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 RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Oral Argument Requested)

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I. INTRODUCTION

Because Plaintiffs have moved for summary judgment on claims upon which they bear the burden of proof, they must satisfy a "higher" summary judgment threshold by showing that the "the evidence is so powerful that no reasonable jury would be free to disbelieve it." *Trs. of Iron Workers Defined Contribution Pension Funds v. Next Century Rebar, LLC*, 115 F.4th 480, 489 (6th Cir. 2024). Yet they admit that their entire case is based on inference. (ECF No. 89, PageID.4266). They similarly admit that their evidence establishes at most correlation, not causation. (ECF No. 105, PageID.6646). Besides inference and allegedly correlative evidence, Plaintiffs cherry-pick and mischaracterize the evidence and ignore the legal infirmities in their claims. Because Plaintiffs cannot meet their high bar for summary judgment, this Court must deny their motion.

II. BACKGROUND

Burnette extensively briefed the facts in its Brief in Support of Motion for Summary Judgment. (ECF No. 96, PageID.4356-4371). Burnette relies on that briefing and does not duplicate it here. Burnette responds to specific factual issues below.

III. LAW AND ARGUMENT

A. APPLICABLE LAW.

Plaintiffs cite the wrong standard for their summary-judgment motion. The Sixth Circuit recently reiterated that "[t]he standard that a movant must meet to obtain summary judgment **depends on who will bear the burden of proof at trial**." *Next Century Rebar*, 115 F.4th at 488 (emphasis added). "This is because at trial a plaintiff typically bears the burden to prove each element, whereas a defendant need only disprove one element for the plaintiff's claim to fail." *Id.* Accordingly, a plaintiff's "initial summary judgment burden is **higher** in that it must show that the

record **contains evidence satisfying the burden of persuasion** and that **the evidence is so powerful that no reasonable jury would be free to disbelieve it**." *Id*. (emphasis added).

B. PLAINTIFFS HAVE NOT ESTABLISHED A VIOLATION OF THE CLEAN WATER ACT ("CWA").

For Count I of their Amended Complaint, Plaintiffs bear the burden of establishing a violation of the CWA. The method of establishing this violation depends on how, where, and when pollutants are allegedly discharged into "waters of the United States" ("WOTUS"). For any alleged surface water discharge into WOTUS, Plaintiffs must establish that there has been an unpermitted discharge of a pollutant from a "point source." *See, e.g., Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1008 (11th Cir. 2004). For any alleged indirect discharge into WOTUS through groundwater, Plaintiffs must establish the "functional equivalent" of a direct discharge through application of the *Maui* factors. *See County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165 (2020). Moreover, to assert a citizen suit, Plaintiffs must establish a "continuing violation." *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 59 (1987). Plaintiffs cannot meet their high summary judgment burden on any of these points.

1. There Is No "Point Source" Discharge of Surface Water Into the Wetlands.

For surface water discharges, the CWA requires a point source. Plaintiffs cannot meet their burden to establish that there was a "point source" discharge of pollutants into the Wetlands.

(a) Return flows from irrigated agriculture are excluded from the definition of a point source.

Plaintiffs assert that pollutants in the water applied on the Spray Fields enters the Wetlands through surface runoff. (ECF No. 89, PageID.4259-4260). However, runoff (or "return flows") from irrigated agriculture is categorically exempt from the CWA's definition of point source. Burnette previously briefed this issue and incorporates that analysis here. (ECF No. 96,

PageID4372-4376). In short, runoff from irrigation conducted for agricultural purposes is not considered to have originated from a "point source." *See* 33 U.S.C. § 1362(14) (stating that a point source "does not include agricultural stormwater discharges and return flows from irrigated agriculture").

Because application of Burnette's nutrient-rich wastewater fertilizes crops in the Spray Fields, the spray application is necessarily an "activity related to crop production." *Pacific Coast Fed. of Fisherman's Assoc. v. Glaser*, 945 F.3d 1076, 1084-85 (9th Cir. 2019). Thus, any runoff from the Spray Fields is exempt from the CWA's definition of "point source." Accordingly, Plaintiffs' CWA claim fails as a matter of law and Plaintiffs' motion cannot be granted.

(b) Runoff from the Spray Fields does not enter the Wetlands through a "point source."

Even if 33 U.S.C. § 1362(14) does not categorically exclude surface water runoff from the Spray Fields, the CWA still does not apply because any runoff is not discharged into the Wetlands through a "point source." The CWA defines a "point source" as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* Although Plaintiffs assert that each of the spray heads is a "point source," (ECF No. 89, PageID.4269), they ignore that the spray heads discharge **onto the grounds of the Spray Fields—not into the Wetlands**, (*see* ECF No. 89, PageID.4258 (providing a map of "wetted acres")). The mere presence of a point source at some point in the discharge process is not sufficient to trigger the CWA; rather, as Plaintiffs' own precedent establishes, the point source must provide a direct link to WOTUS. *See Flint Riverkeeper, Inc. v. S. Mills, Inc.*, 276 F. Supp.3d 1359, 1367–68 (M.D. Ga. 2017) ("A point source "need not be the original source of [a] pollutant; it need only convey the pollutant to navigable

waters.") (emphasis added); *see also Maui*, 590 U.S. at 167 ("a permit is required when there is a discharge from a point source directly into navigable waters"). Yet Plaintiffs do not identify any pipe, channel or other discrete conveyance that connects the Spray Fields and the Wetlands. Even if Burnette's spray heads are point sources, later surface water runoff is not unless it is conveyed directly into WOTUS by a second point source.

Rather than identify a point source linking the Spray Fields and the Wetlands, Plaintiffs assert that "Burnette's discharges also enter the wetlands as a surface water addition on occasion when ponded wastewater in the retention basin overtops the main berm between the basin and wetlands." (ECF No. 89, PageID.4284). Even if Plaintiffs could establish that water has *ever* overtopped the berm (they cannot), flow over the berm is not through a point source. A berm is not a point source. *See Cordiano v. Metacon Gun Club*, 575 F.3d 199, 224-25 (2d Cir. 2009) (holding that a berm is not a point source because it is not a "discernible, confined and discrete conveyance"). Because the berm could never be characterized as a point source under 33 U.S.C. § 1362(14), any sheet flow does not fall within the CWA's scope.

Moreover, Plaintiffs' assertion that water flows over the berm and into the Wetlands lacks any evidentiary support. Plaintiffs have produced no photos, videos or even deposition testimony from anyone who has ever observed water flowing over the main berm. Plaintiffs' expert Dr. Anthony Kendall admitted that he had no data to support the conclusion that water overtops the berm and enters the Wetlands. Kendall Dep. 81, JX 11. The best that Plaintiffs can do is cite a handful of unsworn violation notices indicating that water may have overtopped the secondary berm (which Plaintiffs refer to as the "retention basin,") and not the main berm separating the Spray Fields from the Wetlands. For example, in EGLE's 2019 violation notice, inspector Dave Walters states, "[a]t the irrigation site I observed runoff from the south center irrigation site

entering the wetland area to the north of the irrigation site." JX 49 at 1. Plaintiffs twist this inadmissible statement[1] to imply that Mr. Walters was referencing the Wetlands. Not so. Mr. Walters was referencing the isolated wetland area lying between what is now the secondary berm and the main berm, which is immediately north of the Spray Fields (but which nevertheless remains separated from the Wetlands at issue by the main berm). (*See* ECF No. 89, PageID.4260; *see also* **Exhibit H**).

