’s illegal discharges. *See Exhibit 2, Affidavit of Dennis Gretel (Aug. 21, 2023).*

23. ESLA members also include Brian Taylor who owns and lives on property that is riparian to Spencer Creek. Mr. Taylor and his guests have noted the discoloration of Spencer Creek and Elk Lake and using the waterfront is less attractive when the water is stained. For years, Mr. Taylor spent time cleaning Spencer Creek by his property but has stopped since the reporting of *E. coli* contaminating the water. He also advises his grandchildren to alter their swimming location

due to fears for their health and has noted paint peeling from his boat that coincides with the discoloration of Elk Lake. *See* Exhibit 3, Affidavit of Brian Taylor (Aug. 23, 2023).

24. Burnette's violations of the Clean Water Act, Groundwater Permit, and the Michigan Environmental Protection Act, which affect the Wetlands, Spencer Creek, Elk Lake and its connecting waters, also impair the personal and property rights and interests of The Watershed Center and its Leadership Circle members, whose interests Watershed Center represents. The Watershed Center Leadership Circle members' use and enjoyment of Spencer Creek and Elk Lake are negatively impacted by Burnette's effluent and pollutant discharges, which adversely impact aquatic species and create unnatural quantities of foam, discoloration, and settleable solids in Spencer Creek and unnatural color in Elk Lake. These impacts have contributed to a reasonable fear of pollution and reduce the ability of Watershed Center Leadership Circle members to enjoy the Waterbodies. Watershed Center members include Samantha Ogle. *See* Exhibit 4, Affidavit of Samantha Ogle (Aug. 23, 2023.)

25. Samantha Ogle is a member of The Watershed Center Leadership Circle and a volunteer with The Watershed Center Adopt-A-Stream team that monitors Spencer Creek. Ms. Ogle regularly assesses water quality in Spencer Creek and where it outlets into Spencer Bay. She has observed that Spencer Creek suffers discoloration, settleable solids, unnatural quantities of foam, and malodorous characteristics during parts of the year, and she takes precautions to avoid contact and mitigate discomfort associated with these characteristics by purchasing personal protection equipment and expending personal resources. In addition, Ms. Ogle, who regularly swims, boats, and kayaks in Elk Lake, avoids the outlet of Spencer Creek because of the pollution that she has observed in Spencer Creek and reasonably believes to come from Burnette Food's illegal discharges. *Id.*

26. Burnette's violations also harm the organizational interests of the Plaintiffs TWC and ESLA. The protection and improvement of the environment and water quality of the Waterbodies are important parts of each Plaintiff's mission. A critical component of these goals is ensuring compliance with federal and state environmental laws and regulations, including the Clean Water Act and the Michigan Environmental Protection Act. When Burnette violates federal and state environmental laws as well as its Groundwater Permit, it adversely affects water quality and in turn the organizational interests of the Plaintiffs.

27. The historic Grand Traverse bands were signatories to the March 28, 1836 Treaty of Washington, by which GTB and the other intervening-plaintiff Indian Tribes in the "*United States v. Michigan*" litigation (W.D. Mich. Case No. 2:73-cv-26) reserved off-reservation fishing rights in portions of the Great Lakes (including the Grand Traverse Bay area of Lake Michigan adjacent to Elk Lake) declared in *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd*. 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). In the 1836 Treaty GTB also reserved usufructuary fishing, hunting, trapping, and gathering rights in inland portions of the cession that were confirmed by the November 2, 2007, Consent Decree (W.D. Mich. Case No. 2:73-cv-26, ECF No. 1799). GTB has the duty under its Constitution approved by the Secretary of the Interior to preserve and protect the natural resources within the 1836 Treaty-ceded territory; therefore, it is crucial for GTB to protect and restore the species and habitats vital to the continued responsible utilization of these resources. GTB's treaty-reserved rights "are property rights protected by the United States Constitution." *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, 971 F. Supp. 282, 288 (W. D. Mich. 1995), *aff'd*. 141 F.3d 635 (6th Cir. 1998), *cert. denied*, 525 U.S. 1040 (1998). These

property rights are likely to be adversely impaired by Defendant's continuing illegal discharges of pollutants into the receiving waterbodies.

28. For the reasons described above, the Plaintiffs and their members and citizens have suffered and continue to suffer injury-in-fact from Burnette's failure to comply with the Clean Water Act, the Michigan Environmental Protection Act, and its Groundwater Permit. This injury is fairly traceable to Burnette's conduct and would be redressed by the relief the Plaintiffs seek in this action.

