UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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,

Civil Action No. 1: 23-cv-00589

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PLAINTIFFS RESPONSE TO DEFENDANT'S MOTION TO DISMISS (ECF 20)

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I. INTRODUCTION

Defendant Burnette Foods, Inc. ("Burnette") disposes of polluted industrial wastewater by spraying it onto discharge fields ("Spray Fields"). As a result of these discharges, some wastewater is taken up by vegetation, some directly flows to wetlands, and some percolates to groundwater and migrates into nearby waterbodies. Spencer Creek (sometimes referred to as "Gretel's Creek"), forms at an indistinguishable point in the wetland-stream complex ("Wetlands") and flows into Elk Lake. Burnette has no permit to discharge pollutants into waters regulated by the Clean Water Act ("CWA"). As required by the CWA, Plaintiffs first notified Burnette and CWA regulators that they intended to file this lawsuit, identifying the violating activities, the responsible people, and the violation locations and dates. The Plaintiffs went to extraordinary measures to not only investigate violation notices issued to Burnette for excessive discharges of contaminated wastewater, but also to conduct their own assessment of the water quality in Spencer Creek before filing this lawsuit. The results of that assessment found high levels of contamination. Plaintiffs then filed this lawsuit after the requisite 60-day waiting period. These facts are undisputed, and they are sufficient for Plaintiffs to bring this citizen suit against Burnette for violations of the CWA.

Burnette is very good at turning clear things into murky messes. This case is about Burnette discharging its industrial wastewater in excessive volumes to the point where it overwhelms the Spray Fields, and the pollution flows downstream contaminating the Wetlands, Spencer Creek, and Elk Lake in violation of the CWA. It's that simple. Burnette claims, even though its pollutants flow downstream all the way to Elk Lake, it isn't liable simply because two culverts act as barriers to surface water connectivity and separate the Wetlands from Spencer Creek and Elk Lake. According to Burnette, this separation means there is no CWA jurisdiction over the wetland area under *Sackett v. EPA*, 143 S. Ct. 1322 (2023). This is a misapplication of law. Culverts do not

create a per se exemption from CWA liability. Far from being barriers, these culverts intentionally ensure surface connectivity throughout the continuous wetland-stream complex and *aid the pollutants in reaching* protected, downstream waterbodies. Unlike the discharges at issue in *Sackett* and its predecessors, Burnette's is not unpermitted immobile fill deposited into an isolated wetland; rather, Burnette's discharges are composed of unpermitted industrial wastewater that drains, through the wetland-stream complex connected by a chain of point-source culverts, less than a mile into Spencer Bay in Elk Lake.

Burnette further contends it had no notice Plaintiffs intended to bring a *federal* claim, even though the subject of the pre-suit Notice of Intent to Sue letter ("NOI") is "Clean Water Act Notice of Intent to Sue" and states at least 14 times that Burnette's unpermitted discharges violate the CWA. NOI (ECF No. 16-1, PageID.1648). Burnette also argues Plaintiffs' NOI is insufficient because it attacks their lack of a CWA permit instead of a specific standard in a (non-existent) permit. Burnette's lack of any CWA permit *is* the valid and specific violation. Burnette has not carried its burden of showing there are no disputed material facts at this point in this litigation.

II. BACKGROUND

Burnette Foods owns and operates a fruit processing and canning facility in Elk Rapids, Michigan. For over thirty years, Burnette has disposed of the vast majority of its industrial fruit processing wastewater by spraying it onto the Spray Fields as an integral part of a "land treatment system" to treat the effluent for the potentially harmful pollutants it contains. 1990 Inspection Report (ECF No. 16-8, PageID.1982); Discharge Management Plan ("DMP") (ECF No. 16-6, PageID.1709-1710). Unfortunately, Burnette has been consistently discharging the wastewater in ways that have led to the effluent saturating and overwhelming the land treatment system. 2021 EGLE Violation Notice ("2021 VN") (ECF No. 16-12, PageID.2008); 2020 EGLE Violation

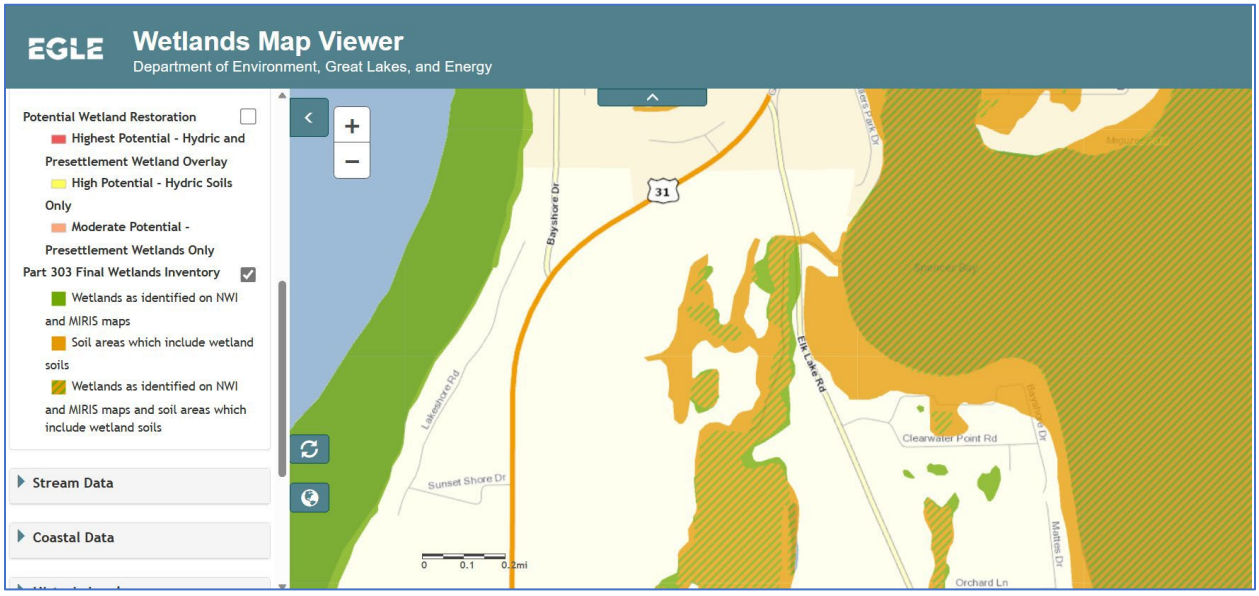
Notice ("2020 VN") (ECF No. 16-11, PageID.1999); 2019 EGLE Violation Notice ("2019 VN") (ECF No. 16-10, PageID.1993). The result is that industrial wastewater pollution flows into the Wetlands and continues downstream into Spencer Creek and Elk Lake. For years, local residents have sought relief from the pollution coming from Burnette's Spray Fields and impacting the Wetlands, Spencer Creek, and Elk Lake. Even though state regulators from the Department of Environment, Great Lakes, and Energy ("EGLE") have cited Burnette numerous times through the years for violations relating to its industrial wastewater and the land treatment system, none of EGLE's actions have abated Burnette's pollution of the Wetlands, Spencer Creek, and Elk Lake. *Id.* Burnette suggests Plaintiffs' filing of this suit is unfounded since EGLE has not prosecuted Burnette for violating the CWA. Def. Brief (ECF No. 21, PageID.3547). However, the CWA citizen suit provision was drafted for this very purpose: to give citizens power to hold polluters accountable when the regulatory agencies fail to do so. *See* 33 U.S.C. § 1365. Therefore, Plaintiffs have appropriately filed this citizen suit pursuant to the CWA hoping to finally put an end to Burnette's polluting practices and to protect the Wetlands, Spencer Creek, and Elk Lake from further degradation.

Burnette's "Background Section" and Jurisdictional Report[1] mischaracterize much of the geography in question and the flow of the effluent downstream. For instance, Burnette claims that berms on the Spray Fields stop the flow of effluent into the Wetlands. *Id.* (ECF No. 21,

[1] As discussed in detail below, the Sixth Circuit has generally treated motions to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction that present factual attack with extreme caution when the jurisdictional elements are intertwined with the merits. *See,* infra. Section III, Standard of Review, pp. 6-9. Under such circumstances, courts assume jurisdiction and decide the case on the merits. *See, Moore v. Lafayette Life Ins. Co.,* 458 F.3d 416 (2006). Therefore, Plaintiffs believe this Court should disregard the Jurisdictional Report in the present context of Burnette's motion to dismiss.

PageID.3550). However, EGLE inspectors have reported that the wastewater discharges cause surface water flow of the effluent into the Wetlands despite the berms. 2021 VN ¶ 5 (ECF No. 16-12, PageID.2010). Burnette also claims the Wetlands are bifurcated into two separate wetlands by the Farm Road and its culverts. Def. Brief (ECF No. 21, PageID.3550-3551, citing ECF No. 21-1, PageID.3583-3584). But EGLE and Burnette's own prelitigation report state the Wetlands on either side of the Farm Road are part of one wetland complex, supported by the Figure 1 map of the Wetlands at issue on EGLE's wetland finder page.