Similarly, EGLE's 2020 violation notice states that staff "observed ponded effluent and saturated soils along the northern edge of spray field 36 leading up to the wetland area that is located north of field 36." JX 50 at 1 (emphasis added). However, annotated photographs of the 2020 and 2021 inspections conducted by Mr. Walters clearly show that his references to the "wetland area" are indeed the area of ponding now set off by the secondary berm/retention basin. The notes on these photographs depict the area past the secondary berm and call it the "wetland area," the "ponded area," and the "outer wetland." *See* **Exhibit A**. Plaintiffs' mischaracterization of these reports further highlights the danger of relying on inadmissible evidence that has not been verified through any testimony or affidavits.

Plaintiffs also attempt to demonstrate "occasional" overtopping of the main berm based on the testimony of their expert, Dr. Kendall. Burnette has already fully briefed why Dr. Kendall's analysis on this issue is deficient. (ECF No. 86, PageID.4105-4107). In short, Dr. Kendall

[1] To the extent Plaintiffs offer statements in violation notices to establish that water has flowed over the top of the berm (or any other fact), the statements are hearsay and therefore inadmissible. *See* FRE 801(c); 802. The Court cannot consider hearsay in deciding whether Plaintiffs are entitled to summary judgment. *See Washington v. Roosen, Varchetti & Oliver*, 894 F. Supp.2d 1015, 1030 (W.D. Mich. 2012) ("Before a court may consider evidence in a motion for summary judgment, the evidence must be admissible at trial."). Statements regarding the berm in these notices are patently untrustworthy because they have not been subject to cross-examination or any scrutiny that would clarify what exactly the person saw.

concluded that the berm could be overtopped based on his assumption that the berm height was 0.4 feet—despite his admission that he observed that the primary berm around the Spray Fields was least "waist high" or "on the order of three-ish feet." Kendall Dep. 68, JX 11. In other words, Dr. Kendall's calculation that the berm can be overtopped is premised on a berm height that is approximately 13% of the height that Dr. Kendall observed in the field. Obviously, such calculations are deficient—especially where Plaintiffs lack any direct evidence to establish that water has ever overtopped the berm.

Ultimately Plaintiffs' assertion that ponded wastewater "occasionally flows into the wetlands via surface overflow" is unsupported by the evidence and amounts to mere conjecture.

2. Plaintiffs Have Failed to Meet Their Burden to Establish the Functional Equivalent of Direct Discharge Under *Maui*.

Plaintiffs also assert that Burnette is discharging pollutants into the Wetlands through groundwater discharges that are the "functional equivalent" of a direct discharge. (ECF No. 89, PageID.4280 (citing *Maui*, 590 U.S. 165)). As Plaintiffs acknowledge, *Maui* describes **seven** factors that inform whether a groundwater discharge is the functional equivalent of a direct 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.

Maui, 590 U.S. at 184-85.

Ignoring *Maui*'s clear directive to apply *at least* the seven-factor test provided, Plaintiffs try to establish the functional equivalent of a direct discharge based on only two *Maui* factors—time and distance—which Plaintiffs claim are solely determinative in this case. (ECF

No. 89, PageID.4280).[2] This position is meritless. If the Supreme Court had intended to make *Maui* determinations based solely on time and distance it would not have established the additional five *Maui* factors. Moreover, the seven *Maui* factors are collectively intended to allow the court to determine "how similar to (or different from) the particular discharge is to a direct discharge" (which the *Maui* court indicated was the purpose of the exercise). *Maui*, 590 U.S. at 184. Accordingly, the *Maui* factors are calculated to analyze whether pollutants reach WOTUS without having been reduced in volume or concentration by dilution, chemical change, or otherwise.

Plaintiffs cannot meet their burden to establish the functional equivalent of a direct discharge without producing sufficient evidence for the Court to analyze ***all*** relevant *Maui* factors. In fact, the Tenth Circuit recently reversed a trial court's decision that premised its *Maui* analysis solely on time and distance.

> [W]e hold that it was legal error for the district court to conclude that the unlined Settling Ponds were the functional equivalent of a direct discharge, primarily on the first two factors of time and distance . . . [T]he court should have made additional findings on the additional *Maui* factors, including how much the pollutant is diluted or chemically changed as it travels and the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source.

Stone v. High Mountain, 89 F.4th 1246, 1259-60 (10th Cir. 2024) (footnote omitted and emphasis added). Plaintiffs bear the burden to establish all relevant *Maui* factors—they cannot pick and choose the factors they like best. Courts must "hold[] [p]laintiffs accountable for failing to put on evidence of all the geology that would establish the functional equivalent of a direct discharge[.]" *Id*. at 1260. If Plaintiffs fail to demonstrate, among other things, "how much the pollutant is diluted

[2] Plaintiffs claim that "[t]ime and distance are the most important factors in most cases." (ECF No. 89, PageID.4280). Plaintiffs omit the second half of this quote from *Maui*, which provides in full that "[t]ime and distance will be the most important factors in most cases, but not necessarily every case." *Maui*, 590 U.S. at 185. The Court never stated that time and distance could ever be the only factors considered.

or chemically changed as it travels and the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source," they cannot establish the functional equivalent of a point source discharge. *Id*. at 1259. Allowing a plaintiff to carry its burden by referencing only two factors and ignoring the rest shifts the burden to the defendant, which is legal error. *Id*. at 1261.

Here, Plaintiffs declined to produce evidence on most *Maui* factors, stating that "[t]he remaining *Maui* factors do not sufficiently impact the functional equivalency analysis to overcome the overwhelming implications of proximity and short travel times." (ECF No. 89, PageID.4283). This statement is clearly erroneous. Plaintiffs have not met their burden to produce the evidence necessary to analyze any of the seven *Maui* factors, including time and distance.[3] (ECF No. 96, PageID4379-4380).

There are obvious flaws in Plaintiffs' abbreviated *Maui* analysis. For example, Dr. Kendall asserts that "essentially all" of Burnette's wastewater "ends up in the wetland." Kendall Dep. 198:16-23, JX 11. Yet, Plaintiffs' own statements establish that there is very little, if any, connection between the groundwater in the Spray Fields and the down gradient water level. Although Plaintiffs claim that Burnette's discharges are "exponentially higher" during peak cherry season in July and August (ECF No. 89, PageID.4254, Pl Br at 2), they also acknowledge that Spencer Creek **typically does not flow in July and August**.[4] (ECF No. 89, PageID.4271,

[3] Notably, Plaintiffs calculated the transit time and distance to the Wetlands adjoining the Spray Fields. Because the Wetlands are not actually WOTUS (as discussed herein) all calculations of transit time and distance are necessarily inaccurate.

[4] ESLA and TWC member Sam Ogle testified that there are "times of the year where there is no flow," which is "[t]ypically in the later, dryer months of the summer" which Ms. Ogle admitted includes July and August. Ogle Dep. 127:9-24, JX 5. Despite their assertion that 2024 experienced drought conditions, photographs taken by Plaintiffs depict a lack of flow even during prior "peak" processing seasons in July and August of 2022 and 2023. JX 65, 1-5,7-8 (depicting various angles of Spencer Creek on July 19, 2022; July 25, 2022; August 1, 2022; and August 10,

4273). This disconnect would become apparent under a complete *Maui* analysis. Therefore, fearing an unfavorable answer, Plaintiffs ignore most of the *Maui* test and instead baldly assert that most of it is irrelevant.

Plaintiffs' assertion that it does not need to address the remainder of the *Maui* factors violates *Maui* and *Stone*. Ultimately, Plaintiffs failure to meet their burden[5] to produce evidence to allow the Court to analyze all seven *Maui* factors is fatal to any claim that groundwater discharges from the Spray Fields are the functional equivalent of a direct discharge under the CWA. By extension, an analysis limited to two-sevenths of the relevant test cannot the high summary-judgment bar described in *Next Century Rebar*. Accordingly, Plaintiffs' motion must be denied.

