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

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

(Oral Argument Requested)

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I. INTRODUCTION

For years, Defendant Burnette Foods, Inc., has worked with government regulators to resolve any environmental issues possibly arising from its state-issued groundwater permit, which allows it to irrigate its farmland with recycled water from its fruit-processing facility. Apparently, these efforts have not satisfied Plaintiffs, a group of self-appointed private regulators. Plaintiffs raised their concerns about Burnette's irrigation practices with the relevant federal regulator and the relevant state regulator, but neither decided that corrective action was necessary. Unhappy that the subject-matter experts disagreed with them, Plaintiffs now rush to this Court as a "last resort," and ask for a third opinion on Burnette's environmental compliance. After Burnette pointed out numerous jurisdictional and other flaws in Plaintiffs' original complaint, they filed their Amended Complaint. But no matter how hard Plaintiffs try, they cannot amend their way into this Court. And in attempting to do so, they only further illustrate why the Court must dismiss their claims.

First, this Court lacks subject-matter jurisdiction over Plaintiffs' Clean Water Act ("CWA") claim. Because Congress meant for federal, state, and local governments to serve as the CWA's primary enforcers, citizens can only bring suits like this one in "limited circumstances." *South Side Quarry, LLC v. Louisville & Jefferson County Metropolitan Sewer Dist.*, 28 F.4th 684, 689 (6th Cir. 2022). The regulation that governs a citizen-plaintiff's mandatory pre-suit notice confirms just how narrow those circumstances are: before they file suit, citizens must provide a notice that complies with 40 C.F.R. § 135.3(a), which requires them to identify, among other things, the "*specific* standard, limitation, or order alleged to have been violated," (emphasis added), and "the activity alleged to constitute a violation." Here, Plaintiffs identified only the CWA's general prohibition against unpermitted discharges into surface water. Binding precedent holds that this is not enough. *See South Side Quarry*, 28 F. 4th at 696 ("[T]he CWA's citizen-suit provision

doesn't authorize citizen suits for violating some general prohibition."). Moreover, Plaintiffs' notice gave no indication that they planned to bring a federal claim for unpermitted discharge: they described the relevant water bodies as only "waters of the state," provided a state-specific definition for this term, and never mentioned the "functional-equivalent" exception to the CWA's point-source requirement upon which they now rely. Because Plaintiffs' pre-suit notice was not just deficient but actively misleading, this Court must dismiss this suit for lack of subject-matter jurisdiction under Rule 12(b)(1).

Second, Plaintiffs still have not pleaded facts sufficient to establish a CWA claim—though at least this time they mention the proper legal framework. Plaintiffs fail to plead any factual basis for this Court to conclude that the relevant wetlands have a "continuous surface connection" with any "waters of the United States," or that Burnette's alleged agricultural run-off constitutes a "point source." The reason for this repeated failure to plead necessary facts is obvious: *facts establishing these elements do not exist*. After Plaintiffs filed this suit, Burnette commissioned an expert report, which demonstrates that the actual on-the-ground facts foreclose any conclusion that the wetlands at issue fall within the CWA's scope. Given these pleading deficiencies and the objective evidence placing Plaintiffs' concerns outside of the CWA, the Court must dismiss Plaintiffs' claims under Rule 12(b)(1) and (6).

And, finally, because this Court must dismiss Plaintiffs' CWA claim for the reasons described above, it should also decline supplemental jurisdiction over Plaintiffs' state-law claim under 28 U.S.C. § 1367(c)(3).