V. STATUTORY LANDSCAPE

CLEAN WATER ACT

29. Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" without a proper permit pursuant to Section 402 or 404. 33 U.S.C. § 1311(a). A "discharge" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

30. A "pollutant" is defined in the CWA as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

31. "Navigable waters" are defined in the CWA as "waters of the United States." 33 U.S.C. § 1362(7). The Supreme Court has long held that at least some wetlands should be considered "waters of the United States" due to the language of Section 404(g)(1) in the CWA which authorizes States to apply to the EPA for permit programs regulating dredged or fill material discharges into navigable waters "including wetlands adjacent thereto." 33 U.S.C. § 1344(g)(1). *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138 (1985); *Rapanos v. United*

States, 547 U.S. 715, 768 (2006) (opinion of Kennedy, J.); *Sackett v. EPA*, 143 S.Ct. 1322, 1339 (2023).

32. The recent *Sackett* decision created a two-part test to determine if wetlands are “adjacent to” a body of water that would result in the wetlands being protected by the CWA. The requirements are: “first, the adjacent [body of water constitutes] . . . ‘water[s] 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.” *Sackett*, 143 S.Ct. at 1341 quoting *Rapanos*, 547 U.S. at 742.

33. A “point source” “means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.” 33 U.S.C. § 1362(14).

34. The EPA has specifically enumerated that fruit processing wastewater is a “point source” requiring NPDES permits in Part 401 of the Code of Federal Regulations (“CFR”). “This part 401 sets forth the legal authority and general definitions which will apply to all regulations issued concerning specific classes and categories of point sources under parts 402 through 699 of this subchapter which will follow.” 40 C.F.R. § 401. *See also* 40 C.F.R. § 407.20, “Apple Products Subcategory”; 40 C.F.R. § 407, “Canned and Preserved fruits and vegetables processing point source category.”

35. The Supreme Court recently ruled that a “point source” need not discharge the pollutant directly into the waters of the U.S. to require a NPDES permit. Rather, the Court held

the requirement of the addition of a pollutant from a “point source” is met so long as the conveyance through another medium (i.e., groundwater) “is the functional equivalent of a direct discharge from the point source into navigable waters.” *County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct., 1462, 1477 (2020).

36. Section 505 (“Citizen Suit section”) of the CWA allows any citizen to bring a citizen suit against a polluter “who is alleged to be in violation of (A) an effluent standard or limitation under this Act.” 33 U.S.C. § 1365(a)(1).

37. The Citizen Suit section of the CWA defines “effluent standard or limitation” as, among other things, “an unlawful act under subsection (a) of section 1311 of this title;”. 33 U.S.C. § 1365(f).

38. Section 402 of the Clean Water Act grants states the right to issue National Pollutant Discharge Elimination System (“NPDES”) permits to individuals or corporations that allow and set effluent limits for enumerated pollutants to be discharged into specified receiving waters of the United States. 33 U.S.C. § 1342.

39. Section 402(k) of the Clean Water Act, 33 U.S.C. § 1342(k), acts as a “permit shield,” which can serve as a defense against citizen suits seeking enforcement of an alleged violation of section 301(a), but this defense is only available for discharges that are regulated by a NPDES permit. *See Atlantic States Legal Foundation, Inc. v. Eastman Kodak Company*, 12 F.3d 353 (2d Cir. 1993).

40. District Courts in the Sixth Circuit and other Appellate Circuit Courts have consistently allowed citizen suits alleging Section 301(a) violations to be litigated when the alleged violator did not possess a NPDES permit for the discharges, as is the case here. *See Starlink Logistics Inc. v. ACC, LLC*, No. 1:12-cv-00011, 2022 U.S. Dist. LEXIS 212425, at *34 (M.D.

Tenn. Nov. 23, 2022); *Ward v. Stucke*, No. 3:18-cv-263, 2021 U.S. Dist. LEXIS 167486, at *1 (S.D. Ohio Sept. 3, 2021); *Olympic Forest Coal. v. Coast Seafoods Co.*, 884 F.3d 901 (9th Cir. 2018); *Sierra Club v. El Paso Gold Mines*, 421 F.3d 1133 (10th Cir. 2005).

41. The CWA requires citizen suit plaintiffs to provide notice to defendants 60 days prior to filing a civil suit. 33 U.S.C. § 1365(b).

42. The 60-day 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).

MICHIGAN ENVIRONMENTAL PROTECTION ACT

43. Section 1701(1) of MEPA allows any person to maintain an action “for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.” MCL 324.1701(1).

44. Section 1703 of MEPA states in part: “(1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that his or her conduct is consistent with the promotion of public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction. Except as to

the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts apply to actions brought under this part.” MCL 1703(1). Costs may also be apportioned to the parties in the interest of justice. MCL 1703(3).

VI. FACTUAL ALLEGATIONS

BACKGROUND

45. Burnette owns and operates the fruit processing Facility located at 701 US-31 South in Elk Rapids, Antrim County, Michigan. Burnette also owns and maintains an approximately 100-acre parcel of property located at or near 11100 Elk Lake Road that contains the Spray Fields, portions of the Wetlands, and the headwaters for Spencer Creek.