Figure 1



Am. Compl. (ECF No.16, PageID.1634); LEI Wetland Delineation Report ("LEI Report") (ECF No. 16-16, PageID.2034) (the wetland areas "are part of the same wetland complex, connected via culvert"); 2008 EGLE Violation Notice ("2008 VN") (ECF No. 16-9, PageID.1989) ("water is flowing to the lake from the irrigation field, *through the wetland*, into the creek, and draining into Elk Lake." (emphasis added)). Burnette claims the culverts under the Farm Road divide the Wetlands since they act as barriers to surface water connectivity when - in actuality - they are

"equalization culverts" placed 3.5 inches below ground level to maintain surface water connectivity. EGLE Notice of Authorization (ECF No. 16-13, PageID.2021). This surface water connection maintains the water flow drainage in the Wetlands from the southside of the Farm Road to the downstream northside and regulators requested a second culvert be added to help maintain this connectivity. *Id.* (ECF No. 16-13, PageID.2021). Indeed, state regulators have long recognized the Wetlands on either side of the Farm Road all the way to Elk Lake Road as an interconnected wetland-stream complex. 1990 Inspection Report (ECF No. 16-8, PageID.1985); 2008 VN (ECF No. 16-9, PageID.1989). Burnette further asserts that Spencer Creek does not form until east of Elk Lake Road. Def. Brief (ECF No. 21, PageID.3551). However, local residents and EGLE inspectors have noted that the Wetlands act as the headwaters of Spencer Creek and the creek "flows out of the wetland" before it reaches Elk Lake Road. 2020 Inspection Report (ECF No. 16-14, PageID.1686); Aff. Ogle (ECF No. 16-4, PageID.1686).

Burnette's foundational premise for its Motion to Dismiss is that if the Wetlands are not "waters of the United States" ("WOTUS"), then Plaintiffs do not have a claim for relief and this Court does not have jurisdiction to hear the case. This is not true. Burnette discharges pollutants that reach multiple WOTUS (Wetlands, Spencer Creek, Elk Lake) and, therefore, the discharges fall under the jurisdiction of the CWA and Plaintiffs have stated a claim upon which this Court may provide relief. A recent Supreme Court holding clarifies that discharges coming from an original, qualifying "point source" constitute CWA violations if the pollutants reach WOTUS, even if the path to the WOTUS is indirect and goes through other mediums such as groundwater or covered conveyance point sources like culverts. *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020). Thus, Plaintiffs have an actionable claim so long as the pollutants reach any WOTUS and are discharged in a manner that is the functional equivalent of a direct discharge (i.e.,

Spencer Creek and/or Elk Lake), regardless of whether the Wetlands are determined to be WOTUS.

III. STANDARD OF REVIEW

A. RULE 12(b)(1)

Burnette seeks dismissal under Rule 12(b)(1) for lack of subject-matter jurisdiction. It is long settled that there are two types of 12(b)(1) attacks: facial attacks and factual attacks. *See Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). Burnette's claim that Plaintiffs did not comply with the CWA pre-suit notice requirements is a 12(b)(1) facial attack. "A facial attack on the subject matter jurisdiction alleged by the complaint merely questions the sufficiency of the pleading." *Id*. Facial attacks afford a plaintiff the "safeguards" of the 12(b)(6) standard of review. *Id*. "[T]he plaintiff can survive [a motion to dismiss] by showing any arguable basis in law for the claim made." *Metro Hydroelectric Co., LLC v Metro Parks*, 541 F.3d 605, 611 (6th Cir. 2008) (citation omitted). Plaintiffs' NOI detailed each requirement enumerated in 40 C.F.R. 135.3(a). Likewise, Burnette's violations of CWA Section 301 are illegal discharges affording this Court subject-matter jurisdiction in a citizen suit.

Burnette also raises a 12(b)(1) factual attack claiming the Wetlands are not, in fact, WOTUS. Sometimes, when confronted with factual attacks on its jurisdiction, a court "may weigh the evidence and decide factual disputes when necessary." *Moher v United States*, 875 F. Supp. 2d 739, 749 (WD Mich. 2012). However, the Supreme Court has cautioned against courts conflating jurisdictional issues and the merits, describing decisions that dismiss for lack of jurisdiction when a threshold fact has not been established as "drive-by jurisdictional rulings." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 91 (1998) (citations omitted). The Court warned that such rulings should be given "no precedential effect" on whether the federal court has authority to adjudicate

the claim. *Id*. Jurisdiction is not defeated "by the possibility that the averments might fail to state a cause of action on which petitioners could recover . . . Failure to state a proper cause of action calls for a judgment on the merits and not for dismissal for want of jurisdiction." *Bell v. Hood*, 327 U.S. 678, 682 (1946). Accordingly, the Sixth Circuit has determined district courts should apply a Rule 56 or 12(b)(6) standard when the jurisdictional basis intertwines with the merits of a federal cause of action. *Gentek Bldg Prod. v. Sherwin-Williams Co.*, 491 F.3d 320, 330-331 (6th Cir. 2007). *Moore v. Lafayette Life Ins. Co.,* 458 F.3d 416 (2006); *Rudd v. United States, No. 5:22-cv-00201-GFVT,* 2023WL 4936671 (E.D. Ky. Aug. 2, 2023). As *Gentek* explained,

> [A] district court engages in a factual inquiry regarding the complaint's allegations only when the facts necessary to sustain jurisdiction do not implicate the merits of the plaintiff's claim. . . As a general rule a claim cannot be dismissed for lack of subject-matter jurisdiction because of the absence of a federal cause of action. . . The exceptions to this rule are narrowly drawn, and are intended to allow jurisdictional dismissals only in those cases where the federal claim is clearly immaterial or insubstantial.

Id at 331. Applying this to the CWA, several courts have noted the jurisdictional issues and the merits of the cause of action readily intertwine and the line distinguishing them becomes blurry. *See Red River Coal Co. Inc. v. Sierra Club,* No. 2:17CV00021, 2018 WL 491668 (W.D. Va. Jan. 19, 2018; *Seneca Lake Guardian v. Greenidge Generation, LLC*, No. 6:23-CV-06063 EAW, 2023 WL 5348835 (W.D.N.Y. Aug. 21, 2023); *Cal. Sportfishing Prot. Alliance v. Shamrock Materials, Inc.*, Case No. C11-2565 MEJ, 2011 WL 5223086 (N.D. Cal. Nov. 2, 2011). As the Ninth Circuit concluded, "[t]he 'jurisdiction' of the CWA has nothing to do with the jurisdiction of this court. . . Baykeeper's failure to establish that Cargill's Pond was a water of the United States is a failure to make out a case, not a failure to establish the jurisdiction of the court." *San Francisco Baykeeper v. Cargill Salt Division,* 481 F.3d 700, 709 n.9 (9th Cir. 2007).

To prevail in this CWA citizen suit, Plaintiffs must prove (1) the addition/discharge of (2) a pollutant into (3) navigable waters (WOTUS) by any (4) person (5) in violation of, or without, a valid NPDES permit. 33 U.S.C. §§ 1311(a), 1342(k), 1362(12). Determining whether the Wetlands, Spencer Creek, and/or Elk Lake are WOTUS polluted by Burnette's effluent reaches the merits of this case and Plaintiffs' claims are clearly *not* "immaterial or insubstantial." Even Burnette acknowledges there are fact issues implicated here – it raised a 12(b)(6) issue asserting their wastewater is not directly discharged into WOTUS. Def. Brief (ECF No. 21, PageID.3577-3578). Thus, Burnette improperly invites a factual inquiry when there are genuine factual disputes about where Burnette's pollutants reach WOTUS. Given that the jurisdictional elements are clearly intertwined with the merits in this case, this Court should assume jurisdiction and decide the case on the merits. *Moore,* 458 F.3d at 443 (2006).

B. RULE 12(b)(6)

Rule 12(b)(6) provides for dismissal if the complaint "fail[s] to state a claim upon which relief can be granted[.]" Fed. R. Civ. P. 12(b)(6). The complaint must present enough facts to state a claim that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007). A claim is facially plausible when it pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Plausibility asks for more than sheer possibility that defendant has acted unlawfully but does not have a probability requirement. *Id.* "[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." *Id.* The Court must construe the complaint in the light most favorable to 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). Additionally, district courts are limited to analysis of the following documents when making a 12(b)(6) ruling: the complaint allegations, exhibits attached to complaint, public records, items in the case record, and exhibits attached to defendant's motion "so long as they are referred to in the complaint". *Rondigo, LLC v. Richmond*, 641 F.3d 673, 680-81 (6th Cir. 2011).

Plaintiffs emphasize that Burnette's motion relies heavily on its July 23, 2023, Jurisdictional Report (ECF No. 21-1, PageID.3582). This Court should disregard the report as it is improper evidence presented for its Rule 12(b) motion. *Id.* Burnette asks the Court to disregard the supported allegations in Plaintiffs' Complaint and attached exhibits, which Burnette largely ignores, and instead take as gospel the factual and legal conclusions of an unverified report that makes vague assertions about selected conditions on private property, based on a single site visit on July 5, 2023 (created post litigation and pre-discovery). The report is outside the documents permissible in a 12(b)(6) motion and, for the reasons stated above, the 12(b)(1) factual attack should not be decided at this stage of litigation, rendering consideration of the Jurisdictional Report improper at this time.