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

II. BACKGROUND

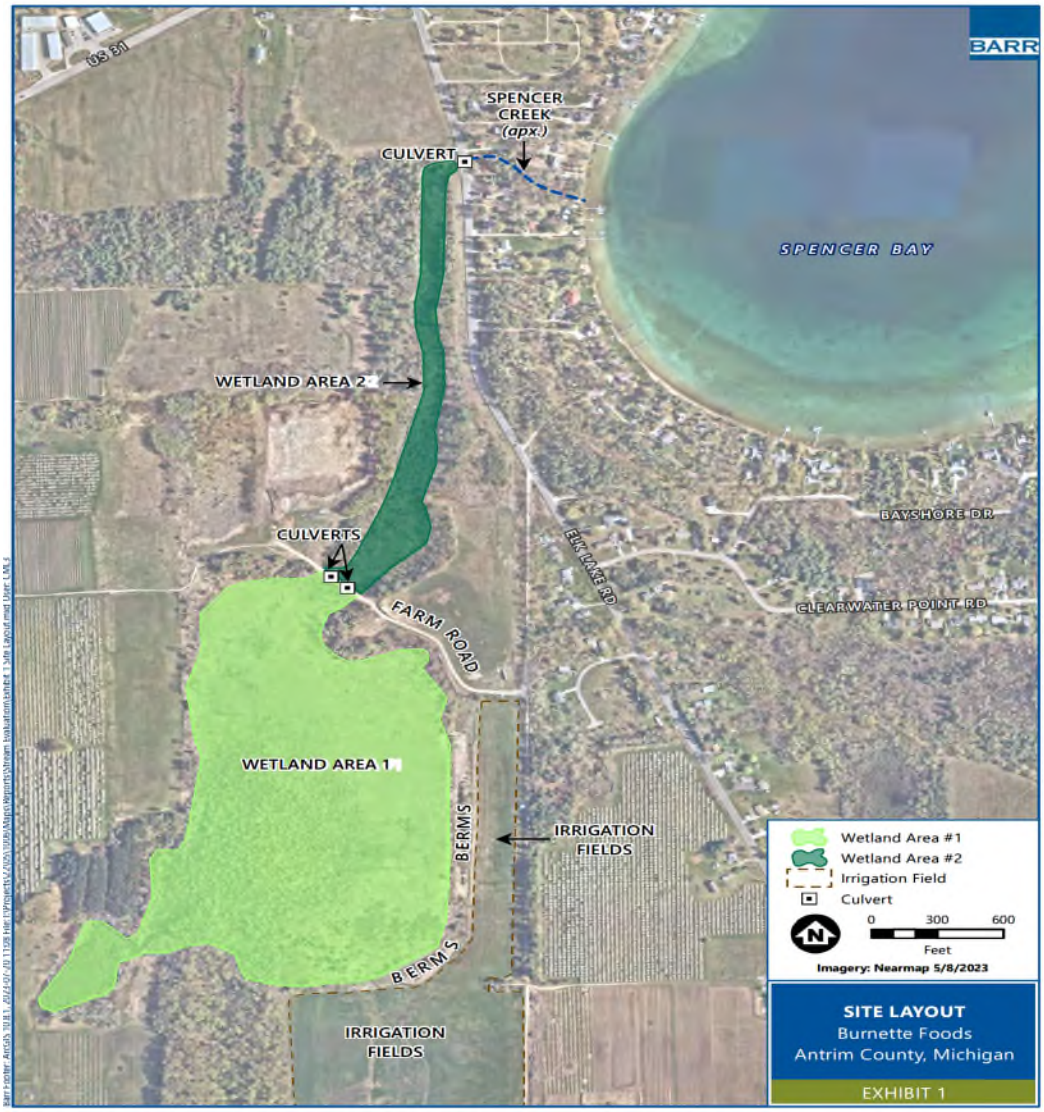
Burnette Foods is an integrated farming and food-processing company based in Northern Michigan that grows, processes, and distributes fruit and vegetables. Burnette operates a facility in Elk Rapids, Michigan, where it washes, cuts, and processes fruit into shelf-stable products, such as applesauce, canned apples, and—of course—canned cherries. *See, generally*, https://www.burnettefoods.com/ (last accessed September 24, 2023); Am. Compl. ¶ 13 (ECF No. 16, PageID.1621).