46. The Spray Fields are adjacent to the Wetlands that are the headwaters of, and adjacent to, Spencer Creek (sometimes referred to as “Gretel’s Creek”) that flows into Elk Lake.

47. The Facility generates millions of gallons of wastewater each year related to the handling, washing, processing, and canning of fruit.

48. In general, fruit processing wastewater contains elevated concentrations of numerous pollutants including, but not limited to, phosphorus, biological oxygen demand (“BOD”), and total suspended solids (“TSS”).

49. The EPA has categorized fruit processing facilities as “point sources” requiring a NPDES permit if the fruit processing wastewater is to be discharged into waters of the United States because of the pollutants carried in the wastewater effluent. *See* 40 C.F.R. §§ 401, 402, and 407.

50. Food processing wastewater pollutants such as phosphorus, BOD, and TSS can have serious environmental impacts because they are or contain oxygen-consuming materials.

These pollutants can also create disturbing qualities in natural waters such as unnatural foaming, foul odors, algae blooms, and discoloration.

51. When these pollutants are improperly treated and allowed to enter streams and lakes, they can cause eutrophication of the aquatic ecosystems where the balance of plants, animals, and aquatic microorganisms is upset by the lack of oxygen in the system. Eutrophication can result in loss of fish populations, tainted drinking water, and degradation of recreational opportunities.

52. The vast majority of Burnette's fruit processing wastewater is piped approximately 1.3 miles south of the Facility to a pump house located on or near Burnette's Spray Fields because the sheer volume and concentration of pollutants in its wastewater would overwhelm and incapacitate the local public owned treatment works ("POTW"). The wastewater is then discharged onto the Spray Fields.

53. Burnette does not have a NPDES permit for the discharge of its fruit processing wastewater to its Spray Fields.

54. Burnette does have a Groundwater Permit No. GW1810211 ("Groundwater Permit"), issued pursuant to Part 22, Water Resources Protection, of the Natural Resources Environmental Protection Act, P.A. 451 of 1994 that authorizes discharges of the Facility's wastewater onto the Spray Fields as part of a "land treatment system" subject to maximum daily and yearly volume limits. *See* Exhibit 5, Mich. Dep't of Env't, Great Lakes and Energy, Groundwater Permit No. GW1810211 (June 2017).

55. According to the "Discharge Management Plan" for Burnette's Groundwater Permit, the "land treatment system" utilizes a combination of spray irrigation systems and drip irrigation systems to discharge the wastewater to the Spray Fields. *See* Exhibit 6, Mich. Dep't of

Env't, Great Lakes and Energy, Discharge Management Plan for Permit No. GW1810211 ENV-022-101, Revision C, at 2 (March 2019).

56. The Spray Fields consist of four fields: Field 39, Field 38, Field 37, and Field 36. Field 39 is managed as one 4.0-acre spray field; Field 38 is managed as one 8.0-acre spray field and one 8.1-acre drip field; Field 37 is managed as one 6.7-acre spray field and one 8.1-acre drip field; and Field 36 is divided into 10-acre sub-sites for spray. *Id* at 7.

57. The Spray Fields consist of plants specifically required by EGLE to create a “slow rate land treatment system” that can “uptake” various excess pollutants in the wastewater effluent as a means of treating the wastewater and cleansing it before it impacts receiving waters. A “slow rate land treatment” system is regulated by Mich. Admin. Code R. 323.2234. *Id* at 10.

58. The enumerated “uptake plants” in the Discharge Management Plan were dictated by EGLE specifically for their ability to absorb certain pollutants such as phosphorus and nitrogen from the soil that has been discharged in the wastewater effluent and increase BOD. *Id*.

59. A key component of an effective “slow rate land treatment” is that the receiving land does not get saturated and has time to allow the wastewater effluent to percolate into the soil and be taken up by the plants in the fields before the pollutants can migrate into receiving waterbodies.

60. For over three decades, however, Burnette has been frequently spraying excessive amounts of its wastewater as well as wastewater with excessive levels of pollutants, in violation of its Groundwater permit, onto the Spray Fields to the extent that the “slow rate land treatment system” is overwhelmed and unable to absorb the wastewater effluent and the pollutants therein before they reach the Wetlands. This illegal behavior results in pollutants contaminating the Wetlands, Spencer Creek, and Elk Lake. *See* Exhibit 7, Mich. Dep't of Nat. Resources, Inspection

Report, Subject: R-31-90, Burnette Foods by John T. Kraft (Sept. 7, 1990); Exhibit 8, Mich. Dep't of Env't Quality, Violation Notice No. 003697 (Sept. 29, 2008); Exhibit 9, Mich. Dep't of Env't, Great Lakes, and Energy, Violation Notice No. 0009839 (Aug. 21, 2019); Exhibit 10, Mich. Dep't of Env't, Great Lakes, and Energy, Violation Notice No. 00984 (Nov. 6, 2020); and Exhibit 11, Mich. Dep't of Env't, Great Lakes, and Energy, Violation Notice No. 012414 (Nov. 15, 2021).