3. Only Discharges From a Point Source Directly Into WOTUS, or the Functional Equivalent Thereof, are Regulated Under the CWA.

Pursuant to 33 U.S.C. § 1362(12)(A), the CWA requires a permit for "discharges of pollutants" to navigable waters from a point source. According to the Supreme Court, the discharge must go *directly* from the point source to the navigable water; *Maui* clearly instructs that a permit is required only when there is either: (1) a discharge "from a point source directly into navigable waters"; or (2) the functional equivalent of a "direct discharge." 590 U.S. at 167, 184 ("[A]n addition falls within the statutory requirement that it be from any point source when a

2023).

[5] Plaintiffs fail to recognize that they bear the burden of establishing that groundwater discharges are the functional equivalent of a direct discharge, repeatedly questioning why Burnette's experts have not developed their own calculations. (*See* ECF No. 89, PageID.4280-4284). The answer is simple: Burnette has no obligation to do so. Plaintiffs are merely engaged in improper burden-shifting.

point source **directly deposits** pollutants into navigable waters, or when the discharge reaches t**he same result through roughly similar means**. (emphasis added)).

Notwithstanding the Supreme Court's unambiguous language in *Maui*, Plaintiffs assert that a permit could be required for the "addition of" pollutants without any consideration as to whether those pollutants were conveyed from a point source directly into navigable waters. This argument derives from a cherry-picked excerpt from an opinion in *Rapanos*. *Rapanos v. United States*, 547 U.S. 715 (2006). Specifically, citing to *Rapanos*, Plaintiffs assert that "'[t]he 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.'" (ECF No. 89, PageId.4277) (*citing Rapanos* 547 U.S. at 743). Again, citing the same text from *Rapanos*, the Plaintiffs also assert that "[e]ven if Spencer Creek and the wetlands were not WOTUS (which Plaintiffs firmly dispute), Burnette's wastewater flows through them to Elk Lake, so Burnette's unpermitted discharges remain subject to the CWA…." (ECF No. 89, PageId.4270) (fn 66) (*citing Rapanos* 547 U.S. at 743). [6]

Plaintiffs' reliance on the above excerpt from *Rapanos* is misplaced for several reasons. First, both of the issues at hand (including the requirement that pollutants be directly deposited into WOTUS and when a "point source" conveyance must be established) were squarely decided in *Maui* (as discussed above). Meanwhile, the excerpt on which Plaintiffs rely has no binding

[6] Plaintiffs attempt to assert CWA regulation based solely on allegations that a pollutant might eventually make its way to WOTUS is consistent with the "fairly traceable" test that *Maui* specifically rejected. *See Maui* at 174 ("Our view is that Congress did not intend the point source-permitting requirement to provide EPA with such broad authority as the Ninth Circuit's narrow focus on traceability would allow.")

effect[7] because it was borrowed from a portion of an opinion that was never subsequently adopted and which was specifically called out as dicta[8] by the *Rapanos* plurality.

Besides being largely irrelevant based on subsequent and superseding caselaw, this argument also fails on its own terms. Plaintiffs omitted the last clause of the last sentence in their repeated *Rapanos* reference. The full quotation reads as follows:

> Thus, from the time of the 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.**

Rapanos at 743 (emphasis added). Plaintiffs truncated that quote without providing ellipses, omitting necessary context. Repeated in its entirety, the excerpt makes it obvious that a direct discharge is required, although conveyances can serve as an additional, intervening point source before the final direct discharge. To the extent that the referenced is at all ambiguous, *Rapanos* further noted that "the Act makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to navigable waters." *Id.*; *see also Kentucky Waterways All. v. Kentucky Utilities Co.*, 905 F.3d 925, 934 (6th Cir. 2018) ("For a point source to discharge into navigable waters, it must dump directly into those navigable waters—the phrase "into" leaves no room for intermediary mediums to carry the pollutants."), *abrogated on other grounds by Maui*.

Plaintiffs' assertion that the mere "addition of" pollutants is sufficient has no merit. Plaintiffs must establish either a direct, point source discharge into the Wetlands, or the functional

[7] In *Sackett v. EPA*, 598 U.S. 651(2023), the Supreme Court held that *Rapanos* was not controlling (*Id*. at 728 fn. 3); however, it did adopt a portion of plurality decision incorporating the test for relative permanent bodies of water. *Id*. 671.

[8] The first sentence in the paragraph containing the excerpt referenced by Plaintiffs clearly states that "we do not decide this issue." *Rapanos*, 547 U.S. at 743.

equivalent of a direct discharge into the Wetlands. They have not established either. Thus, even assuming that the Wetlands are actually WOTUS (which is not the case) there is no viable CWA claim upon which the Court could grant summary judgment in Plaintiff's favor.

C. THE WETLANDS ARE NOT WOTUS.

To obtain summary judgment on the WOTUS issue, Plaintiffs would need to establish that the evidence compels the conclusions (1) that Spencer Creek is a relatively permanent continuously flowing body of water; and (2) that the Wetlands have a continuous surface connection with Spencer Creek. Plaintiffs can do neither.

1. Spencer Creek is Not a Relatively Permanent Body of Water.

Plaintiffs assert that Spencer Creek is a relative permanent body of water. (ECF No. 89, PageID.4270-4273). That position is inconsistent with both the facts established during discovery and *Sackett v. EPA*, 598 U.S. 651 (2023). As discussed in Burnette's Brief in Support of Motion for Summary Judgment, (ECF No. 96, PageID.4392-4395), *Sackett* adopted a test first established in *Rapanos*, which concluded that the CWA applies to "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Sackett*, 598 U.S. at 678 (citing *Rapanos* 547 U.S. at 739). *Rapanos*, as adopted by *Sackett*, also held that relatively permanent water bodies do not "include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id*. at 461 (emphasis added). As a result, intermittent streams do not qualify as relatively permanent bodies of water that can be considered WOTUS.

There is no material question of fact in this case. It is undisputed that Spencer Creek is at most an intermittent stream. Plaintiffs' own expert witness, Stuart Kogge, classified Spencer Creek

as intermittent in his Expert Report. Kogge Report 12, JX 20. He later testified that Spencer Creek is an intermittent stream. Kogge Dep. 186, 187:10-18. 190:16-18 ("[**T]his is an intermittent stream**."), JX 10 (emphasis added). Burnette's expert reached the same conclusion. *See* MacGregor Report 7, JX 26. The conclusion that flow in Spencer Creek is intermittent at best is also consistent with the testimony of Plaintiffs' witnesses, Dennis Gretel and Brian Taylor, who have both lived near Spencer Creek for decades. Both witnesses acknowledged that the flow in Spencer Creek is directly related to rain or snow melt and that there are routinely extended dry spells and breaks in flow. *See* Taylor Dep. 37:19-38:6 (stating that "If we get heavy rainfall, water will flow through the creek. If we don't it stays dry."), JX 9; *Id.* at 51:20-22 (explaining that "in general the creek is dry"); Gretel Dep. at 52:8-16 (characterizing the flow from Spencer Creek as "intermittent"), JX 8; *Id.* at 20:10-24 (flow is dependent on rain); *Id.* at 22:16-24 (flow from spring into summertime "depends on how much snow we had").

In sum, there is no material issue of fact that flow in Spencer Creek is intermittent. But at the very least, all of this evidence forecloses summary judgment in Plaintiffs' favor on this issue. Accordingly, the Court must deny Plaintiffs' motion.