Burnette's fruit processing creates wastewater. Am. Compl. ¶ 47 (ECF No. 16, PageID.1630). 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 pipes this water about a mile south of the Elk Rapids facility and sprays it on several agricultural fields (the "Spray Fields"). *Id*. at ¶ 52 (ECF No. 16, PageID.1631). There are technically four distinct Spray Fields, some of which are adjacent to each other.[1] *Id*. at ¶ 56. These fields are designated "Field 36," "Field 37," "Field 38," and "Field 39." *Id*. at ¶ 56 (ECF No. 16, PageID.1632). Plaintiffs' Amended Complaint only identifies alleged surfacewater discharges occurring from Field 36, Compl. ¶¶ 94-99;[2] Ex. 20 to Am. Compl. (ECF No. 16-21, PageID.3531; ECF No. 16-12, PageID.2008), so Burnette's description is limited to Field 36.

Here is an overview of the relevant area's geography:

[1] Although there are four numbered Spray Fields, 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. *See* Am. Compl. ¶ 56.

[2] Paragraph 99 also alleges that "Burnette has not maintained adequate cover crop in field 38." (ECF No. 16, PageID.1640). This falls short of alleging a surfacewater *discharge* from Field 38.



Clean Water Act Jurisdictional Evaluation Report ("Jurisdictional Report"), Ex. 1 (**Ex. A**). As demonstrated in this figure, Spray Field 36 is near a wetland identified in the National Wetlands Inventory as "Freshwater Forested/Shrub Wetland Area" ("Wetland Area 1"). *Compare* Jurisdictional Report, Figure 2 *with* Jurisdictional Report, Ex. 1. Two manmade berms separate Spray Field 36 from Wetland Area 1 and 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

("the Farm Road Culverts") 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; there are often periods where there is no water flow within the Farm Road Culverts. *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, ("the Elk Road Culvert"), when sufficient surface water is present in Wetland Area 2 to induce flow. *Id*. at 3. The Elk Lake Road Culvert 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. The Elk Lake Road Culvert is buried underground and is approximately 200 feet long:

Screenshot of Aerial view from Google Earth.[3]

[3] The red line on this photograph was created by counsel, using Google Earth's measuring tool. "[A] court ruling on a motion to dismiss may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice." *Bailey v. City of Ann Arbor*, 860 F.3d 382, 386 (6th Cir. 2017). The Court can consider this picture and the approximate length of the Elk Lake Road Culvert because these are "matter[s] . . . beyond reasonable controversy." *Moran v. Edie Parker, LLC*, 563 F. Supp.3d 671, 675 (E.D. Mich. 2021) (quoting Fed. R. Evid. 201(b) advisory committee's note).

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, Defendant believes that Spencer Creek runs from the culvert outfall on the east side of Elk Lake Road into another culvert, which discharges into Elk Lake. Jurisdictional Report 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."). Am. Compl. ¶ 54 (ECF No. 16, PageID.1631); Ex. 5 to Am Compl. (ECF No. 16-5). The Groundwater Permit allows Burnette to discharge 425,000 gallons of wastewater per day and 15,000,000 gallons per year onto the Spray Fields. (ECF No. 16-5).

Over the years, EGLE has sent letters to Burnette regarding alleged violations of its Groundwater Permit. Plaintiffs' suit presents these alleged violations as a parade of horribles. Am. Compl. ¶¶ 60, 70, 85-93 (ECF No. 16, PageID.1632-1633, 1635, 1638-1639). However, even if these alleged violations can be established, they relate to Burnette's state-issued Groundwater Permit. **None implicates the CWA's prohibition on unpermitted discharges into surface water of the United States**. Rather, they relate to Burnette's application of water onto the grounds of the Spray Fields. Burnette has worked with EGLE regarding these alleged violations. *See* Am. Compl. ¶¶ 72-76 (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. Am. Compl. ¶ 10

(ECF No. 16, PageID.1620). 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)." Am. Compl. ¶ 27 (ECF No. 16, PageID.1625). 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 ¶ 11. (ECF No. 16, PageID.1620). 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.* (ECF No. 16, PageID.1620-1621).

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 ¶ 12. (ECF No. 16, PageID.1620-1621).