61. The Spray Fields are sloped toward the Wetlands and hydrology reports show that both the Spray Fields' surface water runoff and any shallow groundwater underlying the Spray Fields flow into the Wetlands and Spencer Creek as illustrated in Figure 1 below:

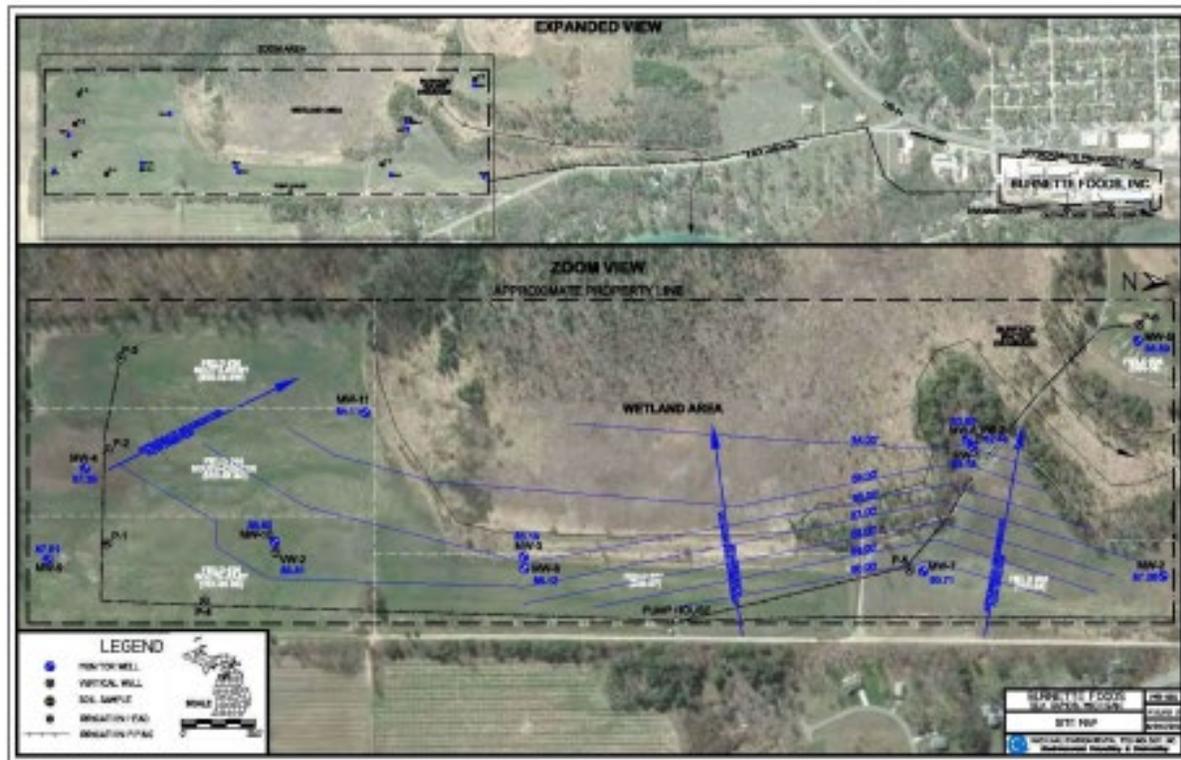


Figure 1

62. Spencer Creek originates on Burnette's property at an indistinguishable point somewhere in the Wetlands and then flows under Elk Lake Road before out-falling into Elk Lake. The total length of Spencer Creek from its headwaters to Elk Lake is approximately a mile or less.

63. A “farm road” runs through the Wetland system so that Spray Fields 38 and 39 are north of the “farm road” and Spray Fields 36 and 37 are south of the “farm road.”

64. An “equalization culvert” runs under the farm road and maintains a surface water connection between the Wetlands north and south of the “farm road.” The “equalization culvert” has an 18-inch diameter and is buried approximately 3.6 inches below surface grade for the purpose of maintaining good drainage and surface water connectivity in the Wetlands. *See* Exhibit 12, Mich. Dept’t of Env’t, Great Lakes, and Energy, Notice of Authorization, Permit Number WRP032418 v. 1 (March 14, 2022).

65. An EGLE inspector toured the Spray Fields in August 2020 and confirmed that Spencer Creek flows “out of the wetland” well before it reaches Elk Lake Road. *See* Exhibit 13, Mich. Dept’t of Env’t, Great Lakes, and Energy, Groundwater - Reconnaissance Inspection by David Walters, at ¶ 7 (August 12, 2020). *See also* Exhibit 14, Mich. Dept’t of Env’t, Great Lakes, and Energy, Groundwater - Reconnaissance Inspections Photos.