IV. LAW AND ARGUMENT

The Court should deny Burnette's Motion to Dismiss because Plaintiffs sufficiently alleged that Burnette discharged pollutants into actual WOTUS and provided the required pre-litigation notice to Defendant.

A. PLAINTIFFS' PRE-SUIT NOTICE IS MORE THAN SUFFICIENT.

The elements of the compulsory 60-day pre-suit notice are set forth in 40 C.F.R. § 135.3:

> Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, 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.

Plaintiffs' NOI more than adequately advised Burnette of the nature of the allegations against it, including all the required elements of 40 C.F.R. § 153.3. sets forth an extensive background and history of Burnette's chronic CWA violations and explains step-by-step Burnette's fruit processing operations and its waste disposal practices that result in the contamination of nearby protected waterways. (ECF No. 1-1, PageID.1648). The notice allegations are substantiated by Plaintiffs' independent data, information reported by Burnette to regulators, and EGLE violation notices and reports. Burnette challenges the NOI on two specific grounds: failure to identify a specific CWA standard, limitation, or order; and inadequate identification of the activity constituting a CWA violation.

While the notice requirement is strictly applied in the 6th Circuit, the notice need only "allow Defendants to identify all pertinent aspects of [their] violations without extensive investigation." *Sierra Club v. Hamilton County Board of County Commissioners*, 504 F.3d 634, 644 (6th Cir. 2007); *see also Waterkeepers Northern California v. AG Industrial Mfg., Inc.*, 375 F.3d 913, 920 (9th Cir. 2004) ("The point of the Act's notice requirement is not to prove violations, it is to inform the polluter about what it is doing wrong, and to allow it an opportunity to correct the problem."). At the pleading stage, the notice is "reasonably construed." *California Sportfishing Protection Alliance v. Shiloh Group, LLC*, 268 F. Supp. 3d 1029, 1051 (N.D. Cal. 2017).

1. CWA § 301 General Prohibition is an "Effluent Standard, Limitation, or Order" That Supports a CWA Citizen Suit.

Burnette claims Plaintiffs did not allege an effluent standard, limitation, or order they were violating in the NOI. Burnette argues Section 301's general prohibition against discharging pollutants without a permit is not a specific standard, limitation, or order. This contention is

inherently false. The CWA citizen suit provision *explicitly defines* Section 301's general prohibition as an effluent standard, limitation, or order. 33 U.S.C.S. § 1365(f). Burnette does not dispute that Plaintiffs alleged in the NOI that they were violating Section 301. Def. Brief (ECF No. 21, PageID.3561). So, Burnette's contention is not an issue with Plaintiffs notice, rather, it is an issue with the language of the statute itself, granting CWA jurisdiction over Section 301 violations.

Section 301 states, "[e]xcept as in compliance with this section and [33 U.S.C.S. §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §1311(a). The CWA also authorizes any citizen to bring a citizen lawsuit against any polluter "who is alleged to be in violation of (A) an effluent standard or limitation under this Act[.]" 33 U.S.C. § 1365(a). Most importantly , the citizen suit provision specifically enumerates the Section 301(a) general prohibition as an "effluent standard or limitation." As quoted in Plaintiffs' Amended Complaint, the citizen suit provision states, "[f]or purposes of this section, the term 'effluent standard or limitation under this Act' means . . . an unlawful act under subsection (a) of ***section 301 of this Act [33 U.S.C.S. § 1311(a)] [.]"*** 33 U.S.C.S. § 1365(f) (emphasis added); Am. Compl. ¶ 37 (ECF No. 16, PageID.1628). The plain language of this definition - in the citizen suit provision itself - clearly permits citizen suits for violations of the Section 301 prohibition against discharging pollutants without a permit. "It is well settled that the starting point for interpreting a statute is the language of the statute itself." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,* 484 U.S. 49, 56 (1987). "When interpreting a statute, we first use the traditional tools of statutory construction, to determine whether Congress directly addressed the precise question at issue. If the precise question at issue is addressed, then the unambiguously expressed intent of

Congress controls." *Olympic Forest Coalition v. Coast Seafoods Co.,* 884 F.3d 901, 905 (9th Cir. 2018) (internal quotations and citation omitted).

Burnette, however, completely ignored the citizen suit provision section defining an "effluent standard or limit" in their Brief. Instead, Burnette cherry-picks a quote from a Sixth Circuit case, taken out of context and misrepresented, to argue Section 301 violations can never be the basis for a CWA citizen suit. Def. Brief (ECF No. 21, PageID.3564). It is true that some Section 301 violation citizen suits are barred by the statute, *but only when the defendant has a NPDES permit*. 33 U.S.C. § 1342(k). CWA Section 402 authorizes regulators to issue NPDES permits setting effluent limits for enumerated pollutants discharged into specified receiving waters. 33 U.S.C. § 1342. An issued NPDES permit is an exception to the Section 301 general prohibition. 33 U.S.C. § 1311(a). Thus, a defendant in compliance with a NPDES permit has a limited "permit shield" against Section 301 citizen suits. 33 U.S.C. § 1342(k); *see also Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.,* 897 F.2d 1128 (11th Cir. 1990).

Burnette bases its Section 301 argument almost entirely on one quote from the Sixth Circuit where the Court faulted the plaintiff for failing to identify specific exceedances or other violations of existing permits. (ECF No. 21, PageID.3563); *see also South Side Quarry, LLC v. Louisville & Jefferson County Metropolitan Sewer District*, 28 F.4th 684, 696 (6th Cir. 2022). But the defendant in *South Side Quarry* had Kentucky-issued NPDES (KPDES) permits for the subject discharges, which is why the Sixth Circuit found the pre-suit notice allegations of violating Section 301 "general prohibition" insufficient. *Id.* Burnette ignores this key distinction, instead actively misleading this Court. In fact, Burnette deliberately omitted only one sentence from the middle of its block quote: "[a]s South Side itself notes, MSD has multiple KPDES permits authorizing the treatment and discharge of stormwater and wastewater." *Id.*; *see also* Def. Brief (ECF No. 21,

PageID.3563). Then, Burnette emphasizes the final sentence of its block quote but glosses over two key words – "without more" – referring to violations of MSD's KPDES permits that provide a permit shield. *Id.* Thus, *South Side Quarry* stands for a citizen suit notice alleging Section 301 "general prohibition" needs to allege specific violations of the permit when the defendant has a NPDES permit.

Burnette's reliance on *Fitzgibbons* is similarly misplaced because, again, the defendants had a NPDES permit. *See Fitzgibbons v. Cook*, Case No. 1:08-cv-165, 2008 WL 5156629, at *4 (W.D. Mich. Dec. 8, 2008). The *Fitzgibbons* plaintiffs' NOI was premised on an unpermitted Section 301 discharge. Unbeknownst to plaintiff at the time of drafting the NOI, defendant had a NPDES permit. Once learning of the permit, the plaintiffs filed a suit alleging NPDES permit violations without re-issuing an NOI based on the permit violations. Thus, the alleged behavior in the NOI was different than the alleged violations in the complaint, so this Court dismissed the suit for lack of sufficient notice. *Id.*

Courts have overwhelmingly interpreted the Clean Water Act to allow for citizen suits based solely on violations of the Section 301 general prohibition when a polluter did not have a NPDES permit. Indeed, district courts in the Sixth Circuit have followed and even cited *South Side Quarry* when holding allegations of the Section 301 general prohibition are proper grounds for CWA citizen suits when defendants do not have a NPDES permit. *See Starlink Logistics Inc. v. ACC, LLC*, 42 F. Supp. 3d 652, 695 (M.D. Tenn. 2022) (dismissed on other grounds) ("Defendant's argument nonetheless fails because it ignores a key distinction between (a) CWA citizen-suit claims that allege discrete violations of an existing permit, and (b) claims (like this one) that the defendant *wholly lacks a required permit*."); *Ward v. Stucke*, No. 3:18-cv-263, 2021 WL 4033166, at * 10-11 (S.D. Ohio Sept. 3, 2021) (summary judgment awarded to defendant on other grounds).

Likewise, Circuit Courts in the 4th, 5th, 9th, and 10th Circuits have all relied on the plain statutory language of the CWA and allowed citizen suits predicated on Section 301 violations if the defendant has no NPDES permit. *See Upstate Forever v. Kinder Morgan Energy Partners, LP*, 887 F.3d 637, 642 (4th Cir. 2018) (overturned, in part, on other grounds); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.,* 73 F.3d 546, 561 (5th Cir. 1996); *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) (reversed and remanded on other grounds).

Defendant asks this Court to ignore the plain statutory language and overwhelming case law regarding Section 301 citizen suits. No court has held that a citizen suit cannot be brought against a person for violating the general prohibition when they do not have a NPDES permit. It is undisputed that Burnette has no NPDES permit authorizing its fruit processing wastewater discharges via spray irrigation, so *South Side Quarry* and *Fitzgibbons* are inapplicable. Plaintiffs properly notified Burnette that its unpermitted discharges violate the general prohibition in Section 301(a).