On November 17, 2022, Plaintiffs sent a notice of intent to sue Burnette for its irrigation practices. Notice of Intent to Sue (ECF No. 16-1) ("Pre-Suit Notice"). Plaintiffs claimed that Burnette's wastewater sometimes "pools" on its Spray Fields and then "discharges" to the wetlands. Pre-Suit Notice 11 (ECF No. 16-1, PageID.1658). 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).[4] 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. 16-1, PageID.1658-1659). 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

[4] 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.

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)) (ECF No. 16-1, PageID.1659).

The Pre-Suite Notice also did not identify any device that Plaintiffs contended met the statutory definition of "point source." Nor did Plaintiffs state any belief that Burnette's activities were the "functional equivalent" of a point source. (ECF No. 16-1, PageID.1658-1659).

Plaintiffs sent their Pre-Suit Notice to both the Environmental Protection Agency ("EPA") and EGLE. Am. Compl. ¶ 7 (ECF No. 16, PageID.1619-1620). Neither of these regulatory agencies decided that Plaintiffs' claims merited any civil enforcement action. *Id*. at ¶ 9. (ECF No. 16, PageID.1620).

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 ¶¶ 94-99 (ECF No. 16, PageID.1639-1640).[5]

[5] Again, Plaintiffs' suit also references alleged violations of pollutant and discharge limits contained in Burnette's Groundwater Permit. Am. Compl. ¶¶ 85-93 (ECF No. 16, PageID.1638-1639). To be clear, these alleged violations do not relate to the CWA; rather they are defined solely by the terms of the state-issued Groundwater Permit, which might go to Plaintiffs' MEPA claim. The three alleged "unpermitted wastewater effluent discharges" are the only alleged acts that could form the basis for a CWA claim. *Id*. at ¶¶ 94-99 (ECF No. 16, PageID.1639-1640).

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. Am. Compl., Relief Requested (ECF No. 16, PageID.1644-1645).

III. LAW AND ARGUMENT

Plaintiffs' suit suffers from several 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" or that the alleged migration of "pooled" groundwater was the functional equivalent of a point source. Binding precedent makes clear that these faults require the Court to dismiss the Amended Complaint. Second, 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." In fact, Plaintiffs cannot plead these elements because they do not exist: 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 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); ; *Starlink Logistics, Inc. v. ACC, LLC*, 642 F. Supp.3d 652, 687 (M.D. Tenn. 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 the CWA does not regulate the Wetland Areas, 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)). [6] This standard is articulated in detail below. *See, infra.*, Sec. III.A.2.

Moreover, the facts on the ground at the Wetland Areas further 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

[6] 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.").

merits of 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 complaint 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 system "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 CWA authorizes the EPA Administrator to "prescribe by regulation," the matter in which a pre-suit notice must be given. *Id.*

The EPA Administrator has exercised its statutory authority to define the necessary pre-suit notice in 40 C.F.R. § 135.3(a). That provision provides that a 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) (emphasis added). 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*, 624 F. Supp.3d at 687.

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 of "the activity alleged to constitute a violation."

1. Plaintiffs Pre-Suit Notice 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). Their Amended Complaint confirms that this is their primary theory. Am. Compl. ¶ 94. 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. 16-1,

PageID.1658). 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. 16-1, PageID.1658); *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. 16-1, PageID.1658). 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 a CWA claim will (or could be) premised on Burnette's state-issued Groundwater Permit. *See* Pre-Suit Notice 11 (ECF No. 16-1, PageID.1658) ("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.

In *South Side Quarry*, a property owner sued a local water authority under the CWA for regularly diverting raw sewage into its quarry. 28 F.4th at 684. Plaintiff's pre-suit notice identified

a host of rules, at least one of which it hoped satisfied 40 C.F.R. § 135.3(a)'s requirement to identify a "specific standard, limitation, or order alleged to have been violated[.]" *Id*. at 692. These rules included "the CWA's general prohibition on the dumping of pollutants into U.S. waters," a prior consent decree, an easement, and several state-issued permits. *Id*. The Sixth Circuit walked through these rules, one-by-one, to decide whether any could satisfy § 135.3(a)'s specific-standard requirement. *Id*. at 694-697. When the Court turned to the CWA's general prohibition on unpermitted discharges, it squarely rejected the plaintiffs' argument that this general rule satisfied § 135.3(a)'s specific-standard requirement:

> 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 Quarry. at 684.