(a) Spencer Creek cannot be deemed to be relatively permanent or continuously flowing based on evidence of seasonally intermittent flow.

Plaintiffs argue that relatively permanent body of water can still satisfy *Sackett* based on "seasonal" flow. (ECF No. 89, PageID.4272). Plaintiffs' argument is entirely premised upon a footnote in *Rapanos*, which provides as follows:

> By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day, continuously flowing stream postulated by Justice

> Stevens' dissent (hereinafter the dissent), *post*, at 15. Common sense and common usage distinguish between a wash and seasonal river.

Rapanos, 547 U.S. at 732, fn 5.

This footnote does not create a blanket exception that sweeps in *all* geographic features with seasonal flow. On the contrary, it provides only that two specific types of seasonal waterbodies are not necessarily excluded. Those two categories are (1) "streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought" and (2) "seasonal rivers, which contain continuous flow during some months of the year but not others." Plaintiffs cannot fit Spencer Creek into either of these categories.

Although Plaintiffs assert that the "relatively permanent" standard does not exclude "streams that dry up under extraordinary circumstances, such as drought," (ECF No. 89, PageID.4272), they do not assert that Spencer Creek dries up only under extraordinary circumstances. Clearly, they cannot. It is undisputed that Spencer Creek is weather dependent and dries up **almost every summer and fall season**. *See* Taylor Dep. 37-38, 51, JX 9; Gretel Dep. 20, 22, 52, (JX 8) discussed *supra*. That testimony is corroborated by photos from multiple dates which show that Spencer Creek is frequently dry throughout the summer and fall. *See* JX 65. Any event that occurs regularly (such as the absence of surface water or flow in Spencer Creek) cannot be said to occur only under extraordinary circumstances. *See United States v. Sharfi*, 2024 WL 4483354, at *12 (S.D. Fla. Sept. 21, 2024)[9] (discussing *Rapanos* footnote 5 and acknowledging that "[t]he footnote describes the *extraordinary* circumstances of a drought as perhaps causing a stream, river, or lake to 'dry up.'"). Clearly, Spencer Creek does not fit within the first category of

[9] All unpublished opinions cited herein are attached in **Exhibit I**.

seasonal waterbodies addressed by the *Rapanos* footnote, because it normally dries up for long stretches each summer and fall.

Plaintiffs also assert that the "relatively permanent" standard does not exclude "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months," (ECF No. 89, PageID.4272), but fail to establish or even assert that Spencer Creek is a "seasonal river." The limitation to "seasonal rivers" is specific and intentional. The *Rapanos* plurality routinely references a broad range of water bodies (*e.g.*, "lakes, rivers and streams," 547 U.S. at 766) when describing waterbodies that might be deemed relatively permanent. However, the reference to "seasonal rivers" in footnote 5 is specific and does not sweep in "seasonal lakes" or "seasonal streams." The clear implication is that the exception for "seasonal rivers" is limited to bodies of water that can be demonstrated to be an actual river. *See Sharfi*, 2024 WL 4483354 at *15 (noting that "this footnote regarding seasonality, by its own terms, applies to rivers and not ditches"). Rivers are larger and wider bodies of water when compared to a creek (such as Spencer *Creek*). Even when flowing at its highest rates after torrential rainfall, no one could reasonably conclude that Spencer Creek is a river, seasonal or otherwise. Accordingly, Spencer Creek does not fit within the second category of seasonal waterbodies addressed by the *Rapanos* plurality footnote.

Because Plaintiffs cannot establish that Spencer Creek fits within one of the two categories of seasonal streams that are "not necessarily excluded" from the definition of relatively permanent waterbodies, they cannot assert that Spencer Creek is "relatively permanent" based on seasonal flow. Moreover, even if one of the above classifications applied to Spencer Creek, the mere existence of seasonal flow is not sufficient to establish that a stream is "relatively permanent." That

argument was considered and dismissed in *United States v. Sharfi*, No. 21-CV-14205-MARRA/MAYNARD, 2024 BL 333871, (S.D. Fla. Sept. 21, 2024):

> Here, the undisputed material evidence establishes that the area of ditches in this case closest to Defendants' Site are, at most, "intermittent" or "ephemeral" ditches or channels with seasonal flow. This does not meet the Sackett standard of "relatively permanent, standing or continuously flowing body of water" to qualify as WOTUS. See *Sackett*, 598 U.S. at 671; *Rapanos*, 547 U.S. at 739.

Id. at *12 (emphasis added).

Seasonal flow in a stream must be continuous for that body to be deemed relatively permanent—intermittent seasonal flow is not sufficient. In *Lewis v. United States*, 764 F. Supp.3d 362 (M.D. La. Jan. 29, 2025), the Court granted partial summary judgment against the Army Corps of Engineers, holding that only relatively permanent water bodies with a continuous flow could be relatively permanent:

> [T]he law is clear. For a tributary to be a water of the United States, it must be "relatively permanent, standing or continuously flowing[.]" 33 CFR 328.3. The Corps' attempted interpretation, that an intermittent flow—even one that is both seasonal and intermittent—suffices for Clean Water Act jurisdiction, is not consistent with the statute.

Id. at 379. The "continuous flow" requirement has clearly been the law of the land, particularly after *Sackett* overturned the significant nexus test, as noted by *Lewis*:

> [T]he Court is unaware of any court since *Sackett* that has held that a tributary with only an intermittent flow that is not continuous for at least some months of the year may be a relatively permanent water.

Id. (collecting cases) (citations omitted).

Finally, to establish that any waterbody is relatively permanent based on seasonal flow requires "continuous flow at least seasonally," which the Army Corps of Engineers determined (by applying pre-*Sackett* law) is "typically three months." *See* U.S. EPA & U.S. Army Corps of Engineers, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision

in *Rapanos v. United States* & *Carabell v. United States*" at 6-7 (Dec. 02, 2008) ("*Rapanos Guidance*")), **Exhibit B**. Thus, Plaintiffs bear the burden of proving that Spencer Creek has continuous and uninterrupted flow for an entire season (typically three months) to establish it is relatively permanent. Moreover, to show that flow is actually "seasonal" (as opposed to ephemeral) they would have to show that there is uninterrupted flow in Spencer Creek across the same season every year.

Plaintiffs cannot meet their burden to establish that Spencer Creek has such continuous seasonal flow because their own expert, Stuart Kogge, has already concluded otherwise. From the outset, Mr. Kogge has consistently concluded that Spencer Creek is "intermittent." Mr. Kogge first opined that Spencer Creek was intermittent in his Expert Report. Kogge Report 12, 14 ("Spencer Creek is a very small intermittent stream with a small sub watershed to feed it."), JX 20. During his deposition, Mr. Kogge confirmed this conclusion. *See* Kogge Dep.186:4-16; 187:12-15; 190:17-18; 197:19-23, JX 10. Mr. Kogge later changed his theory in his February, 14, 2025 Expert Rebuttal Report, stating that "an intermittent stream may be characterized as seasonal where there are periods of continuous flow at certain times of year, every year." Kogge Rebuttal Report at 4, JX 21. However, Mr. Kogge ultimately concluded that Spencer Creek was "seasonally intermittent." *Id*. at 5. As noted above, "seasonally intermittent" flow is not sufficient to establish that Spencer Creek is relatively permanent. *See e.g.*, *Lewis*, 764 F. Supp.3d at 379 (holding that "an intermittent flow—even one that is both seasonal and intermittent—suffices for Clean Water Act jurisdiction, is not consistent with the statute."). Because neither "intermittent" nor "seasonally intermittent" flow is continuous, neither of Mr. Kogge's characterizations of flow in Spencer would allow the Court to conclude that it is relatively permanent.