66. The Wetlands adjacent to the Spray fields on either side of the “farm road” are part of one large wetland complex that encompasses Spencer Creek as illustrated in Figure 2 below:

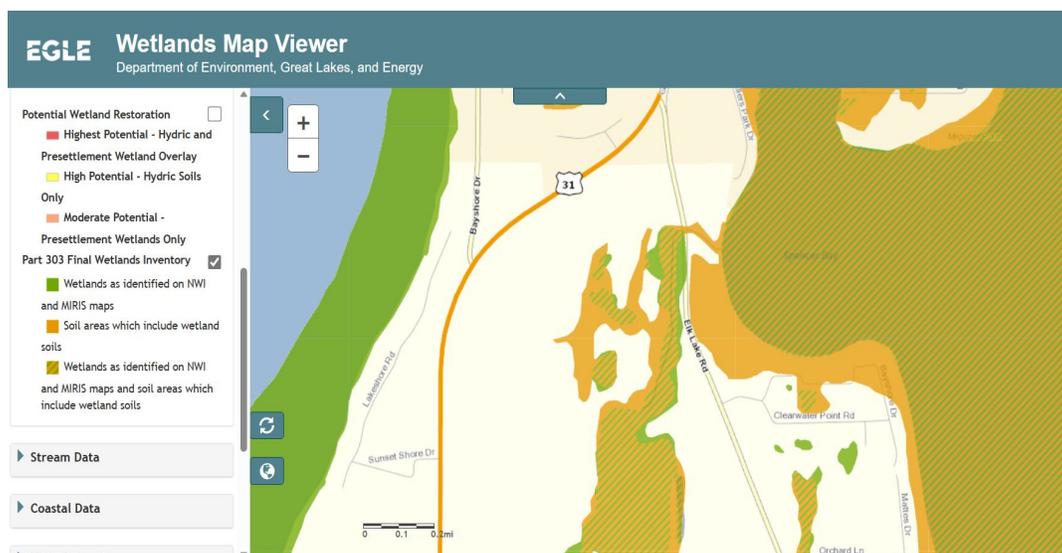


Figure 2

67. The Wetlands maintain a surface water connection through the “equalization culvert” according to a Wetland Delineation Report prepared for Burnette in May 2021 that concludes, “[b]ased on LEI’s investigation and research, one area of regulated wetland separated by a road, with a surface water connection through a culvert, exists on the property.” *See* Exhibit 15, “Wetland Delineation Report for Burnette Foods Inc.,” Lakeshore Environmental, Inc., Project Number: 18-628, at 5 (May 2021).

68. On numerous occasions over the past five years, unnatural qualities have been observed in Spencer Creek downstream of Burnette’s Spray Fields by local citizens. These unnatural qualities are indicative of excessive BOD and TSS loading including unnatural foam, strong odors, cherry pulp, staining in Spencer Creek and Elk Lake, and orange and red settleable solids along the creek bottom. *See* Exhibit 11, 2021 Violation Notice, at ¶ 8; Exhibit 1, Notice of Intent to Sue, at 10.

69. EGLE inspectors have noted that Spencer Creek flows in the northern portions of the Wetlands and presents characteristics such as discoloration and foam that indicate Burnette’s wastewater effluent is being discharged into the Wetlands and Spencer Creek without being properly treated by the “slow rate land treatment system.” *See* Exhibit 13, 2020 Inspection, at ¶ 7; Exhibit 14, Groundwater -Reconnaissance Inspections Photos.

70. In the last five years, EGLE has issued to Burnette three violation notices dated August 21, 2019, November 6, 2020, and November 15, 2021, citing Burnette for violations of the Clean Water Act and hundreds of violations of its Groundwater Permit. *See generally* Exhibit 9, 2019 Violation Notice; Exhibit 10, 2020 Violation Notice; Exhibit 11, 2021 Violation Notice.

71. Dangerous *E. coli* bacteria has also been detected in Burnette’s wastewater effluent in tests conducted by EGLE and in water samples collected by Plaintiffs from numerous points

along Spencer Creek, posing a threat to the health of Plaintiffs and the general public. *See* Exhibit 1, Notice of Intent to Sue, at 8; Exhibit 9, 2019 Violation Notice, at 1; Exhibit 11, 2021 Violation Notice, at ¶6.

72. In the violation notice issued by EGLE to Burnette on August 21, 2019, EGLE required Burnette to prepare an evaluation and sampling analysis plan to assess numerous wastewater effluent parameters, including *E. coli*. *See* Exhibit 9, 2019 Violation Notice, at 5.

73. In its response to the August 21, 2019, violation notice, Burnette contested EGLE's requirement to sample and evaluate for *E. coli*, stating that there is no potential for *E. coli* from its spray irrigation practices. *See* Exhibit 16, Burnette Foods, Response to Violation Notice No. VN 009839 (Sept. 20, 2019), at 6.