South Side Quarry is directly on-point. Here, the only CWA standard that Plaintiffs' Pre-Suit Notice cites is § 1311(a)'s general prohibition on unpermitted discharges. Pre-Suit Notice 11-12 (ECF No. 1658-1659). *South Side Quarry* holds that this rule cannot be a "specific standard, limitation, or order" for the purposes of § 135.3(a), which in turn means that any pre-suit notice premised solely on § 1311(a) does not satisfy 33 U.S.C. § 1365(b)'s notice requirement. Because Plaintiffs' Pre-Suit Notice does not "strictly comply" with the CWA's citizen-suit notice provision, this Court must dismiss their CWA claim. *Id*. at 694.

Anticipating this argument, Plaintiffs' Amended Complaint cites several district court cases and out-of-circuit cases for the proposition that "[d]istrict 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[.]" Am. Compl. ¶ 40 (ECF No. 16-PageID.1629).[7]

None of these cases invalidate *South Side Quarry*. First, unlike S*outh Side Quarry*, none are binding on this Court. *Hillman Power Co., LLC, v. On-Site Equip. Maint., Inc.*, 582 F. Supp.3d 511, 516 (E.D. Mich. 2022). Second, the adequacy of the plaintiffs' pre-suit notice was not at issue in most of Plaintiffs' cited cases, so they provide no guidance on this point. *Wright v. Spaulding*, 939 F.3d 695, 701-702 (6th Cir. 2019). And the rationale of the only court that has squarely addressed this issue is unreasoned and perfunctory. *See Starlink Logistics, Inc., v. ACC LLC*, 642 F. Supp.3d 652, 695 (M.D. Tenn. 2022).

Moreover, dismissal under these circumstances is not unusual. On at least one prior occasion, this Court has dismissed, for lack of subject-matter jurisdiction, a CWA claims where the pre-suit notice alleged only "a violation of the CWA for not applying for and obtaining a NPDES permit." *Fitzgibbons v. Cool*, Case No. 1:08-cv-165, 2008 WL 5156629, at *4 (W.D. Mich. Dec. 8, 2008). That same result should follow here.

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

Plaintiffs' Pre-Suit Notice also failed to adequately describe the activity that Plaintiffs believed violated the CWA. For, the Notice identified a different standard than the one advanced

[7] Notably, Plaintiffs' Amended Complaint does not attempt to reconcile *South Side Quarry* with their Pre-Suit Notice, despite the fact that this was Burnette's lead-off argument in its original motion to dismiss. (ECF No. 11, PageID.1575-1577).

in Plaintiff's Amended Complaint. Plaintiff's Amended Complaint alleges that Burnette violated the CWA by discharging to "waters of the United States." Am. Compl. ¶¶ 103-105 (ECF No. 16, PageID.1641). However, Plaintiff's pre-suit notice failed to provide notice of any alleged discharge to "waters of the United States." In fact, the section of the Pre-Suit Notice titled "Violations of Clean Water Act (Federal and State Law)," asserts only that Burnette's wastewater entered "surface waters of the state" and/or "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. 16-1, PageID.1658-1659) (emphasis added).

The terms "waters of the state" and "surface waters of the state" referenced in the pre-suit notice are not synonymous with the CWA's definition of "waters of the United States". The distinction between the terms specifically referenced in Plaintiffs Pre-Suit Notice ("waters of the state" and "surface waters of the state") and in its Amended Complaint ("waters of the United States") is illustrated by the different definitions that each of those terms has pursuant to applicable law. The term "waters of the state" is defined by M.C.L.A. § 324.3101(aa) as "groundwaters, lakes, rivers, and streams and all other watercourses and waters, including the Great Lakes, within the jurisdiction of this state." The term "Surface waters of the state" is defined at Mich. Admin. Code R. 323.1044(u):

> u) "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.