(b) Plaintiffs cannot establish continuous flow for any material period of time.

Undeterred by the conclusions of their own expert, Plaintiffs nevertheless maintain their assertion of continuous flow, stating that they have "[i]rrefutable evidence gathered during ESLA site visits confirm Spencer Creek is permanent and flowing throughout the year except in the driest months." (ECF No. 89, PageID.4271). Plaintiffs further assert that Spencer Creek "typically maintains continuous flow 10 months annually and year-round flow some years." (ECF No. 89, PageID.4273). These assertions are baseless. The uncontroverted testimony of Plaintiffs' own witness, Dennis Gretel, who resides on Spencer Creek, establishes that Spencer Creek is not flowing for 10 months. Mr. Gretel testified that water had ceased flowing out of Spencer Creek in either May or June of last summer and had not resumed at the time of his deposition, which was on November 5, 2024. Gretel Dep. 24:2-10, JX 8. In other words, Mr. Gretel's testimony establishes that there was no flow in Spencer Creek whatsoever for at least five months, and possibly longer, in 2024. As a result, Plaintiffs cannot even establish that Spencer Creek has intermittent flow for ten months annually, much less the "continuous flow 10 months annually" that they allege.

Moreover, Plaintiffs cannot meet their burden to prove that Spencer Creek has continuous seasonal flow during any season. Both Mr. Gretel and Mr. Taylor, who have lived on Spencer Creek for decades, testified that flow in Spencer Creek is dependent on precipitation or snow melt and often ceased at different times throughout the year. *See* Taylor Dep. 37-38, 51, JX 9; Gretel Dep. 20, 22, 52, JX 8, discussed *supra.* The fact that Plaintiffs witnesses have testified that flow in Spencer Creek is dependent upon precipitation and is often dry establishes that there is not continuous flow.

Even if the evidence did not show a lack of continuous flow (which it does), Plaintiffs have not met their burden to establish continuous or uninterrupted flow in Spencer Creek for any material period of time (not for an entire year, month, or week) because they have not bothered to collect the data. To demonstrate that flow is continuous, it is necessary to take continuous measurements. If water is actually flowing, Plaintiffs could have easily collected continuous measurements by placing a flow meter[10] in Spencer Creek. They did not.

In the absence of verifiable data (or even expert opinions) showing the lack of uninterrupted flow that is necessary establish continuous flow in Spencer Creek, Plaintiffs attempt to rely on anecdotal evidence collected by an intern to support their conclusion that there is continuous flow in Spencer Creek. Plaintiffs first assert that "[p]hotographs and video of different stretches of the creek through the years clearly depict continuous water flowing." (ECF No. 89, PageID.4271). Next Plaintiffs assert that "[f]ield observations and records during ESLA sampling further support the continual presence of water through the creek." (ECF No. 89, PageID.4271). Plaintiffs' assertions have no merit. Common sense dictates that photos and field observations from isolated visits cannot establish that water was flowing continuously in Spencer Creek for any period of time. At best, that evidence could establish that water was flowing on the date and time that such photos or field observations were taken. Moreover, the error of Plaintiffs' reliance on anecdotal evidence is compounded by selection bias—ESLA frequently elected to conduct site visits after rainfall (when there was the greatest chance that water would be flowing).

[10] A flow meter is a device that is often utilized to take continuous measurements over an extended period of time.

Plaintiffs have attempted to make a sweeping conclusion about the flow in Spencer Creek based on an extremely limited data set. Their own witness, Stuart Kogge, explains the problem with that approach:

> . . . I didn't make any determination as to how many days of a year that it flows. That would be difficult to try and decipher, because my understanding is that the watershed center and other people they don't monitor it continuously, they go out there twice a year. Who knows what happens the other 363 days of the year.

Kogge Dep 189:23-190:4, JX 10 (emphasis added). A review of the evidence cited by Plaintiffs **(**2019-2024 ESLA Reports, JX 43-48; Ogle 2020 Field Notes, JX 76) shows that ESLA conducted field observations a grand total of 51 times across a 4.5 year time period prior to filing this lawsuit. In other words, they have concluded that there was continuous flow for "10 months annually" based on approximately 10 visits per year, covering roughly 2.7% of the days in each year.

Worse yet, during most of the field visits Plaintiffs did not attempt to measure flow. Based on the information provided by Plaintiffs, attempts to actually measure flow were limited to a grand total of twelve measurements[11] taken by ESLA between July 14 and October 7, 2021. (ECF No. 89, PageID.4271). These limited measurements cannot establish "continuous flow;" at best, they indicate flow during a portion of twelve days over a three-month period, over four years ago. Moreover, flow was almost non-existent on at least three of the twelve days when flow measurements were taken. The 2021 ESLA Report indicates that on July 22, 2021, Spencer Creek had a flow rate of 0.11 cubic feet per second ("cfs"). Meanwhile, ESLA noted that Spencer Creek "had very little flow" on that date. (JX 45, ECF No. 99-45, PageID.5877). On two other occasions (September 16, 2021 and September 30, 2021), an even lower flow rate of 0.1 cfs was observed.

[11] Flow measurements were reportedly utilizing a float test which involved dropping a ping pong ball into Spencer Creek and timing how long it took for that ball to travel to "a designated point downstream." (JX 45, ECF No. 99-45, PageID.5878).

(*Id.* at PageID.5896). Given that flow was negligible on three of the twelve days when measurements were taken, Plaintiffs cannot know that water was flowing through Spencer Creek an hour after flow measurements were taken or an hour before, and they certainly cannot reasonably assume that flow continued on days when no flow measurements were taken.

The lack of any evidence to support Plaintiffs' claims of continuous flow throughout the year is further established by a review of the records they provided to document their investigation. Plaintiffs failed to conduct any flow measurements or field observations whatsoever for almost 6 months out of the year (from late-October to late-April) in any year. (*See* e.g., JX 43-48). Obviously, Plaintiffs cannot claim to know that there is continuous flow in Spencer Creek at any point in time from October to April, when they did not collect data or make observations.

The biggest problem with Plaintiffs' evidence is that it could never establish that there is continuous flow in the same season year after year. The fact that an intermittent stream might flow continuously for three months in a given year does not establish "seasonal" flow. As Plaintiffs' expert Stuart Kogge stated, seasonal flow occurs where there are "periods of continuous flow at certain times of year, every year." Kogge Rebuttal Report at 4, JX 21. Without data showing continuous flow for any one season in any one year, Plaintiffs cannot hope to establish recurrent continuous flow across multiple years.

Next, Plaintiffs' assertion that "[l]ocal residents confirm Spencer Creek has continual flow most months of the year except during the driest months like July and August" is an inaccurate description of the deposition testimony of Dennis Gretel and Brian Taylor. (*See* ECF No. 89, PageID.4271). A review of the deposition transcript of Dennis Gretel cited by Plaintiffs (Gretel Dep. at 22, 26, JX 8) does not state that water is flowing most months of the year and does not indicate that such flow is continuous. On the contrary, Mr. Gretel's testimony repeatedly indicates

that flow in Spencer Creek is intermittent. *Id.* at 52 (characterizing the flow from Spencer Creek as "intermittent"), *Id.* at 20 (flow is dependent on rain); *Id.* at 22 (flow from spring into summertime "depends on how much snow we had"). Plaintiffs have similarly mischaracterized the testimony of Brian Taylor. The section of Brian Taylor's deposition cited by Plaintiffs (Taylor Dep. p 36, JX 9) discusses flow but does not state or imply that there is "continuous" flow during any period of time. In fact, Mr. Taylor indicates that flow is dependent on precipitation. *Id.* at 37-38 (stating that "If we get heavy rainfall, water will flow through the creek. If we don't it stays dry."); *Id.* at 51 (explaining that "in general the creek is dry"). Obviously, the testimony of Dennis Gretel and Brian Taylor does not establish that there is continuous flow in Spencer Creek. It confirms that flow is at best intermittent. Based on these evidentiary shortcomings, Plaintiffs are not entitled to summary judgment.

