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 IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION (ECF 90)

(ORAL ARGUMENT REQUESTED)

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PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

I. INTRODUCTION

The Court should deny *Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction* because it is meritless. Plaintiffs Grand Traverse Band of Ottawa and Chippewa Indians ("GTB"), Grand Traverse Bay Watershed Initiative, Inc. ("TWC"), and Elk-Skegemog Lakes Association ("ESLA") (collectively, "Plaintiffs") sued Burnette Foods, Inc. ("Burnette") for violations of the Clean Water Act ("CWA") and the Michigan Environmental Protection Act ("MEPA") resulting from Burnette's industrial processing wastewater discharges. Each Plaintiff has standing, Burnette's violations continue, MCL § 324.20137(6) does not deprive the Court of MEPA jurisdiction, and the Court may award full relief under MEPA.

II. BACKGROUND

Background facts are well-developed elsewhere, and Plaintiffs address record evidence on Burnette's substantive arguments in context. This section addresses a few standouts.

Burnette claims it has been developing "a new multi-million-dollar wastewater treatment system" that may be completed in 2025, unless EGLE requires "additional treatment."[1] This notably vague, citationless teaser begs for more: what, where, how much, for what parameters and volumes, to what standards, with what monitoring and controls, what additional treatment and when and for what, and much more. When asked in discovery, Burnette clammed up:

> subsequent modifications to Defendant's wastewater systems following EGLE's allegations of wastewater discharge violations, be they

[1] ECF 91, PageID.4307.

> hypothetical or implemented, **have no bearing or relevance whatsoever** to the claims set forth in Plaintiffs' First Amended Complaint.[2]

If treatment plans are irrelevant to Plaintiffs' claims, then they are also irrelevant to this Court's jurisdiction and should be disregarded. Moreover, the forthcoming-ness of treatment modifications confirms Burnette's untreated discharges continue unabated – they are not wholly in the past (see **Section IV.B** below).

Burnette says Administrative Consent Order ("ACO") negotiations with EGLE are ongoing but not what these have to do with jurisdiction. The forthcoming-ness of an ACO confirms there is presently no EGLE approval that could deprive this Court of jurisdiction under MCL § 324.20137(6), if it even applied (see **Section IV.C** below).

Burnette says a forthcoming ACO requires a hydrogeologic evaluation of groundwater impacts, noting EGLE first requested this in October 2019. The study would add two upgradient wells at each field to be monitored, alongside existing wells, for five years.[3] The evaluation is jurisdictionally irrelevant (see **Section IV.C** below) but epitomizes Burnette's delay strategy.

Burnette expects a forthcoming modified groundwater discharge permit to replace the 2017 version that expired in 2020 but remains in force. While jurisdictionally irrelevant, it illustrates Michigan's statutory structure: plaintiffs may seek administrative review of capricious EGLE permitting decisions, *and* plaintiffs may pursue MEPA claims to challenge a defendant's polluting conduct; state law authorizes *both* (see **Section IV.D** below).

Plaintiffs recite standing-related evidence contextually below. Unrelated to standing, Burnette vilifies Christine Crissman, TWC Executive Director, for not stopping to look at Spencer

[2] **Ex 1** (Burnette Resp to Rog) (emphasis in original).

[3] **Ex 2** (Hydrogeological Work Plan); ECF 99-56, PageID.6116-17 (Draft ACO Par 3.15).

Creek on her way to and from dropping her kids at school.[4] Similarly, Burnette deprecates any harm to GTB because it has not issued no-fish or no-swim advisories. These extraneous criticisms illustrate Burnette's misunderstanding of water quality and misplaced litigation priorities. Water quality, like books and people, should not be judged by appearances. To protect water quality, the CWA deals principally in prevention through permitting, not cure following fish kills. Water quality sampling confirms Spencer Creek is polluted, and all who have opined on causation conclude Burnette's spraying is the main pollution source. Burnette's primary defense is that the creek is small and occasionally dry. No matter – it drains Burnette's polluted wastewater to Elk Lake. Plaintiffs sued Burnette because its unpermitted discharge is a real threat to local water quality that they work to protect. Burnette's motion is groundless: Plaintiffs have standing, and this Court has jurisdiction to hear their CWA and MEPA claims.

III. LEGAL STANDARD

Burnette's motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) mounts factual attacks sounding in various theories. Factual attacks challenge the actual existence of matters affecting jurisdiction. *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996) (in factual attack, trial court may weigh evidence, evaluate merits of jurisdictional claims, with proof burden on plaintiff) (citations omitted). Burnette's motion presents an incomplete record and relies upon inapplicable statutes and caselaw.

[4] ECF 99-18, PageID.5050 (Crissman 49:22-23).