Meanwhile, the definition of "waters of the United States" has been subject to extensive judicial interpretation and reinterpretation, most recently in *Sackett v. EPA*, 143 S. Ct. 1322 (2023), as discussed in greater detail below. Following *Sackett*, the EPA and other federal authorities amended the definition of "waters of the United States" in an attempt to align the regulatory definition of "waters of the United States" with *Sackett*. The revised definition of "waters of the United States" at 40 C.F.R. 102.2(a), provides as follows:

(a) *Waters of the United States* means:

(1) Waters which are:

(i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(ii) The territorial seas; or
(iii) Interstate waters, including interstate wetlands;

(2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section:

(i) That are relatively permanent, standing or continuously flowing bodies of water; or
(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or
(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)(i) of this section and with a continuous surface connection to those waters; or

> (iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;
>
> (5) Intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) of this section:
>
> (i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)(i) of this section; or
> (ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section.

A cursory glance at these defined terms highlights the difference between the "waters of the state" and "surface waters of the state" that are subject to state regulation and "waters of the United States" that are subject to federal regulation under the CWA. For instance, the terms "waters of the state" and "surface waters of the state" include water bodies that would not be "waters of the United States," such as impoundments, open drains, non-navigable streams, non-adjacent wetlands and any other surface bodies of water within the confines of the state. Put simply, the terms "waters of the state" and "surface waters of the state" are much broader, and conflict with the more limited definition of "waters of the United States." This glaring mismatch between the Pre-Suit Notice's language and the allegations set forth in Plaintiff's Amended Complaint 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 phrases "waters of the state" and "surface waters of the state," ***it was actively misleading***.

Plaintiffs' Pre-Suit Notice even went so far as to define the term "surface waters of the state" by specific reference to the definition set forth in the Michigan Administrative Rules. *Id*. at 12 n.5. In other words, 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.

Moreover, Plaintiffs have recently conjured a new theory regarding Burnette's activities, which it raises for the first time in its Amended Complaint: that that "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." Am. Compl. ¶ 109. But the Pre-Suit Notice did not raise this theory or assert that the migration of wastewater in groundwater was the "functional equivalent" of a direct point-source discharge, so neither Burnette nor government regulators were given the pre-suit opportunity to apply the multi-factor *Maui* test for functional equivalency. Plaintiffs cannot rewrite their Pre-Suit Notice through their Amended Complaint. This lack of notice of Plaintiffs' new central theory on point-source discharges means that this Court must dismiss Plaintiffs' Amended Complaint. *South Side Quarry*, 28 F.4th at 694.

Finally, even if none of these flaws are independently fatal, their cumulative effect was to deprive Burnette of any cohesive notice of Plaintiffs' intended federal claim. The Notice did not identify any specific federal standard, used language only applicable to state regulation, and did

not raise the central point-source theory upon which they now rely. Under these circumstances, Burnette and government regulators lacked sufficient notice of Plaintiffs' CWA claim.

C. PLAINTIFFS 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. And Plaintiffs' CWA

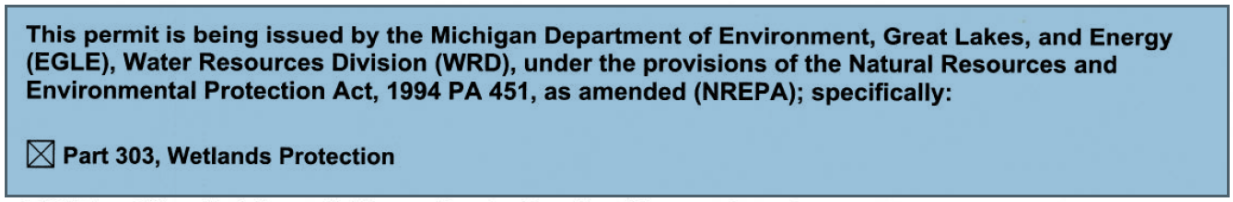
claim suffers from an even more fundamental flaw: the facts on the ground in Elk Rapids do not fit the *Sackett* test. As a result, Plaintiff's CWA claim was doomed before it was filed.