2. There Is No Continuous Surface Connection Between Spencer Creek and the Wetlands.

Plaintiffs have not established that there is a continuous surface connection between Spencer Creek and the Wetlands. Contrary to Plaintiffs' position, for a continuous surface connection to exist between two bodies of water, there must be surface water present in both. *Rapanos* first established the test for a continuous surface connection, holding that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Rapanos*, 547 U.S. at 742. *Sackett* adopted this language outright. *Sackett*, 598 U.S. at 678.

Recent court cases have continued to acknowledge that any "wetland" must be indistinguishable from the "water." *Sharfi* aptly recognizes that a necessary condition for a surface connection to occur between two waterbodies is the presence of surface water in both:

> In proper context, then, a qualifying continuous surface connection must render the two things being connected—in this case, Wetlands and adjacent regulated WOTUS—indistinguishable from one another except for *temporary* disturbances, which plainly and necessarily requires a surface connection involving water.

United States v. Sharfi, No. 21-CV-14205, 2024 WL 4483354, at *17 (S.D. Fla. Sept. 21, 2024), *report and recommendation adopted*, No. 21-14205-CIV, 2024 WL 5244351 (S.D. Fla. Dec. 30, 2024). The *Sharfi* court succinctly identifies the necessity of surface water to form a connection between a wetland and a waterbody, and that such connection renders the border between the waters of the WOTUS and the wetland *indistinguishable*:

> It is true that the *Sackett* majority never uses the phrase 'continuous surface water connection,' but Plaintiffs' argument ignores the latter half of the second part of the *Sackett* test, which requires that the continuous surface connection be one which *makes it difficult to determine where the 'water' ends and the 'Wetland' begins*. *Id.* at 678-79 (quoting *Rapanos*, 547 U.S. at 742, 755) (emphasis added). *Sackett* plainly held that 'the CWA extends only to those Wetlands that are "as a practical matter *indistinguishable* from waters of the United States."' *Sackett*, 598 U.S. at 678 . . . Plaintiff ignores this indistinguishability requirement, which becomes meaningless if abutment alone establishes a 'continuous surface connection.'

Id. at *16. Burnette has described in its prior briefing the myriad points at which the Wetland and Spencer Creek are plainly distinguishable—past the roadside ditch, Spencer Creek meanders through three culverts, the last of which is often plugged by sand and thus is cut off from Elk Lake. *See* Def. Br. at 46-48 (ECF No. 96, PageID4399-4401). Here, it is obvious where the WOTUS ends and the Wetland begins. Based on the foregoing, Plaintiffs have failed to demonstrate that a continuous surface connection exists between the Wetlands, Spencer Creek, and Elk Lake. As a result, summary judgment in their favor would be inappropriate.

3. Plaintiffs have Failed to Establish a Continuing Violation of the CWA.

"It is well established that the CWA does not permit citizens' suits for violations that were wholly in the past." *Ward v. Stucke* ("*Ward II*"), No. 21-3911, 2022 WL 1467652, at *3 (6th Cir.

May 10, 2022) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987)); *see also, Ward v. Stucke* ("Ward I"), No. 3:18-cv-263, 2021 WL 4033166, at *5 (S.D. Ohio Sept. 3, 2021) (*citing Ailor v. City of Maynardville*, 368 F.3d 587, 596-97 (6th Cir. 2004) ("Citizens who bring CWA citizen suits only for past violations lack standing.")). Burnette incorporates its discussion of the necessity of a violation being continuing from its prior briefing. (ECF No. 91, PageID.4332-4334). Notably, Plaintiffs' alleged "evidence" of violations of the CWA predates the filing of this lawsuit.[12] Thus, even if Plaintiffs could establish a past violation of the CWA (which it cannot), it would still be precluded from bringing a CWA claim absent evidence of ongoing violations. As a result, Plaintiffs cannot establish an ongoing violation and Plaintiffs' CWA citizen suit must be dismissed.

D. PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THEIR MICHIGAN ENVIRONMENTAL PROTECTION ACT ("MEPA") CLAIM.

1. This Court Cannot Grant Relief on the MEPA Claim.

Plaintiffs' MEPA claim suffers from jurisdictional flaws that not only bar a grant of summary judgment in their favor but, as explained in Defendant's Brief in Support of its Motion to Dismiss for Lack of Subject Matter Jurisdiction[13], require the Court to dismiss this claim in its entirety. First, Plaintiffs' MEPA claim is barred by Michigan's statutory prohibition on pre-enforcement judicial review when EGLE has already selected a response activity. Under MCL

[12] In Plaintiffs' discussion of "continuing violations" (ECF No. 89, PageID.4266-4268), they fail to identify any alleged violations of the CWA occurring after the filing of this lawsuit. Instead, they suggest that there might be continuing violations of Burnette's state-issued Groundwater Discharge Permit. A violation of Part 22 would not establish a violation of the CWA.

[13] This Brief also explained why Plaintiffs lack Article III standing to bring their claims. (ECF No. 91, PageID.4318-4332). This is another reason the Court cannot grant summary judgment in Plaintiffs' favor; it lacks jurisdiction to decide Plaintiffs' claims.

§ 324.20137(6), courts lack jurisdiction to review challenges to a response activity selected or approved by EGLE or to review an administrative order until after the response activity is completed. The term "response activity" is defined broadly to include any evaluation, interim response, remedial action, or other actions necessary to protect public health or the environment. MCL § 324.20101(vv). Here, EGLE has required Burnette to conduct a hydrogeologic evaluation of the Spray Fields as part of an ongoing enforcement proceeding and is finalizing an Administrative Consent Order to address the alleged permit violations. This constitutes a response activity and an administrative order under the statute. As a result, this Court lacks subject-matter jurisdiction over Plaintiffs' MEPA claim, and any challenge must await post-enforcement review. *See Abnet v. Coca-Cola Co.*, 786 F. Supp. 2d 1341, 1347 (W.D. Mich. 2011); *Genesco, Inc. v. Michigan Dep't of Envtl. Quality*, 250 Mich. App. 45, 55-56 (2002).

Second, Plaintiffs are precluded from obtaining relief under MEPA that would conflict with or modify the terms of Burnette's existing groundwater discharge permit. Part 31 of NREPA and the Michigan Administrative Procedures Act ("MAPA") establish that challenges to the terms of a permit must be brought through a contested case hearing within 60 days of permit issuance, and judicial review is only available after exhaustion of administrative remedies and a final agency decision. MCL § 324.3112(5). Plaintiffs failed to pursue these administrative remedies and are not aggrieved by a final decision or order. Michigan courts have consistently held that MEPA cannot be used to circumvent the statutory permit appeal process. *See Lakeshore Group v. State*, 2018 WL 6624870 (Mich. Ct. App. Dec. 18, 2018). Accordingly, this Court lacks jurisdiction to award declaratory or injunctive relief under MEPA that would alter the terms or conditions of Burnette's permit; Plaintiffs' sole forum for such relief was through the prescribed administrative process.