IV. ARGUMENT

A. Each Plaintiff has Article III standing.

"To satisfy Article III standing requirements, a plaintiff must show: (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Cleveland Branch NAACP v. City of Parma*, 263 F.3d 513, 523-24 (6th Cir. 2001) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs*., 528 U.S. 167, 180-81 (2000)). "An association may obtain 'standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Id.* (quoting *Laidlaw,* 528 U.S. at 181, citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

Burnette makes two main arguments: (1) no Plaintiff has organizational standing because no member has suffered a concrete, particularized injury; and (2) no claimed injury is fairly traceable to Burnette. Plaintiffs respond in that order below.

But first, Plaintiffs respond to Burnette's argument that caselaw requires each Plaintiff to establish standing, particularly because this is a fee-shifting case. ECF 91, PageID.4319 n.1, quoting *Miller v. Thurston,* 967 F.3d 727, 734 (8th Cir. 2020) (citing *Town of Chester v. Laroe Estates, Inc.,* 581 U.S. 433, 439 (2017)). Burnette introduces this argument by referencing Plaintiffs' First Amended Complaint ("FAC"), where Plaintiffs alleged:

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

Caselaw is clear and straightforward: where at least one plaintiff has standing, the court need not consider whether other plaintiffs have standing. *See Horne v. Flores,* 557 U.S. 433, 446 (2009) (citing *Arlington Heights*, 429 U.S. at 264 and n.9); *Bowsher v. Synar,* 478 U.S. 714, 721 (1986) (with standing established for one plaintiff, "[w]e therefore need not consider the standing issue as to [two others]"). "It is settled that in a case involving joined, individual plaintiffs bringing a shared claim seeking a single remedy, Article III's case-or-controversy requirement is satisfied if one plaintiff can establish injury and standing" and it is "immaterial" if other plaintiffs "might be unable to demonstrate their own standing." *J.D. v. Azar,* 925 F.3d 1291, 1323-24 (D.C. Cir. 2019) (citations omitted). The rationale is "preservation of judicial resources" – "courts have generally refrained from expending judicial resources on standing disputes that will not impact the ultimate disposition of the claims presented." *Priorities USA v. Benson*, 448 F. Supp. 3d 755, 761 (E.D. Mich. 2020) (citations omitted).

Burnette's invocation of *Miller* to assert Plaintiffs are "wrong" is misplaced. Although *Miller* stated, "[e]ach Plaintiff must establish standing for each form of relief sought," that was *dicta*: there was no dispute *any* of four plaintiffs seeking common relief lacked standing, which was addressed collectively. 967 F.3d at 735. *Miller* inaccurately attributed the sentence to *Town of Chester v. LaRoe Estates, Inc*., 137 S. Ct. 1645, 1651 (2017), which reasserted the "simple rule" that, "when there are multiple plaintiffs[,] *[a]t least one* plaintiff must have standing to seek each form of relief requested in the complaint." 581 U.S. at 439 (emphasis added). *Miller* may be accurate when plaintiffs seek unique relief, but if *Miller* meant "each" plaintiff seeking common relief must have standing, that was inaccurate; *Town of Chester, Horne*, *Arlington Heights*, and *Bowsher* control.

Burnette's speculates FAC Paragraph 2 is there because Plaintiffs "anticipat[ed] that they may lack standing." Nonsense; it is there because Burnette previously moved to dismiss for lack of jurisdiction on the basis TWC and ESLA lacked standing.[5] What FAC Paragraph 2 anticipated was that Burnette mistakenly believes each Plaintiff must have standing.

Burnette argues that requiring each plaintiff to establish standing "has real-world consequences in fee-shifting cases" because otherwise a plaintiff without standing could receive an attorney fee award. This argument is illogical and irrelevant. Plaintiffs seek identical relief – an order directing Burnette to cease its violations of federal and state law plus civil penalties. To prove these claims, Plaintiffs collectively hired experts, conducted discovery, filed motions, and more. If successful, Plaintiffs are entitled to recover reasonable litigation costs, and the Court may address all Burnette's concerns about their propriety then. 33 U.S.C. § 1365(d); MCL § 324.1703(3); *see generally Am. Canoe Ass'n v. City of Louisa,* 683 F. Supp. 2d 480 (E.D. Ky. 2010) (comprehensive discussion of standards, precedent related to litigation costs). Whether there were one, three, or twelve plaintiffs prosecuting this case would otherwise be inconsequential except that *Burnette* has driven up litigation costs by ignoring black letter precedent and trying repeatedly and pointlessly to *dis*prove standing. Burnette cites no law supporting its novel theory that fee-shifting impacts jurisdiction.

1. *TWC has standing*.

Burnette argues that TWC (a) lacks associational standing because it has no members, let alone any with any concrete, particularized injury, and (b) lacks organizational standing because it has not been directly impacted by Burnette operations. TWC has associational standing, irrespective of whether it also has organizational standing.