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, 2023) ("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 200-foot-long, buried culvert under Elk Lake Road, and still more between Spencer Creek and Elk Lake Road. Am. Compl. ¶¶64, 67; *see* Jurisdictional Report 2-3,

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. Moreover, the culvert running underneath the farm road is not a water of the United States (as it is neither a navigable water nor a tributary to a navigable water). And EGLE agrees that there is no stream or tributary of a navigable water at, under, or in the culvert. In 2022, Burnette obtained a permit from EGLE (Permit Number WRP032418) to install the Farm Road culverts (the "Wetland Permit"). EGLE issued the Wetland Permit pursuant to Part 303 of the Michigan Natural Resources and Environmental Protection Act at Mich. Comp. Laws 324.30101 *et seq* ("Part 303) which governs wetlands regulated under state law:


This permit is being issued by the Michigan Department of Environment, Great Lakes, and Energy (EGLE), Water Resources Division (WRD), under the provisions of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA); specifically:

☒ Part 303, Wetlands Protection

Ex. B. Notably, EGLE did *not* issue a permit for a *stream* crossing pursuant to Part 301 of the Michigan Natural Resources and Environmental Protection Act at MCL 324.30101 *et seq* ("Part 301") in 2022 or at any time thereafter. This is important because Part 301 requires a permit for any activity that might "structurally interfere with the natural flow of an inland lake or stream" (such as a culvert) pursuant to Mich. Comp. Laws 324.30102(e). EGLE did not require a Part 301 permit for the installation of the culvert because there was no inland stream. In the absence of a

stream or tributary of a navigable water flowing into or out of Wetland Area 1, there could not be a continuous surface water connection between Wetland Area 1 and any "water of the United States." This alone breaks the chain necessary for CWA jurisdiction to attach under *Sackett* because the Farm Road Culvert provides a clear break in continuous surface water connection.

Moreover, the next downgradient wetland area (Wetland Area 2) also lacks a continuous surface water connection. Wetland Area 2 is cut off from the next surface water body (Spencer Creek) by a 200-foot culvert that runs under Elk Lake Road. And even when you consider Spencer Creek (which begins east of Elk Lake Road), there are still more culverts before Spencer Creek arrives at Elk Lake. These repeated breaks in any surface water connection 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 Sackett*, 143 S. Ct. at 1340.

Notably, the *Sackett* Court contemplated this very scenario. There, the Court stated that "a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction[.]" *Id*. at 1341 n.16. Here, the culverts act as barriers between the Wetland Areas and any navigable water.

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 (the Farm Road) separating Wetland Area 1 from Wetland Area 2, and Wetland Area 2 from Spencer Creek or other surface water (Elk Lake

Road). 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: Elk Lake Road and the 200-foot underground culvert breach the connection.

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 far 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 (that extends for approximately 200 feet), 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. Neither Wetland Area 1 nor Wetland Area 2 can be waters of the United States if the far-less attenuated wetland in *Sackett* is not.

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 continuous 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.

Plaintiffs have failed to plead a plausible 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.

D. 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 do *not* allege that any ongoing point source discharges directly into the Wetlands Area.[8] Instead, they rely on the Supreme Court's opinion in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020) which recognized an exception to the CWA's point-source requirement if there is "the functional equivalent of a direct discharge from the point source into navigable waters." 140 S. Ct. 1462, 1477 (2020). Plaintiffs' functional-equivalent theory is fairly simple: "Burnette's frequent and ongoing excessive applications of wastewater effluent to its Spray

[8] Notably, Plaintiffs original complaint alleged that Burnette's irrigation system directly discharged into the Wetland Areas. Compl. ¶ 37, 63 (ECF No. 1, PageID.28). Plaintiffs have dropped these allegations in their Amended Complaint.