In addition to, the jurisdictional bars provided by Michigan's bar on pre-enforcement review and administrative review process, EGLE's continuing regulation of the Spray Fields requires application of the *Burford* abstention doctrine with regard to Plaintiffs' MEPA claim. *See Burford v. Sun Oil Company*, 319 U.S. 315 (1943). This abstention doctrine provides that federal courts must abstain from considering state claims when there is "timely and adequate state-court review" available and either (1) "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or (2) "where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Saginaw Housing Com'n v. Bannum, Inc.*, 576 F.3d 620, 625-26 (6th Cir. 2009). *Burford* abstention protects "complex state administrative process from undue federal interference." *Id.* "The key question is whether an erroneous federal court decision could impair the state's effort to implement its policy." *Ada–Cascade Watch Co., Inc. v. Cascade Res. Recovery, Inc.*, 720 F.2d 897, 903 (6th Cir. 1983).

"The State of Michigan has an overriding interest in the protection of its environment from the effects of unregulated wastes." *Id.* at 904. Accordingly, Michigan has implemented a comprehensive regulatory framework that consolidates review into EGLE, an agency with specialized competence, with post-agency review available in state courts. This Court meddling with EGLE's regulation of Burnette or the terms of Burnette's Groundwater Discharge Permit would disrupt EGLE's efforts with respect to establishing a coherent policy related to the state's groundwater permitting process. *See Coalition for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1194 (6th Cir. 1995) (reversing a district court's denial of *Burford* abstention where the underlying dispute dealt with permitting of hazardous waste facilities). It would also disrupt the EGLE's

policy of encouraging regulated entities to resolve alleged violations through administrative settlements. The *Burford* doctrine therefore also bars this Court from granting summary judgment on Plaintiffs' MEPA claim.

2. Plaintiffs Have Not Established a Prima Facie MEPA Violation.

Plaintiffs assert that they are entitled to summary judgment on their MEPA claim because Burnette has violated its Groundwater Discharge Permit. (ECF No. 89, PageID.4290-4292). Plaintiffs further assert that those violations establish a prima facie case pursuant to *Nemeth v. Abonmarche Dev.*, 576 N.W.2d 641 (Mich. 1998). This argument stumbles out of the gate. *Nemeth* provides that "[w]here the purpose of the statute used as a pollution control standard is to protect our natural resources or to prevent pollution and environmental degradation, a violation of such a statute can establish a prima facie case under the MEPA." *Id.* at 651. However, Plaintiffs ignore that *Nemeth* also clearly states that "each alleged MEPA violation must be evaluated by the trial court using the pollution control standard appropriate to the particular alleged violation." *Id.* at 650 (emphasis added). Here, Plaintiffs are mixing and matching pollution control standards. Plaintiffs allege violations of Burnette's Groundwater Discharge Permit, which provides pollution control standards for "Groundwater Quality" pursuant to Part 22 (Mich. Admin. Code R. 323.2201 *et seq*.). Meanwhile, Plaintiffs assert that discharges from the Spray Fields have impaired ***surface waters*** in the Wetlands, Spencer Creek, and Elk Lake. Plaintiffs cannot use a violation of a groundwater pollution control standard to make a prima facie case of impairment to surface waters. *Nemeth*, 576 N.W.2d at 650.

3. Burnette Can Rebut Any Prima Facie Case of Impairment.

Even assuming Plaintiffs could establish a prima facie MEPA claim based on Part 22 violations (they cannot), *Nemeth* "emphasize[d] that this is not the end of the inquiry." 576 N.W.2d

at 656, n. 10. In *Nemeth*, the Court held that "defendants had the opportunity to rebut that prima facie showing either by submitting evidence to the contrary, i.e., that plaintiffs have shown neither pollution, impairment, nor destruction, nor the likelihood thereof, in spite of proof of the SESCA violations." *Id.* (emphasis added). Thus, Burnette can rebut a prima facie case by showing that Plaintiffs have failed to demonstrate any pollution, impairment, or destruction of natural resources, notwithstanding any violations of its Groundwater Discharge Permit.

In this case there is no material pollution, impairment, or destruction of natural resources. Plaintiffs allege the presence of low dissolved oxygen ("DO") concentrations, high concentrations of metals (iron, manganese, and arsenic), and *E. coli* in surface water and/or groundwater near the Wetlands. However, the resources that Plaintiffs claim are impaired merely display naturally occurring conditions intrinsic to wetlands and their appurtenant streams and groundwater.

(a) The presence of *E. coli* in surface water is not evidence of impairment.

As discussed by Burnette's expert Dr. Richard Rediske, wetlands are "significant sources of *E. coli*." JX 27 at 13. Dr. Rediske also explained that *E. coli* is naturally found in the intestines of warm-blooded animals; he further opined that *E. coli* present in animal feces is the likely source of any *E. coli* impacts. *See id* at 11 (*citing* Harwood et al., 2014), 16, 20, 27. Numerous studies establish that high levels of *E. coli* naturally occur in wetlands. Wetlands are significant sources of *E. coli* and suspended solids in the Great Lakes. *Id.* at 13 (*citing* Harrow-Lyle et al., 2024). *E. coli* can live on aquatic vegetation. *Id.* at 11, (*citing* Ishii et., 2006; Jamieson et al., 2005; and Safaie et al., 2021). Because bacteria can be transported on suspended particulates and organic matter in streams, observed *E. coli* in the Wetlands and/or Spencer Creek may be the result of upstream animal fecal deposition. *Id.* (*citing* Jamerson et al., 2005; Bai & Lung, 2005). Wetlands

are consistently net exporters of *E. coli* due to the presence of animal feces and *E. coli* growing within the sediment, decomposing plant litter, and organic detritus of the wetland. *See* **Exhibit C.**

Additionally, the culvert under Elk Lake Road could itself be an *E. coli* source; the bacteria can grow on biofilms on the metal and slough off in turbulent water. *Id.* at 14 (*citing* Augustyniak et al., 2021). Biofilms also grow on aquatic plants and are known to be a source of *E. coli*. *Id.* at 18 (*citing* Cho et al., 2022). The homes along Spencer Creek are served by septic systems, which also can be significant sources of *E. coli*. *Id.* at 16, (*citing* Verhougstraete et al., 2015). Concentrations of *E. coli* increased significantly as surface water passed through the culvert below Elk Lake Road and along the homes (and septic systems) lining Spencer Creek. *See* JX 27 at 27-28.

Plaintiffs' evidence of *E. coli* impacts originating in the Spray Fields is non-existent. All of Plaintiffs' analysis is premised upon sampling data compiled by ESLA. *See* JX 43-48. Dr. Rediske raised concerns regarding the quality and accuracy of Plaintiffs' *E. coli* sampling data, noting that their sampling methods "deviated from regulatory guidelines established by EGLE and other environmental agencies, raising concerns about the reliability of their data." *Id.* at 27.

Plaintiffs offered no expert testimony to support their assertion that the Spray Fields are a potential source of *E. coli* impacts in the Wetlands and/or Spencer Creek. Plaintiffs' expert, Stuart Kogge testified that he: (1) did not conduct *E. coli* sampling (JX 10, 88:21); (2) was not an *E. coli* expert (*Id.* at 93:9-15; 95:6); (3) had no experience tracing the source of *E. coli* (*Id.* at 93:16-18); (4) did not know whether *E. coli* could survive exposure to the air or ultraviolet light after being discharged in the Spray Fields (*Id.* at 96:12-24); and (5) did not know how far *E. coli* could travel in groundwater before it dies (*Id.* at 97:2-3). Mr. Kogge also appeared to be completely unaware of the fact that animal feces are a significant source of *E. coli*. When questioned, he repeatedly

suggested that only "dead" animals were a source of *E. coli*. (*see id.* 90-94). In sum, rather than recognizing that wetlands are themselves a source of *E. coli* and ignoring obvious sources (like the animals observed by ESLA[14] during their site visits), Plaintiffs simply assumed that Burnette must be the source of any *E. coli*.[15] The *E. coli* present in the wetlands is not evidence of impairment of natural resources—it is evidence of a typical wetland.