2. PLAINTIFFS' NOI PROPERLY IDENTIFIED ACTIVITIES CONSTITUTING CWA VIOLATIONS

Burnette challenges Plaintiffs' NOI as insufficiently descriptive of the activity constituting a CWA violation, arguing the NOI referenced "waters of the State," not "waters of the United States," thereby failing to effectively invoke CWA jurisdiction. Def. Brief (ECF No. 21, PageID.3564-3568). Burnette further contends the NOI omitted reference to an indirect conveyance being the "functional equivalent" of a direct discharge and that Plaintiffs first raised the "*Maui* holding" in their Amended Complaint. *Id.* (ECF No. 21, PageID.3568-3569). Burnette's argument is, essentially, that Plaintiffs' NOI failed to make particular legal assertions – that

receiving waters are "WOTUS" and the indirect discharge constitutes a "point source." But CWA citizen suit plaintiffs are not required to assert such legal conclusions in their pre-suit notice.

EPA's notice regulation does not require pre-suit notices to enumerate legal theories. 40 C.F.R. § 135.3. It requires information sufficient for the defendant to identify (1) the standard, limitation, or order allegedly violated, (2) "the activity alleged to constitute a violation," (3) responsible people, (4) violation location, and (5) violation dates. *Id.* These factual allegations describe behaviors so the defendant may abate the illegal discharges to "cure the violations before suit is brought, which may obviate the need for a costly lawsuit." *Stephens v. Koch Foods, LLC*, 667 F. Supp. 2d 768, 785 (E.D. Tenn. 2009) (quoting *Frilling v. Village of Anna*, 924 F. Supp. 821, 833-34 (S.D. Ohio 1996). Plaintiffs' NOI clearly provided these facts, including fully describing Burnette's land application activities (discharges of the wastewater through the sprayer system in violation of its discharge permit that overloads the land treatment system), water migration routes (surface overflow and subsurface lateral flow), and the locations of discharges and receiving waters (from the Spray Fields to the wetland network and downstream to Spencer Creek and Elk Lake). (ECF No. 16-1, PageID.1653-1654). Plaintiffs' NOI provided ample description of the activities Burnette needed to modify to cease violating Section 301. Instead, Burnette chose to ignore the NOI, just as they've ignored the numerous EGLE Violation Notices, and continue discharging the wastewater in a manner that pollutes the Wetlands, Spencer Creek, and Elk Lake. Prospective citizen suit plaintiffs are not required pre-litigation to articulate their legal theories or standards explaining why they believe the behaviors are illegal. The only law Burnette invokes to support this theory is *South Side Quarry*, 28 F. 4th at 694, where the court rejected an attempt to pursue permit-specific effluent limit violations that were not identified in the pre-suit notice. Def. Brief (ECF No. 21, PageID.3568). That is not this case. As Burnette noted, Plaintiffs put Burnette on

notice they were violating CWA Section 301 by discharging the wastewater without a permit. (*Id.* at PageID.3561). The Court should reject Burnette's attempt to read into clear EPA regulations additional novel requirements to articulate particular legal theories.

3. PLAINTIFFS' NOI PROPERLY IDENTIFIED THE SPECIFIC STANDARD, LIMITATION, OR ORDER ALLEGED TO BE VIOLATED.

Plaintiffs' NOI satisfies the purposes of CWA pre-suit notice and fully identifies the basis for CWA jurisdiction over Burnette discharges. First, the NOI "RE" line expressly characterizes its subject matter as "Clean Water Act Notice of Intent to Sue/60-day Notice Letter." (ECF No. 16-1, PageID.1648). The opening paragraph mentions "ongoing violations of the Clean Water Act, state law, and state permits." *Id*. The final introductory paragraph cites CWA Section 505 (the 60-day notice provision) and reiterates that "[t]his letter provides notice of Burnette's violations [and] of the undersigned entities' intent to sue." (*Id* at PageID.1649). Second, Plaintiffs put Burnette on notice they were violating the CWA's general prohibition against discharging pollutants without a permit. The NOI letter states, "[t]he Clean Water Act 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* at PageID.1658) (quoting 33 U.S.C. § 1311(a)). In the first few paragraphs of the NOI alone, Plaintiffs invoked and relied on, inter alia, the federal CWA. It further articulates the factual support and legal bases of Plaintiffs' eventual claims and causes of action, including but not limited to allegations of CWA violations.

Burnette complains that "waters of the state" is not synonymous with the CWA definition of WOTUS, dedicating pages to the post-*Sackett* modified WOTUS definition. Def. Brief (ECF No. 21, PageID.3564-3567). There are multiple flaws in Burnette's logic. First, Burnette focuses only on selected language from Plaintiffs' notice. Plaintiffs' NOI expressly qualified the term "waters of the state" with "subject to the Clean Water Act," thereby effectively identifying the

impacted waters as WOTUS. (ECF No. 16-1, PageID.1658); ("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 PageID.1658-1659); ("For these reasons, TWC, the Baykeeper, ESLA, and GTB believe that the discharge from Burnette is in violation of the Clean Water Act and state law.") (*Id* at PageID.1660).

Second, Burnette assumes invoking "surface waters of the state" defined in NREPA Part 31, which Burnette acknowledges the NOI invoked, is different than invoking "WOTUS" as defined for the CWA, because some surface water bodies might be "surface waters of the state" but not WOTUS. Def. Brief (ECF No. 21, PageID.3567). But the difference between "surface waters of the state" under Part 31 and WOTUS is murky. Federal courts, for decades, have been grappling with the meaning of WOTUS. *See Sackett*, 143 S. Ct. at 1332 (defining the meaning of WOTUS "has been a contentious and difficult task.") (internal quotation and citation omitted). As Burnette notes, "surface waters of the state" include streams, impoundments, and open drains – but so does WOTUS. Whether a particular water body is WOTUS is a fact-intensive, case-specific inquiry. Plaintiffs reasonably framed their allegations around both "surface waters of the state" and "waters of the state subject to the CWA" because the NOI asserted both federal CWA and state law claims. Plaintiffs' NOI inclusion of its state law allegations thus provided Burnette with excess notice. The Court should reject Burnette's unsupported argument that a citizen pre-suit notice invoking "surface waters of the state" is fatal as a matter of law to CWA jurisdiction.

For the same reasons, Burnette's *Maui* argument is unavailing. While *Maui* was first expressly invoked in Plaintiffs' Amended Complaint (ECF No. 16, PageID.1628), Burnette's objection is again unprecedented form-over-substance. *Maui* held for the first time that the CWA

"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*." *Maui,* 140 S. Ct. at 1476 (emphasis in original). Plaintiffs' NOI contains more than enough factual elucidation of its discharge theory. Section 5 of the NOI, titled "Burnette's Land Discharge Overflows to Wetlands," explains that excessive effluent that Burnette applies to the spray irrigation fields overflows into the wetland network when "soils are saturated and/or effluent application rates are exceeded." (ECF No. 16-1, PageID.1653). Additionally, the areas in the Spray Fields with "shallow low permeability" likely causes "subsurface lateral movement of Burnette's effluent to the wetland network." *Id*. This over-land and through-surface or groundwater conveyance of pollutants is not direct, *i.e*., it involves intermittent steps between application to the Spray Fields and detection within Spencer Creek, Elk Lake, and the connected Wetlands. But that was exactly the point in *Maui* – the CWA prohibits "the same result through roughly similar means." *Maui*, 140 S. Ct. at 1476. In the alternative, the culverts themselves are point sources resulting in a direct discharge of the pollutants to downstream waters and Plaintiffs described the pathway of the pollutants from the sprayers to WOTUS. Plaintiffs' NOI clearly articulated Burnette's activities that constitute CWA violations in its pre-suit notice, with bonus discussion of the hydrologic connections between discharge locations and receiving waters.

At bottom, Plaintiffs fully informed Burnette of the required facts and legal standards with a thorough and detailed NOI that went above and beyond the requirements enumerated in the CWA. Courts reject form-over-substance-type arguments like Burnette's and require only "reasonable specificity." *See San Francisco Bay Keeper, Inc. v. Tosco Corp.,* 309 F.3d 1153, 1158 (9th Cir. 2002).

B. Failure to Plead a Point-Source Discharge

Burnette requests dismissal because no direct "point source" exists discharging their wastewater pollutants directly into "navigable waters." Burnette goes to great lengths to either contort or flat out ignore the plain language of the CWA, federal regulations, and applicable case law. First, Burnette claims their industrial wastewater magically becomes nutritional "agricultural return flow" beyond regulation of the CWA simply because they first spray it on fields specifically intended to treat harmful wastewater pollutants. Second, Burnette ignores the statutory definition of "navigable waters" (and decades of precedent) when claiming that indirect discharges are only subject to CWA regulation if the receiving waterbody can, in fact, be navigated by a boat. Finally, Burnette ignores the pile of factual allegations in Plaintiffs' Complaint and supporting exhibits that show Burnette's wastewater pollutants reach WOTUS through indirect discharges that satisfy the *Maui* "functional equivalency" test.