74. On July 27, 2021, EGLE tested Burnette's wastewater effluent for *E. coli* bacteria, found *E. coli* was present in Burnette's wastewater effluent, and reiterated EGLE's requirement for a sampling plan for *E. coli* in Burnette's wastewater effluent. *See* Exhibit 11, 2021 Violation Notice, at ¶ 6.

75. On numerous dates from June 2021 through July 2021, the Plaintiff Elk-Skegemog Lakes Association collected water samples from numerous points along Spencer Creek to test for *E. coli* concentrations. Analytical results of these samples found *E. coli* concentrations regularly above 300 *E. coli* per 100 milliliters of water, with concentrations ranging from 345 *E. coli* per 100 milliliters of water to greater than 2,419 *E. coli* per 100 milliliters of water. *See* Exhibit 1, Notice of Intent to Sue, at 9-10.

76. All surface waters of the state are protected for total body contact recreation from May 1 to October 31. All surface waters of the state protected for total body contact recreation shall not contain more than 130 *E. coli* per 100 milliliters of water based on a 30-day geometric

mean or a maximum of 300 *E. coli* per 100 milliliters. Mich. Admin. Code, R 323.1100(2); Mich. Admin. Code, R. 323.1062(1).

77. Burnette has not developed or implemented any plan for monitoring the presence of *E. coli* in its wastewater effluent, groundwater, or nearby surface waters.

78. The minimum standard for dissolved oxygen (“DO”) in warm water streams in Part 4 Water Quality Standards under Part 31 is 4 mg/L, or 5 mg/L as a daily average. Mich. Admin. Code, R 323.1064(2)(b).

79. Water sample results collected by EGLE on July 27, 2021, in Spencer Creek—which is considered a warm water stream—indicate that the DO was 1.87 mg/L. *See* Exhibit 11, 2021 Violation Notice, at ¶¶ 9 and 11.

80. Dissolved Oxygen is the measurement of oxygen in the water that is essential to prevent eutrophication. The samples tested by EGLE show the waters in Spencer Creek were significantly below the minimum requirements for warm water streams to support a healthy aquatic ecosystem. *Id.*

81. Water sample results collected by EGLE on July 27, 2021, in the Wetlands adjacent to Burnette’s Spray Fields indicate that total arsenic was 17 ug/L. The concentration of arsenic is above the generic groundwater-surface water interface and surface water standard of 10 ug/L for arsenic. *Id.* at ¶ 3.

82. According to EGLE, overapplication of high-strength wastewater (i.e., wastewater with a high BOD concentration) at the Spray Fields has mobilized arsenic in the groundwater and has resulted in the flow of impacted groundwater to the Wetlands. *Id.*

83. Water sample results collected by EGLE in the Wetlands adjacent to Burnette's Spray Fields indicated an unnaturally high biological oxygen demand ("BOD") concentration of 1,910 mg/L. *Id* at ¶ 5.

84. High concentrations of BOD can directly lead to low DO levels in water.

VIOLATIONS OF NUMERIC POLLUTANT LIMITS

85. According to its Groundwater Permit, Burnette must test and report its wastewater effluent for numerous water quality parameters. It also must monitor and report nearby surface water and groundwater for numerous water quality parameters commonly associated with its wastewater effluent. These parameters include, but are not limited to, biological oxygen demand ("BOD"), nitrogen, ammonia, pH, dissolved oxygen ("DO"), chloride, sodium, and total phosphorus. *See* Exhibit 5, Groundwater Permit, at 5.

86. The Groundwater Permit requires Brunette to submit monthly Discharge Monitoring Reports ("DMRs") that summarize and report monitoring data regarding the effluent parameters and application rates described in ¶ 45. *Id*.

87. According to DMRs submitted by Burnette to EGLE, on dozens of occasions over the past five years the discharge of wastewater effluent by Burnette has resulted in exceedances of the numeric effluent limits specified in its Groundwater Permit and instances in which pH is below the minimum required limit. A table summarizing Burnette's violations of its numeric effluent limits as of the date of this complaint is attached as Exhibit 17.

88. True copies of all DMRs for periods during which there was a violation of a numeric pollutant limit or a discharge volume or rate limit are attached as Exhibit 18.

VIOLATIONS OF NUMERIC WASTEWATER DISCHARGE RATES

89. According to its Groundwater Permit, Burnette must comply with many numeric wastewater discharge rate limits at each of its Spray Fields regarding both spray and drip applications of wastewater effluent. *See generally* Exhibit 5, Groundwater Permit.

90. According to its Groundwater Permit, Burnette must monitor and report the daily and weekly application rates of its wastewater effluent at each of its Spray Fields. *Id.*

91. The Groundwater Permit requires Brunette to submit monthly Discharge Monitoring Reports (“DMRs”) that summarize and report monitoring data regarding the application rates and volumes of the fruit processing wastewater. *Id.*

92. When wastewater discharge rate limits are exceeded or when wastewater is applied to saturated soils, such as after heavy rains, the hydraulic capacity of the soils in the Spray Fields are exceeded, causing the wastewater to runoff into the Wetlands.