(b) The presence of metals in either surface or groundwater is not evidence of impairment.

While Plaintiffs assert that the Spray Fields are the source of metals (iron, manganese, and arsenic) and low DO concentrations in surface water and groundwater adjacent to the Wetlands, they again fail to acknowledge that increased metals concentrations and low DO concentrations are both a common result of mobilization of naturally occurring elements in soils caused by the breakdown of organic matter in the wetlands. As noted by Burnette's expert, Dr. Joel Gagnon:

> Water within the wetland, which appears to contain significant accumulations of peat and other organic matter and is likely characterized by naturally low (hypoxic) or non-detectable (anoxic) dissolved oxygen levels (which are required to preserve organic matter), may also naturally contain the same chemical constituents Kendall (2024) attributes to solubilization in response to wastewater application (e.g., high BOD, iron, and manganese).

JX 24 at 21. Dr. Gagnon further concluded that "[c]urrently available groundwater monitoring data do not lend themselves to differentiating the physicochemical effects that might result from

[14] *See* **Exhibits D** and **E**, (depicting a deer and a mink on the banks of Spencer Creek on two separate occasions).

[15] To the extent that any *E. coli* was at one time present in Burnette's wastewater, the source was a leaking sewer pipe utilized by the Village of Elk Rapids that runs through the Burnette facility (without an easement). Upon discovering the concerns posed by that pipe, Burnette repaired that sewer line. Testing performed after the repair of the sewer line did not identify elevated *E. coli* concentrations in wastewater.

wastewater application from those that occur naturally within wetlands (particularly peatlands)." *Id.*

Burnette need not rely solely on the testimony of its own expert to establish that metals impacts are intrinsic to wetlands—the occurrence of high concentrations of metals, including iron, arsenic, and manganese is well-known and generally accepted. *See e.g.*, "Remote sensing of wetland evolution in predicting shallow groundwater arsenic distribution in two typical inland basins" published in Science of the Total Environment 2022 (noting that "[a] large number of studies have shown that the existence of wetlands may influence arsenic concentrations in adjacent shallow groundwater.") **Exhibit F**; *see also* Rediske Report 10, JX 10 (*citing* Szramek et al., 2003, "Anaerobic conditions in wetlands will also solubilize arsenic related minerals associated with pyrite.").

Moreover, metals mobilization resulting from the presence of organic matter is exacerbated in wetlands with low water levels, such as the Wetlands at issue. *See* **Exhibit G**, "Dissolved Organic Matter in Wetlands" Soil and Water Science Department, Florida Cooperative Extension Service, (June 2009) ("During periods of drought or low water levels, organic matter decomposition rates will increase. Exposed areas in wetlands then exhibit enhanced decomposition of the organic soils and release metals and nutrients contained within organic matter as well as increase DOM concentrations.").

In sum, Plaintiffs cannot establish "impairment" of natural resources based on conditions in surface or groundwater flowing out of wetlands when those conditions are inherent characteristics of wetlands. Accordingly, Burnette can easily rebut any prima facie case of "impairment" advanced by Plaintiffs.

(c) There is no impairment warranting judicial intervention.

While no further inquiry should be required to create a material issue of fact as to the validity of Plaintiffs' MEPA claims, any "impairment" alleged by Plaintiffs does not exceed the threshold required to support a MEPA claim. Michigan courts have noted that "virtually all human activities can be found to adversely impact natural resources in some way or other." *West Michigan Environmental Action Council v. Natural Resources Commission*, 275 N.W.2d 538, 545 (Mich. 1979); *see also City of Portage v. Kalamazoo County Rd. Commission*, 355 N.W.2d 913, 915 (Mich. Ct. App. 1984).

Any MEPA plaintiff must establish a material degree of impairment. Otherwise, a MEPA claim could be filed every time that a homeowner fertilizes a lawn. Accordingly, courts have developed a common law of environmental quality to determine when impacts rise to the degree of impairment warranting judicial intervention pursuant to MEPA.

In *Oscoda Chapter of PBB Action Comm, Inc v. Dep't of Natural Resources*, 268 NW2d 240 (1978), the Michigan Supreme Court issued a plurality decision holding that "[a] court may intervene, under the environmental protection act, if the conduct of the defendant 'has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein.'" *Id.* at 246. The Court found that judicial intervention was not warranted because the record precluded "a determination that it is likely that a 'significant amount' of PBB may 'contaminat[e] surrounding land or water' or 'pollute, impair or destroy' the environment." *Id.* (emphasis added).

In *West Michigan Environmental Action Council v. Natural Resources Commission*, 275 N.W.2d 538 (Mich. 1979), the Michigan Supreme Court held that judicial intervention was justified based on its determination of potential impacts to an elk herd it found to be a "unique" natural resource. *Id.* at 545 (emphasis added). Subsequently, in *Kimberly Hills Neighborhood Assn. v. Dion*, 114 Mich. App. 495 (Mich. Ct. App. 1982), the Michigan Court of Appeals found

that the development of a site that included a small pond did not amount to the "requisite statutory impairment" required under MEPA. *Id.* at 508. The Court went on to note that a "statewide perspective is necessary." *Id.* at 507 (emphasis added). "A focus on narrow local problems is contrary to the intent of the Legislature to carry out its constitutional duty under Const 1963, art 4, §52." *Id.* at 507.

In *City of Portage v Kalamazoo Co Rd Comm'r*, 136 Mich App 276, 280-282 (1984), the Michigan Court of Appeals again analyzed the degree of impairment necessary to justify a MEPA claim, holding that determining whether the impact on natural resources "is so *significant* as to constitute an *environmental risk* and require judicial intervention, requires evaluating the environmental situation prior to the proposed action and compare it with the probable condition of the particular environment afterwards." *Id.* at 282 (emphasis added) (utilizing four specific factors that address degree of harm).

Finally, in *Cook v. Grand River Hydroelectric Power Co.*, 346 N.W.2d 881, 885 (Mich. Ct. App. 1984) the court found that defendant's operation of a dam did "not rise to the level of impairment or destruction of natural resources so as to constitute an environmental risk and justify judicial intervention" even though it acknowledged that "certain plant life would be destroyed and certain animals displaced." *Id.* at 885.

Even in *Nemeth,* 576 N.W.2d 641 (Mich. 1998), which was cited by Plaintiffs, the Court acknowledged that not all impacts warrant a MEPA claim, stating that "one could argue that the MEPA is violated any time someone violates the SESCA by putting a shovel in the ground within five hundred feet of a lake or stream." *Id.* at 656. Accordingly, *Nemeth* allows defendants to rebut a prima facie case by disputing frivolous claims where impacts were not material.

The common theme among each of these cases is a determination that a significant level of impairment of natural resources is necessary to warrant judicial intervention. Plaintiffs' claims of impacts to surface water and groundwater emanating from the Wetlands are indistinguishable from the inherent characteristics of those Wetlands. As a result, the alleged impacts clearly do not exceed the threshold level of impairment that would warrant judicial intervention under MEPA.

IV. CONCLUSION

For these reasons, Burnette respectfully requests that this Court deny Plaintiffs' Motion for Summary Judgment.

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Dated: May 23, 2025

By: */s/Neil E. Youngdahl*

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Neil E. Youngdahl
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