1. Brunette's Fruit Processing Wastewater is NOT Agricultural Return Flow Exempt from CWA Regulation.

Burnette produces millions of gallons of wastewater at its fruit processing plant that contains numerous CWA enumerated pollutants, including Biological Oxygen Demand ("BOD"), Total Suspended Solids ("TSS"), phosphorus, nitrogen, and *E. coli*. The CWA enumerates specific industries whose wastewater shall be regulated because it poses serious environmental risks to the nation's water resources. 33 U.S.C. § 1316. "[C]anned and preserved fruits and vegetables processing" facilities are a listed "source" industry regulated under the CWA. 33 U.S.C. § 1316(b)(1)(A). Accordingly, EPA promulgated effluent pollutant limitations applicable to discharges from fruit product processing plantslike Burnette's. 40 C.F.R. §§ 407.60-407.67 ("Canned and Preserved Fruits Subcategory"); §§ 407.2-407.27 ("Apple Products Subcategory").

EPA precisely enumerates BOD and TSS among regulated pollutants for fruit processing wastewater discharges. 40 C.F.R. § 407.62. Thus, discharges from Burnette's canning and fruit processing plant ***are industrial wastewater*** regulated by the CWA.

Accordingly, EGLE mandates that Burnette discharge the industrial wastewater to the Spray Fields as part of a "land treatment system . . . designed and constructed to provide the necessary treatment to the applied effluent." Discharge Management Plan (ECF No. 16-6, PageID.1710). EGLE requires the Spray Fields to have specific plants capable of absorbing fruit processing wastewater pollutants (phosphorous, BOD, TSS). (ECF No. 16-6, PageID.1717) ("a mixture of 20% alfalfa hay, 30% bromegrass hay, 20% timothy and 30% orchardgrass hay"). Burnette cannot avoid its statutory obligation to obtain a NPDES permit for its industrial wastewater effluent by simply pointing the spray system at state-mandated land-treatment vegetation and flooding the fields. That flies in the face of the statutory and regulatory intent and obligations of Section 1316 of the CWA, the C.F.R., and the state-mandated discharge plan. The CWA defines "agricultural return flows" as "discharges composed *entirely* of return flows from irrigated agriculture." 33 U.S.C. § 1342(l)(1) (emphasis added). Courts have read this language to mean that the agricultural exemption, "must be narrowly construed to achieve the purposes of the CWA" and Congress used the word "entirely . . . to limit the scope of the statutory exemption*."* *Pac. Coast Fed'n of Fishermen's Ass'ns v. Conant,* 945 F.3d 1076, 1085 (9th Cir. 2019). This language "demonstrates that Congress intended for discharges that include return flows from activities unrelated to crop production to be excluded from the statutory exception, thus requiring an NPDES permit for such discharges." *Id*. Burnette's discharges are regulated "source" industry wastewater, not water taken from a natural source to irrigate crops and then "returned" to the water source. The wastewater is piped from an industrial facility to be discharged onto a land treatment

system. So, while it's true that the treatment vegetation utilizes some of the effluent's phosphorus and nitrogen in their growth, that uptake by the plants *is the treatment process* of industrial wastewater. The Spray Fields exist to treat the wastewater; the wastewater doesn't exist to irrigate the vegetation.

Even Concentrated Animal Feed Operations ("CAFO") wastewater, which is sometimes considered "agricultural runoff" rather than industrial wastewater (*see Waterkeeper Alliance, Inc v United States EPA,* 399 F.3d 486, 509 (2d Cir. 2005)), does not qualify for the "agricultural runoff" exemption if the land application process of its manure wastewater is mismanaged and results in overapplication and saturation of soils leading to runoff. The exemption only applies if the discharge "has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater[.]. 40 C.F.R. § 122.23(e); *see also Nat'l Pork Producers Council v United States EPA*, 635 F.3d 738, 744 (5th Cir. 2011)("However, if the land application was not in compliance with those practices, the land application discharge would be an unpermitted discharge in violation of the CWA."). It's clear from the numerous EGLE Violation Notices that Burnette consistently mismanages its wastewater discharges with over applications and saturates the Spray Fields resulting in pollution flowing to WOTUS. So, even if Burnette's industrial wastewater was deemed as "agricultural" as CAFO manure waste, which it is not, Burnette's non-compliance of the Discharge Management Plan would disqualify it from the "return flow" exemption.

2. IT IS IRRELEVANT THAT BOATS CAN'T FLOAT IN THE RECEIVING WETLANDS AND CREEK.

Burnette claims *Maui's* "functional equivalent" standard is inapplicable to its unpermitted wastewater discharges since Spencer Creek and the Wetlands are not traditionally "navigable." Def. Brief (ECF No.21, PageID.3576-3577). This argument is in direct conflict with the CWA and

decades of legal precedent defining "navigable waters." *Maui* held that the CWA applies if the discharges are "the functional equivalent of a direct discharge from the point source into navigable waters." 140 S. Ct. at 1468. The CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). While courts, parties, and regulators have debated for decades what constitutes WOTUS, it is long settled law that "navigable waters" is significantly more expansive than waters that can be navigated by boats. *See Rapanos v U.S.*, 547 US 715, 731 (2006). WOTUS surely encompass traditionally navigable waterbodies but also include their tributaries (40 C.F.R. § 120.2(a)(3)) and adjacent, connected wetlands. *See Sackett*, 143 S. Ct. at 1341. Whether Spencer Creek and the Wetlands qualify as WOTUS is discussed in depth below - but the determination does not hinge on whether you can float a boat on them. Burnette's argument that *Maui* does not apply because the Wetlands and Spencer Creek are non-navigable eschews the clear statutory language and decades of Supreme Court precedent.

3. PLAINTIFFS' COMPLAINT ALLEGES SUFFICIENT FACTS SUPPORTING ITS MAUI INDIRECT-DISCHARGE CLAIM.

Burnette makes a cursory, unsupported assertion that its discharged wastewater is only sprayed directly onto the Spray Fields, so it cannot be a direct discharge into WOTUS. Def. Brief (ECF No. 21, PageID.3578). It is long settled case law that discharges can violate the CWA even if the pollutants take an indirect route to WOTUS. As the *Rapanos* plurality states:

> The Act does not forbid the "addition of any pollutant *directly* to navigable waters from any point source," but rather the "addition of any pollutant *to* navigable waters." § 1362(12)(A) (emphasis added); § 1311(a). Thus, from the time of CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between.

547 US at 743. CWA regulation is not limited to direct discharges to WOTUS.

Alternatively, Burnette asserts a 12(b)(6) theory that Plaintiffs' Amended Complaint offers a mere legal conclusion, without supporting factual allegations, that Burnette's indirect discharges of its wastewater effluent into the Wetlands, Spencer Creek, and Elk Lake are the "functional equivalent" of a direct discharge from a point source. Def. Brief (ECF No. 21, PageID3577). To the contrary, Plaintiffs' Amended Complaint and Exhibits clearly allege pollutants from Burnette's wastewater discharged onto the Spray Fields reach the Wetlands, Spencer Creek, and Elk Lake, in a manner that is the "functional equivalent" of direct discharges from their sprayers.

Through the years, courts have used competing tests to determine if an indirect discharge qualifies as an addition of a pollutant to WOTUS from a point source. *Compare, e.g., Cty. of Maui v. Haw. Wildlife Fund,* 886 F. 3d, at 749 (9th Cir., 2018) ("fairly traceable" standard), with *Upstate Forever v. Kinder Morgan Energy Partners, L. P.,* 887 F. 3d 637, 651 (4th Cir., 2018) ("direct hydrological connection"). *Maui* resolved the issue by holding that an indirect discharge of pollutants violates the CWA if the conveyance of the pollutants is the "functional equivalent" of a direct discharge of pollutants into WOTUS. 140 S.Ct. at 1462. *Maui* identified seven factors for consideration in applying the test:

> (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. *Time and distance will be the most important factors in most cases,* but not necessarily every case.

Id. at 1476-1477 (emphasis added). The original conveyance of the pollutant must be from a point source before it indirectly flows into the receiving waterbodies. *Id* at 1477.

It is undisputed that Burnette discharges its fruit processing wastewater from a spray irrigation system which is a "discernable, confined, and discrete conveyance" point source. 33 U.S.C.§ 1362(14). Am. Compl. ¶¶ 6, 52, 55 (ECF No. 16, PageID.1619; PageID.1631-1632); Def. Brief (ECF No. 21, PageID.3549).

Plaintiffs' Complaint also presents a sufficient factual basis to establish plausibility regarding the *Maui* distance factor. Plaintiffs alleged that Burnette sprays wastewater onto Spray Fields abutting the Wetlands and Spencer Creek. Am. Compl. ¶¶ 46, 61, 105, 107 (ECF No. 16, PageID.1630; PageID.1633; PageID.1641); *see also* Def. Brief (ECF No. 21, PageID.3550) (map, spray fields "near" wetlands). Plaintiffs provided a map showing the proximity of the Spray Fields to the Wetlands and Spencer Creek (less than ½ mile from Spray Field 36 to Spencer Creek) and diagramed hydrological flow from Spray Fields toward and into the adjacent Wetlands and Spencer Creek. Am. Compl. ¶ 61 (ECF No. 16, PageID.1633). Plaintiffs attached exhibits where EGLE inspectors documented Burnette's effluent flowing across the fields a short distance [a few dozen to a couple hundred yards] into Wetlands. 2019 VN (ECF No. 16-10, PageID.1993); 2020 VN (ECF No. 16-11, PageID.1999); 2021 VN (ECF No. 16-12, PageID.2008). Plaintiffs alleged the distance from the Wetlands to Elk Lake is "approximately a mile or less." Am. Compl. ¶ 62 (ECF No. 16, PageID.1633).