93. According to DMRs submitted by Burnette to EGLE, on hundreds of occasions over the past five years Burnette has discharged wastewater effluent at rates that exceed its numeric wastewater discharge rate limits. A table summarizing Burnette’s violations of its numeric discharge limits as of the date of this complaint is attached as Exhibit 19.

UNPERMITTED WASTEWATER EFFLUENT DISCHARGES
INTO WATERS OF THE UNITED STATES

94. Burnette does not have a NPDES permit granting Burnette the right to discharge any of its fruit processing wastewater into waters of the United States.

95. During an inspection conducted by EGLE on July 24, 2019, wastewater effluent was observed running off its Spray Fields to the Wetlands. *See* Exhibit 20, Mich. Dep’t of Env’t, Great Lakes, and Energy, Groundwater - Reconnaissance Inspection by David Walters (July 24, 2019).

96. The July 24, 2019, EGLE Inspection Report states, “[i]rrigation system with traveling spray head on South Center Site (IRR-36-SC) is causing runoff to wetland area to the north.” *Id.* at ¶ 8b.

97. During an inspection conducted by EGLE on August 12, 2020, ponded wastewater effluent and saturated soils were observed along the northern edge of spray field 36 leading up to the edge of the wetland area. Dark brown effluent resembling the visual characteristics of wastewater effluent from Burnette was also observed in the wetland adjacent to spray field 36 and in the flow in the culverts under the “farm road” and under Elk Lake Road. *See* Exhibit 10, 2020 Violation Notice, at 1; Exhibit 13, 2020 Inspection Report, at ¶ 7.

98. During an inspection conducted by EGLE on July 27, 2021, wastewater effluent was observed running along the surface of the ground and ponding along the northern edge of spray field 36 leading up to the wetland area. *See* Exhibit 11, 2021 Violation Notice, at 1-2.

99. According to the July 27, 2021, inspection conducted by EGLE, Burnette has not maintained adequate cover crop in field 38, particularly around wastewater spray heads, and there have been signs of erosion and channelization with exposed soils on field 36. *Id.* at 4.

VII. CLAIMS FOR RELIEF

COUNT I: VIOLATIONS OF SECTION 301(A) OF THE CLEAN WATER ACT

100. Each and every allegation set forth above is incorporated herein by reference.

101. Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into waters of the United States from a “point source” unless the discharge complies with various enumerated sections of the CWA. Section 301(a) prohibits discharges not

authorized by or in violation of the terms of a valid National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

102. Burnette does not have a NPDES permit that grants permission to discharge its fruit processing Facility’s wastewater into any receiving waters of the United States and, therefore, is properly subject to this citizen suit since it does not have the benefit of a Section 402(k) “permit shield.”

103. Elk Lake is a “waters of the United States” as it is a “traditional navigable” waterbody connected to Lake Michigan which is an interstate navigable waterbody.

104. Spencer Creek is a “waters of the United States” as it is a “relatively permanent bod[ies] of water connected to traditional interstate navigable waters.” *See Sackett*, 143 S.Ct. at 1341 quoting *Rapanos*, 547 U.S. at 742. *See also* Exhibit 4, Affidavit of Samantha Ogle, at ¶ 26; Exhibit 13, 2020 Inspection Report, at ¶ 7.

105. The Wetlands adjacent to Burnette’s Spray Fields maintain a surface water connection as part of one wetland complex that is the headwaters of, and adjacent to, Spencer Creek and, therefore, are considered waters of the United States according to the Clean Water Act.

106. On numerous occasions in the past five years, Burnette has discharged excessive amounts of wastewater effluent to its Spray Fields and has exceeded numeric limits in its Groundwater Permit regarding both discharge rates and pollutant limits.

107. The excessive discharges from Burnette’s sprayers and drip systems are in proximity to both the Wetlands and Spencer Creek and the resulting flow of wastewater effluent through the groundwater and surface runoff takes a short span of time to enter into the Wetlands and flow into Spencer Creek.

108. In the Supreme Court case of *Maui*, the Court stated that time and distance are the two most important factors in determining if an indirect conveyance of pollutants to waters of the United States from a point source “is the functional equivalent of a direct discharge from the point source into navigable waters.” *County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct., 1462, 1477 (2020).

109. Burnette’s discharges of wastewater effluent from its sprayers and drip system that saturate the Spray Fields into the Wetlands and Spencer Creek fit squarely within the *Maui* holding of an indirect conveyance being the “functional equivalent” of a direct discharge of a pollutant from a point source that requires a NPDES permit.