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," is the functional equivalent of a point-source discharge. Am. Compl. ¶ 110 (ECF No. 16, PageID.1642).

This functional-equivalent theory's simplicity quickly exposes its lack of merit. There are at least three reasons it does not save Plaintiffs' claim. First, 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 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) is not 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[.]"). Instead, states regulate these discharges.

Second, there is a disconnect between what Plaintiffs spend page-after-page alleging, and what *Maui* actually says. Although *Maui* holds that the CWA sometimes applies to pollutants migrating through groundwater, the migration must occur into *navigable waters*. *See Maui*, 140 S. Ct. at 1476 ("[T]he statute requires a permit when there is a direct discharge from a point source *into navigable waters* or when there is the functional equivalent of a direct discharge . . . [t]hat is, an addition falls within the statutory requirement that it can be 'from any point source' when a point

source directly deposits pollutants *into navigable waters*, or when the discharge reaches the same result through roughly similar means.") (emphases added). The Wetland Areas are not navigable. Spencer Creek is not navigable. *See* Am. Compl. ¶ 104 (alleging only that Spencer Creek is "connected to traditional interstate navigable waters."). Thus, *Maui*'s exception to the statutory point-source requirement simply does not apply.

Third, Plaintiffs' assertion that *Maui* opens the door to federal court is a mere legal conclusion that lacks any supporting factual allegation. *Maui* set forth seven factors that are relevant to whether something is the functional equivalent of a point-source discharge: "(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity." 140 S. Ct. at 1476-77.

Besides asserting that the *Maui* Court stated that "time and distance are the two most important factors," (which is not true, the Court stated that these factors are often—but not always—the most important factors, *Id*. at 1477), Plaintiffs make no effort to establish that *Maui* applies to the facts they have alleged. Am. Compl. ¶ 108-109. The Court cannot simply accept the legal conclusion that *Maui* supports a functional-equivalent finding here. *HDC, LLC*, 675 F.3d at 611. Nor can it scour Plaintiffs' Amended Complaint for factual allegations that save their CWA claim. The only factor that they allege with any sort of detail is length and, in that regard, they acknowledge that Burnette's Spray Fields are *at least a mile away* from Elk Lake. Am. Compl. ¶ 62 (ECF No. 16, PageID.1633). Even viewing this solitary allegation in Plaintiffs' favor, it falls short of establishing the functional equivalent of a direct discharge into navigable water.

The only other assertion that Plaintiffs make to suggest that there may be a point source is to note that certain CWA regulations apply to some fruit-processing facilities. Am. Compl. ¶ 34 (ECF No. 16, PageID.1627). It is unclear why Plaintiffs think these regulations are significant. Of course, some fruit-processing facilities are subject to the CWA—**but only when they have a point-source**. These regulations do not categorically sweep *all* fruit-processing facilities into the CWA's jurisdiction; such an interpretation is absurd and would nullify 33 U.S.C. § 1362(14)'s definition of point-source. Rather, these regulations only provide effluent limits that *may* be applicable to fruit processers who are already under the CWA's purview.

Accordingly, Plaintiffs' CWA claim must be dismissed under Rule 12(b)(6) for lack of a point source.

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

As a factual matter, 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. 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).

E. 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

Until Plaintiffs filed this suit, no one believed that the CWA applied to the Wetland Areas at issue. The reason for this consensus is clear: Plaintiffs' newfound belief is simply not true, as demonstrated by the circumstances on the ground and Plaintiffs' inability to even plead facts supporting the CWA's application. This suit is merely Plaintiffs' attempt to circumvent the government's primary jurisdiction over Burnette's compliance with its state-issued Groundwater Permit, and to second-guess government regulators' decisions. Accordingly, Burnette respectfully requests that this Court dismiss Plaintiffs' Complaint and enter judgment in its favor.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with L.Civ.R. 7.2(b), includes 10,326 words, inclusive of headings, footnotes, citations and quotations, and was prepared using Microsoft Word 365 (2019).

Date: September 29, 2023

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