Likewise, Plaintiffs' Complaint presents a sufficient factual basis to establish plausibility regarding the *Maui* time factor. Plaintiffs pleaded that the effluent would only take "a short span of time" to enter the Wetlands and Spencer Creek. (*Id* at ¶ 107, PageID.1641). Plaintiffs alleged EGLE inspectors observed effluent pooling on Spray Field surfaces causing contemporaneous flow of the wastewater into the Wetlands (*Id* at ¶¶ 95-98, PageID.1640). Plaintiffs provided Affidavits where residents attest the effluent pollutes Spencer Creek and Elk Lake during the

summer months corresponding to Burnette's busiest spraying season. Aff. Gretel ¶ 12(ECF No. 16-2, PageID.1672); Aff. Taylor ¶ 10 (ECF No.16-3, PageID.1678); Aff. Ogle ¶ 27 (ECF No. 16-4, PageID.1686). EGLE inspectors noted a history of resident complaints about discoloration, cherry pulp, and foam during "the high discharge period of cherry harvest processing at the Facility." 2021 VN (ECF No. 16-12, PageID.2001). These allegations support the short time it takes Burnette effluent to reach protected waters.

Further, Plaintiffs' allegations present a sufficient factual basis to establish plausibility regarding the additional *Maui* factors. Most notably, the Complaint asserts effluent travels primarily as surface flow from the land treatment system (but also through saturated groundwater just below the surface of the land treatment system into the Wetlands). Am. Comp. ¶¶ 60, 61, 92, 95-98, 107 (ECF No. 16, PageID.1631-1632, 1639-1641). The effluent then flows through the Wetlands, into Spencer Creek, and downstream into Elk Lake. (*Id* at ¶¶ 60, 61, 66, 69, PageID.1632-1635). These facts address "the nature of the material through which the pollutant travels." *Maui,* 140 S. Ct at 1476-1477. The Complaint also includes factual allegations relating to "the degree to which the pollution (at that point) has maintained its specific identity" and "the extent to which the pollutant is diluted or chemically changed as it travels." *Id*. The Complaint explicitly describes the qualities in Spencer Creek and Elk Lake of unnatural foam, strong odors, discoloration, cherry pulp, and orange and red settleable solids that are indicative of the BOD, phosphorous, and TSS pollutants that allegedly originate from the fruit processing wastewater. Am. Compl. ¶¶ 68, 69, 83 (ECF No. 16, PageID.1635, 1638). In addition, Plaintiffs' alleged *E. coli* and arsenic detected in protected waters originates from, or is mobilized by, Burnette's wastewater effluent. (*Id* at ¶¶ 71, 74-76, 81, 82, PageID.1636-1637).

Maui provides guidance to determine if a discharge is the "functional equivalent" of a direct discharge into protected waters:

> Where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the [CWA] clearly applies. If the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the [CWA] likely do[es] not apply.

140 S. Ct. at 1476. Applying the *Maui* factors, Burnette's wastewater discharges: 1) travel perhaps as little as a few dozen yards or up to a mile to reach the various WOTUS, 2) over the course of hours and sometimes weeks or longer, 3) start as surface water flow, and 4) maintain their physical/chemical integrity. These allegations are consistent with what *Maui* described as a fact pattern where the CWA "clearly applies." *Id.* On remand, the *Maui* District Court found a functionally equivalent discharge where the pollutants travelled a half and full mile through groundwater that took between 84-400 days to reach WOTUS. *Hawaii Wildlife Fund v. Cty. of Maui*, 550 F. Supp. 3d 871, 885 (D. Haw. 2021).

Plaintiffs' allegations amply support the reasonable conclusion that Burnette discharges pollutants to protected waters. At this stage of the case, on a particularly fact-intensive question, no more is warranted. *See Cottonwood Env't'l. Law Ctr. V Edwards.,* Case No. 2:20-00028-BU-BMM*,* 2021 WL 1102405, at *5 (D. Mon. Mar. 3, 2021) ("The functional equivalent analysis requires a fact-intensive inquiry of the discharge at issue"); *Parris v. 3M Co.*, 595 F. Supp. 3d 1288, 1321 (N.D. Ga. 2022) ("these statements raise factual issues that cannot be resolved without the benefit of discovery and a factual record. The Plaintiff [] alleges that Trion's discharges of PFAS to Raccoon Creek from the sludge disposed of in the Raccoon Creek watershed through hydrologically connected groundwater constitute the 'functional equivalent' of a direct discharge

to these surface waters. For now, nothing more is required to avoid dismissal.") (internal quotations and citations omitted).

C. Plaintiffs Pleaded Burnette's Discharges Reach WOTUS.

The CWA prohibits the "discharge of any pollutant" to "navigable waters." 33 U.S.C §§ 1311(a), 1362(12). "Navigable waters" are defined in the CWA as "waters of the United States." 33 U.S.C. § 1362(7). Tributaries that are relatively permanent, standing or continuously flowing bodies of water that flow into traditionally navigable waters that connect to an interstate water (such as Lake Michigan) are WOTUS. 40 C.F.R 120.2(a)(3). It is also well settled that some wetlands are WOTUS. *See Rapanos*, 547 U.S. at 768; *Sackett,* 143 S. Ct. at 1339. Whether particular wetlands are WOTUS has been extensively litigated. Most recently, *Sackett* reiterated wetlands must pass a two-part adjacency test to be WOTUS:

> First, 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.

143 S. Ct. at 1341 (cleaned up, quoting *Rapanos*, 547 U.S. at 742).

Plaintiffs allege Elk Lake, Spencer Creek, and the Wetlands are all WOTUS, a necessary element for this CWA citizen suit. Am. Compl. ¶¶ 103, 104, 105 (ECF No. 16, PageID.1641); *see also* 33 U.S.C. § 1362(7). Plaintiffs further allege Burnette is violating the CWA because it discharges fruit processing wastewater pollutants from a point source into each of those waters. Am. Compl. ¶¶ 107, 109, 110, 119 (ECF No. 16, PageID.1641-1643). Burnette argues that the Wetlands are not WOTUS, so Plaintiffs' CWA claim fails. Def. Brief (ECF No. 21, PageID.3569-3575). But Plaintiffs alleged sufficient facts to support the reasonable inference that Burnette discharges fruit processing wastewater into multiple WOTUS, which is all that is required to

survive a motion to dismiss. Any one of the WOTUS waterbodies brings Plaintiffs' claim within CWA jurisdiction.

1. ELK LAKE AND SPENCER CREEK ARE WOTUS IMPACTED BY BURNETTE'S POLLUTANTS.

It is uncontested that Elk Lake qualifies as WOTUS. (*Id* at PageID.3571). Elk Lake has CWA jurisdictional protection because it is a traditionally navigable water connected to Lake Michigan. Plaintiffs allege Burnette's wastewater discharges from its sprayer system is the "functional equivalent" of a direct discharge from a point source to Elk Lake. Plaintiffs' Complaint Exhibits demonstrate the pollutants from Burnette's effluent have reached Elk Lake. Affidavits by residents in the area attest to red settleable solids, dark discoloration of the lake, and unusual odors all occurring in the lake at and near the outfall from Spencer Creek. Aff. Gretel ¶¶ 12-16 (ECF No. 16-2, PageID.1672); Aff. Taylor ¶¶ 11, 13, 17 (ECF No.16-3, PageID.1679); Aff. Ogle ¶ 27 (ECF No. 16-4, PageID.1686). The affidavits also state these impacts show up year after year during the summer months and coincide with the timing of Burnette's most prolific spraying season. *Id*. Additionally, the 2021 EGLE Violation Notice issued to Burnette noted a history of complaints the department receives from residents about discoloration, cherry pulp, and foam being found in Elk Lake near Spencer Creek. (ECF No. 16-12, PageID.2011). The Violation Notice noted a complaint about impacts on Elk Lake and Spencer Creek EGLE received just days after Burnette discharged three times the volume limit in its groundwater discharge permit. *Id*.

Spencer Creek is a tributary of Elk Lake, thus a WOTUS, and Burnette does not argue otherwise. 40 C.F.R. 120.2(a)(3). Plaintiffs allege pollutants in Burnette's discharges reach and harm Spencer Creek. Spencer Creek is "a relatively permanent creek water channel" that is a tributary of Elk Lake. Aff. Ogle ¶ 26 (ECF No. 16-4, PageID.1686). Plaintiffs allege, per citizens'

and an EGLE inspector's observations, that Spencer Creek begins at an indistinguishable point in the Wetlands west of Elk Lake Road. Am. Compl. ¶¶ 62, 65, 104 (ECF No. 16, PageID.1633-1634, 1641). Indeed, an EGLE inspector noted, "I went to the creek where it crosses Elk Lake Road at the upstream end of the culvert. The creek appeared to have good flow and the bottom of the creek had a brownish orange color." 2020 Inspection Report ¶ 7 (ECF No. 16-14, PageID.2023). Thus, Spencer Creek is a WOTUS and has CWA jurisdictional protection.