110. Therefore, Burnette’s frequent and ongoing excessive applications of wastewater effluent to its Spray Fields that saturates the Spray Fields, causing the wastewater effluent to pool and pond on the surface of the fields and to migrate from its Spray Fields to the Wetlands and Spencer Creek through the groundwater and surface water runoff, are unpermitted discharges into waters of the United States in violation of the Clean Water Act.

111. Plaintiffs have a good faith belief that Burnette is in continuing violation of the Clean Water Act and its Groundwater Permit.

112. Each day of each violation of the Clean Water Act is a separate and distinct violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

113. By committing the acts alleged above, Burnette is subject to an assessment of civil penalties for all violations of the permit and the Clean Water Act occurring within the past five years pursuant to the Clean Water Act Sections 309(d) and 505, 33 U.S.C. §§ 1319(d) and 1365.

114. An action for injunctive relief under the Clean Water Act is authorized by 33 U.S.C. § 1365(a). Continuing commission of the acts and omissions alleged above would irreparably harm the Plaintiffs, their members and citizens, and the citizens of the State of Michigan.

COUNT II: VIOLATION OF THE MICHIGAN ENVIRONMENTAL PROTECTION ACT
("MEPA"), SECTION 1701 OF THE NATURAL RESOURCES AND ENVIRONMENTAL
PROTECTION ACT

115. Each and every allegation set forth above is incorporated herein by reference.

116. MEPA, which is codified as Section 1701 of the Natural Resources and Environmental Protection Act, MCL § 324.1701, authorizes any person to seek declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

117. MEPA was enacted in 1970 by the Michigan State Legislature to implement the State's constitutional commitment to the protection of natural resources. *See* Const. 1963, Art. 4 § 52.

118. Violations of a permit issued pursuant to MEPA creates a prima facie showing that a defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources.

119. Burnette's actions and omissions as delineated throughout this Complaint (including but not limited to the excessive application of wastewater effluent with excessive concentrations of various pollutants) have already and are likely to continue to pollute, impair, or destroy the water or other natural resources, including but not limited to the groundwater that is underlying and nearby its spray field, the adjacent Wetlands, Spencer Creek, and Elk Lake.

120. Plaintiffs lack an adequate remedy at law.

121. Plaintiffs seek a permanent injunction—along with any other available injunctive relief or equitable relief available under MEPA—against Burnette to require it to immediately cease any and all conduct that has already, is currently, or is likely to pollute, impair, or destroy the natural environment.

VIII. RELIEF REQUESTED

Wherefore, Plaintiffs respectfully request that this Court grant the following relief:

1. Declare that the Defendant has violated and continues to be in violation of the Clean Water Act, Section 301(a), 33 U.S.C. § 1311(a), for discharging pollutants into waters of the United States without authorization by a valid NPDES Permit.

2. Declare that the Defendant has violated and continues to be in violation of Section 1701 of the Natural Resources and Environmental Protection Act, MCL § 324.1701, by polluting and impairing the groundwater underlying its Spray Fields and the surface waters of the Wetlands, Spencer Creek, and Elk Lake and its connecting waters.

3. Enjoin the Defendant from further violating the Clean Water Act, Section 301(a), 33 U.S.C. § 1311(a), and Section 1701 of the Natural Resources and Environmental Protection Act, MCL § 324.1701.

4. Award Plaintiffs their reasonable costs of suit, including attorney, witness, and consultant fees, as provided for by Clean Water Act, Sections 309(d) and 505(a), 33 U.S.C. §§ 1319(d) and 1365(a), and the Natural Resources Environmental Protection Act, Section 1703(3), MCL 324.1703(3).

5. Order Defendant to pay civil penalties up to the statutory maximum of \$64,618 per day, per violation for each violation of the Act pursuant to 309(d) and 505(a) of the Clean Water Act, 33 U.S.C. §§ 1319(d) and 1365(a), and 40 C.F.R. §§ 19.1-19.4.

6. Award such other relief as this Court may deem appropriate.

Respectfully Submitted,

Date: August 25, 2023

GREAT LAKES ENVIRONMENTAL
LAW CENTER

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EXHIBIT LIST

1. NOI
2. Affidavit Dennis Green
3. Affidavit Brian Taylor
4. Affidavit WTC member
5. BF Groundwater Permit No. GW1810211
6. Discharge Management Plan for GW Permit
7. 1990 Inspection Report
8. 2008 EGLE Violation Notice No. 003697
9. 2019 EGLE Violation Notice No. 0009839
10. 2020 EGLE Violation Notice No. 00984
11. 2021 EGLE Violation Notice No. 012414
12. EGLE Notice of Authorization Plan for farm road upgrades
13. Aug. 12, 2020 EGLE Inspection Report
14. Aug 12, Photos by EGLE Inspector
15. LEI Wetland Delineation Report for BF
16. BF Response to 2019 EGLE Violation Notice.
17. Table of Effluent limit violations
18. DMRs.
19. Table of total volume violations
20. July 24, 2019 EGLE Inspection Report