Plaintiffs allege pollutants from Burnette's wastewater effluent reach and harm Spencer Creek. EGLE inspectors and residents have observed cherry pulp, orange and red settleable solids in the creek bed, unnatural foam, and strong odors in Spencer Creek that are indicative of BOD, phosphorous, and TSS in Burnette's discharges. Am. Compl. ¶¶ 68, 69 (ECF No. 16, PageID.1635). These observations have taken place in the summer months that coincide with Burnette's highest-volume discharges. Aff. Gretel ¶ 12 (ECF No. 16-2, PageID.1672); Aff. Taylor ¶ 10 (ECF No. 16-3, PageID.1678); Aff. Ogle ¶ 27 (ECF No. 16-4, PageID.1686). The time of year also corresponds with Burnette's prolific violations of groundwater discharge permit volume limits. 2019 VN (ECF No. 16-10, PageID.1994-1996) 2020 VN (ECF No. 16-11, PageID.2000-2004) 2021 VN (ECF No. 16-12, PageID.2008-2009). EGLE has found high levels of BOD in the Wetlands. Am. Compl. ¶ 83 (ECF No. 16, PageID.1338). A major harm of BOD and TSS pollutants is the reduction of dissolved oxygen ("DO") in receiving waters, damaging aquatic life. DO levels in Spencer Creek are extremely low, indicating BOD and TSS in Burnette effluent directly impacts Spencer Creek. (*Id* at ¶¶ 78-80, PageID.1637). *E. coli* has been detected in both Burnette's wastewater effluent as well as Spencer Creek. (*Id* at ¶¶ 71, 74, 75, PageID.1635-1636). EGLE detected elevated arsenic levels in Spencer Creek, indicating concentrated pollutants in the

wastewater effluent flowing through groundwater into Spencer Creek mobilize arsenic and contaminate Spencer Creek. (*Id* at ¶¶ 81-82, PageID.1637).

Assuming these facts are true - including the *Maui* factors described *supra.,* Sec. IV.B.3 - Plaintiffs sufficiently pleaded facts supporting the reasonable inference that Burnette's discharges reach Elk Lake and Spencer Creek, both WOTUS, within a timeframe, distance, and quality satisfying the *Maui* functional equivalency test and without a NPDES permit.

Burnette's argument that any culvert in a body of water or connecting two separate bodies of water nullifies CWA jurisdiction is patently false. Def. Brief (ECF No. 21, PageID.3571-3574). As was explained in *Rapanos:*

> Thus . . . any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, ***but pass 'through conveyances' in between***; [] *See also Sierra Club v. El Paso Gold Mines, Inc.,* 421 F.3d 1133, 1137, 1141 (10th Cir. 2005) (2.5 miles of tunnel separated the "point source" and "navigable waters").

547 U.S. at 743 (emphasis added). While a culvert may not be WOTUS itself, a culvert is a mechanism that may connect WOTUS to each other or maintain a continuous water body on either side of the culvert. In fact, the *Rapanos* plurality noted culverts have appropriately been deemed point sources themselves by lower courts. *Id.* Thus, Defendant's contention that culverts are a "barrier" severing upstream CWA jurisdiction would have the absurd effect of avoiding CWA Section 301 jurisdiction over pollutants flowing through any culvert in WOTUS, contrary to well-established precedent..

2. THE WETLANDS ARE WOTUS IMPACTED BY BURNETTE'S POLLUTANTS.

Wetlands are WOTUS when they have a continuous surface connection to WOTUS. *Sackett*, 143 S. Ct. at 1341. The Wetlands at issue are the headwaters of Spencer Creek, which forms at an indistinguishable point west of Elk Lake Road. Am. Compl. ¶ 62 (ECF No. 16,

PageID.1633); 2020 Inspection Report ¶ 7 (ECF No. 16-14, PageID.2023). Plaintiffs allege that the Wetlands abutting Spray Fields and Spencer Creek form a single Wetland complex. Am. Compl. ¶ 66 (ECF No. 16, PageID.1634). Plaintiffs allege that Burnette's discharges reach and harm the Wetlands. EGLE inspectors note evidence of Burnette's wastewater flowing into the Wetlands with the same characteristics of BOD, TSS, discoloration, and foam that are seen further downstream in Spencer Creek. (*Id* at ¶ 69, PageID.1635). Testing by EGLE shows unnaturally high levels of BOD in this section of Wetlands congruent with contamination from Defendant's effluent. (*Id* at ¶ 83, PageID.1638). Wastewater, at times quickly and often within days or weeks, reaches the Wetlands after discharge by Burnette sprayers. (*Id* at ¶ 107, PageID.1641); 2021 VN ¶ 8 (ECF No. 16-12, PageID.2011). Assuming these allegations are true, they are sufficient to support the reasonable inference that Burnette discharges pollutants into the Wetlands within a timeframe, distance, and quality satisfying the *Maui* functional equivalency test in violation of the CWA. Plaintiffs sufficiently allege that Burnette discharges pollutants into Wetlands, a WOTUS, without a CWA discharge permit.

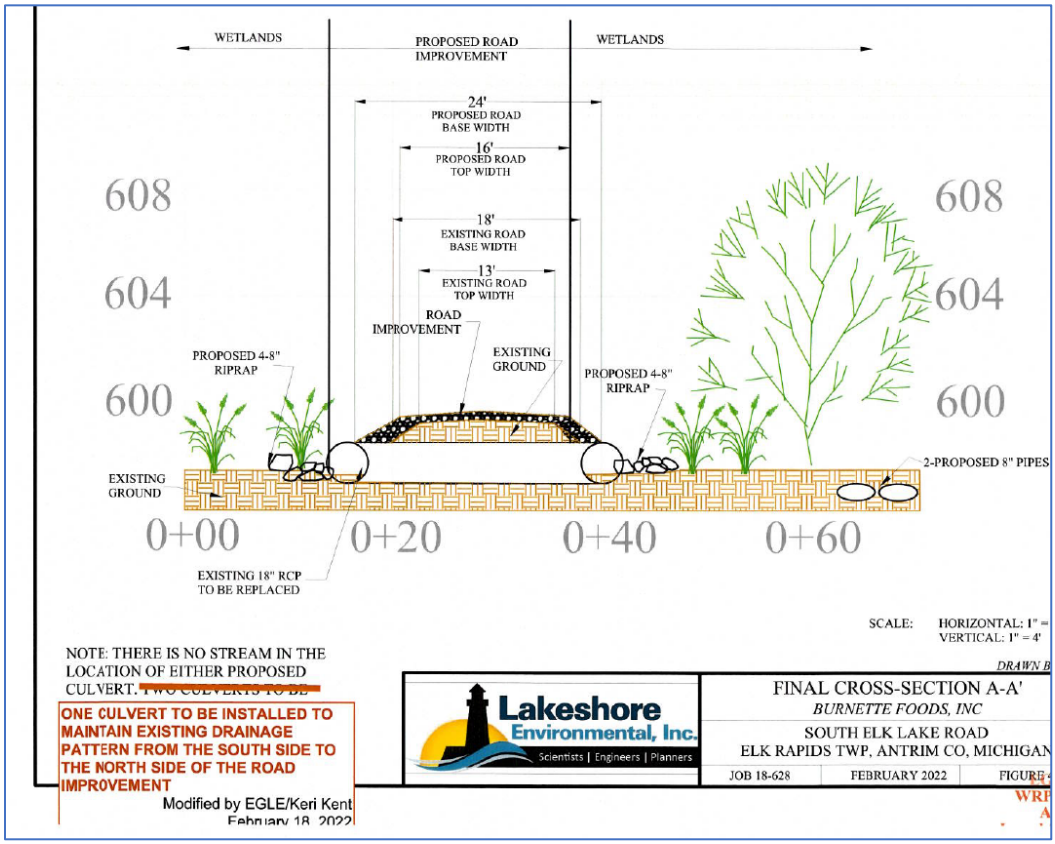
3. THE WETLANDS ON EITHER SIDE OF THE FARM ROAD ARE ALL ONE WETLAND THAT ARE WOTUS.

Burnette raises the issue whether Wetland section 1 and Wetland section 2 are separate wetlands or not. Burnette insists that the culverts under the Farm Road act as a barrier bifurcating the Wetlands into two separate waterbodies. Def. Brief (ECF No. 21, PageID.3550-3551). In support of their argument, Burnette insists that the fact pattern of *Sackett* closely resembles the facts in the case at bar in that the road in *Sackett* had a culvert under it. This contention is false. The wetlands in *Sackett* were separated from "the unnamed tributary" by a road that did NOT have a culvert underneath it. Appellants' opening brief (when the case was in front of the 9th Circuit)

states, "[t]here are no culverts connecting the Sacketts' lot to Kalispell Bay Fen or any other waterway that drains to Priest Lake." Appellants' opening brief at 48, *Sackett v. United States EPA*, Case No. 19-35469, 2019 WL 6918461 (C.A. 9 December 11, 2019). Thus, there was *no surface water connectivity through a culvert* like exists under Burnette's Farm Road. The wetlands in *Sackett* were an isolated wetland with only a subsurface "significant nexus" connectivity to WOTUS and the "significant nexus" test was rejected. *Sackett*, 143 S. Ct. at 1342.

Here, "equalization culverts" run under the Farm Road that maintain surface water connectivity between two sections of the Wetlands as seen in Figure 2 below:

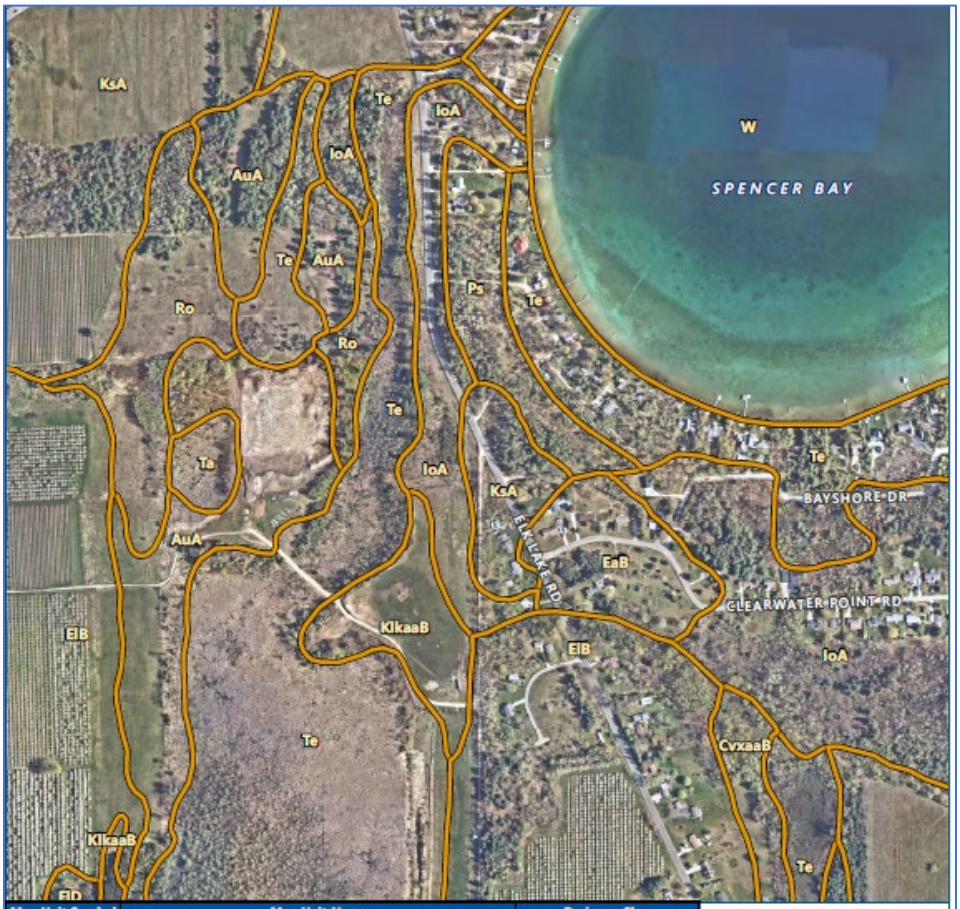
Figure 2



Def. Jurisdictional Report (ECF No. 21-2, PageID.3607).

The purpose of an equalization culvert is to equalize the water levels on either side of the culvert to keep the upstream portion from flooding. The culverts were installed 3.5 inches "below grade" to assure surface water connectivity. EGLE Notice of Authorization for Farm Road (ECF No. 16-13, PageID.2021). An EGLE inspector confirmed this connectivity. "There was flow in the culvert which appeared to be slightly tinted[.]" 2020 Inspection Report ¶ 7 (ECF No. 16-14, PageID.2023). These facts comport with EGLE documents showing EGLE has long considered the wetlands on either side of the culvert as the same wetlands. Am. Compl. ¶ 66 (ECF No. 16, PageID.1634); 1990 Inspection Report (ECF No. 16-8, PageID.1982); 2008 VN (ECF No. 1609, PageID.1989). Even Defendant's own pre-litigation report concludes, "one area of regulated wetland separated by a road, with a surface water connection through a culvert, exists on the property." LEI Report (ECF No. 16-16, PageID.2037). Defendant's Jurisdictional Report also includes a map (Figure 3) that labels both sections of the Wetlands as the "Tawas-Ensley complex ["TE"]".

Figure 3



Map Unit Symbol	Map Unit Name	Drainage Class
AuA	Au Gres-Finch sands, 0 to 4 percent slopes	Somewhat poorly drained
CvxaaB	Charlevoix sandy loam, 0 to 4 percent slopes	Somewhat poorly drained
DeC	Deer Park sand, 2 to 20 percent slopes	Excessively drained
EaB	East Lake gravelly loamy sand, 0 to 6 percent slopes	Somewhat excessively drained
ElB	Emmet-Montcalm complex, lake moderated, 3 to 12 percent slopes	Well drained
ElD	Emmet-Montcalm complex, lake moderated, 12 to 40 percent	Well drained
IoA	Iosco sand, 0 to 4 percent slopes	Somewhat poorly drained
KlkaaB	Kalkaska sand, 0 to 6 percent slopes	Somewhat excessively drained
KsA	Kawkawlin silt loam, 0 to 3 percent slopes	Somewhat poorly drained
Ps	Pickford silty clay loam	Poorly drained
Ro	Roscommon mucky sand	Very poorly drained
Ta	Tawas muck	Very poorly drained
Te	Tawas-Ensley complex	Very poorly drained
W	Water	NA

Def. Jurisdictional Report (ECF No. 21-2, PageID.3592)(though, again, this report should not be considered at this stage of litigation).

Burnette overstates what is required for the Wetlands south of the Farm Road to be WOTUS. The material question is whether there is a surface water connection such that the Wetlands are a single wetland complex, not whether there is a surface water connection *at all times*

through the culverts. Further, these conflicting assessments show a material dispute of fact about the surface water connection through the culvert. It is inappropriate to dismiss claims for lack of subject matter jurisdiction when that determination is intermeshed with the merits of the claim and there is a dispute as to a material fact. *See Gentek,* 491 F3d at 330-331; *Moore,* 458 F.3d at 416; *Rudd,* 2023WL 4936671. To date, Plaintiffs lack access to the culverts. It would be inequitable to dismiss the case, pre-discovery, over a factual dispute where only the Defendant has access to the area in dispute.

However, even if this Court determines that the culvert under the Farm Road creates two separate wetlands, Burnette is still liable for their illegal discharges in violation of the CWA. As discussed *supra*, liability for Section 301 violations can be the result of indirect discharges of pollutants that originate from the sprayers and travel downstream into the northern Wetlands, Spencer Creek, and Elk Lake. Simply calling the Wetlands two separate wetlands does not obviate the liability for the "functionally equivalent" discharge into those downstream WOTUS. Burnette is searching for a "loophole" to exploit that would allow them to keep polluting our nation's precious water resources in contradiction to the intent of the CWA.

Alternatively, the culvert under the Farm Road itself is a point source channeling the pollutants from the Spray Fields into the northern Wetlands, Spencer Creek, and Elk Lake. It is long standing precedent that culverts are point sources per the CWA.

> In fact, many courts have held that such upstream, intermittently flowing channels themselves constitute 'point sources' under the Act. The definition of 'point source' includes '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.'

Rapanos at 743 (quoting 33 U.S.C. § 1362(14)). One way or another, the culverts under the Farm Road (either as a mechanism maintaining surface water connectivity, as a point source itself, or

merely as a conduit aiding an indirect discharge) are transporting pollutants from Burnette's illegal discharges to WOTUS.

For decades Burnette has been discharging millions of gallons of wastewater onto the Spray Fields where it pools and migrates as surface overflow, subsurface lateral flow, and groundwater to the Wetlands, Spencer Creek, and Elk Lake. It is indisputable that subject matter jurisdiction exists for Elk Lake and even Spencer Creek. Plaintiffs have alleged ample facts that show the pollutants are being discharged to those WOTUS via the functional equivalent of a direct discharge from their sprayers. Those allegations alone suffice to defeat Burnette's Motion to Dismiss. Burnette is trying to bob and weave its way out of liability for polluting these WOTUS by claiming this Court does not have subject matter jurisdiction over the Wetlands. However, working upstream even closer to the Spray Fields, Plaintiffs have alleged facts that support the Wetlands, on both sides of the Farm Road, qualify as WOTUS. Alternatively, the culverts are point sources themselves and deposit the pollutants even closer to Spencer Creek and Elk Lake than the sprayers and the *Maui* test for showing the functional equivalency of a direct discharge gets easier to apply the closer the WOTUS are to the initial point source. Regardless of the determination of which portions of the Wetlands are WOTUS, Plaintiffs have stated claims sufficient for any court to reasonably infer that Burnette is liable for violations of the CWA.

V. CONCLUSION

For the reasons stated above, the Court should deny Burnette's motion to dismiss.

Respectfully Submitted,

Date: November 3, 2023

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CERTIFICATE OF SERVICE

I, Tracy Jane Andrews, hereby certify that on the 3rd day of November 2023, I electronically filed the foregoing document with the ECF system which will send a notification of such to all parties of record.

By: /s/ Tracy Jane Andrews

Tracy Jane Andrews (P67467)

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.2(b)(i)

This Brief complies with the word count limit of L. Ci. R. 7.2(b)(i). This brief was written using Microsoft Word and has a word count of 10,730 words.

Respectfully submitted,

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