[5] ECF 11, PageID.1578-81.

TWC has standing to sue on behalf of members because a TWC member has standing to sue in her own right (she suffered a concrete, particularized injury in fact that is fairly traceable to Burnette's actions, and a favorable decision would redress her injury), her interests are germane to TWC's purpose, and her participation is unnecessary. *See Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n,* 389 F.3d 536, 540 (6th Cir. 2004) (citation omitted).

Membership may be established in a non-membership organization when the organization represents people who have "indicia of membership" or are the "functional equivalent of members." *Hunt,* 432 U.S. at 344-45. In *Hunt,* though the Washington Apple Advertising Commission lacked members, the Supreme Court found indicia of membership because "[i]n a very real sense …, the Commission represents the State's growers and dealers and provides the means by which they express their collective views and protect their collective interests." *Id.* at 345.

While *Hunt* noted three factors supporting its conclusion that the growers and dealers were effectively members (they elected the commissioners, may serve on the commission, and finance its activities, including litigation costs), district courts following *Hunt* have found indicia of membership beyond those. *See Flyers Rights Educ. Fund, Inc. v. U.S. Dep't of Transp*., 957 F.3d 1359, 1362 (D.C. Cir. 2020) (finding it "quite doubtful" that "the list of 'indicia' identified in *Hunt* was meant to be exhaustive"); *Citizens Coal Council v. Matt Canstrale Contr., Inc*., 40 F. Supp. 3d 632, 640 (W.D. Pa. 2014) ("Nothing in *Hunt* indicates that the factors delineated there are the only factors to be considered. To so hold would indeed elevate form over substance. Rather, the purpose of the *Hunt* inquiry is to determine whether an organization provides its members with the means to 'express their collective views and protect their collective interests.'") (quoting *Hunt, supra*).

In *Quad Cities Waterkeeper v. Ballegeer,* a Waterkeeper organization whose bylaws prohibited members and whose board was "self-perpetuating" (board elects new board members) had "indicia of membership" for associational standing. 84 F. Supp. 3d 848, 860 (C.D. Ill. 2015). The organization was supported by approximately 160 members who voluntarily associated with the organization and whose financial contributions promoted the Waterkeeper's mission, and the organization "provides a means of expressing and protecting its constituents' collective interests." *Id.* In *Citizens Coal Council,* the court acknowledged that "members may exert influence over their organizations and their activities in a variety of ways," irrespective of voting rights, and found indicia of membership where witnesses affiliated with CCC "for the specific purpose of filing this lawsuit," provided financial support, participated in advisory or coordinating committees, and maintained "direct access to and communication with" CCC's director. 40 F. Supp. 3d at 639, 641. *See also Doe v. Stincer,* 175 F.3d 879, 886 (11th Cir. 1999) (finding associational standing where constituents, "[m]uch like members of a traditional association, . . . possess the means to influence the priorities and activities" of organization); *United States Public Interest Research Group v. Bayou Steel Corp.*, 1997 U.S. Dist. LEXIS 24551 (E.D. La. Sept. 12, 1997) (finding representational standing irrespective of voting on directors); *see generally* Karl S. Coplan, *Is Voting Necessary? Organization Standing and Non-Voting Members of Environmental Advocacy Organizations*, 14 SE. ENVTL. L. J. 47, 75 (Fall 2005).

TWC treats all financial donors as members, but more importantly for this case, people who are part of TWC's Leadership Circle, including Samantha Ogle, are the functional equivalent of members for Article III standing purposes. TWC Executive Director Christine Crissman

testified about how Leadership Circle participants influence, support, and guide TWC activities, policies, and the board:[6]

> Q. And you don't have membership, correct?
>
> A. We do have memberships. So we don't have membership that elects our next set of leaders but we do have membership in a Leadership Circle that we have. Those folks are ambassadors for us in the community, they're nominated to be become members of the Leadership Cricle, they can nominate our board members, they are financial supporters of ours, they can influence the policies and procedures and strategic direction of our organization.
>
> ***
>
> Q. And the people you just described as membership, they do not have a voting interest in the organization, The Watershed Center, correct?
>
> A. Not a specific ability to vote in leadership. They do have the ability to vote in other members of the Leadership Circle or nominate folks to our board of directors.
>
> Q. …. How are the directors of the organization determined?
>
> A. Our board of directors come from nominations either within our staff, the current board of directors, or the Leadership Circle.
>
> ***
>
> Q. And what does it take to be in the Leadership Circle?
>
> A. Leadership circles go through a very similar process as our board of directors. So there's a nominating process. The board development committee vets them and brings their nominations to the board of directors. So a very similar process as our board of directors for our Leadership Circle.

Chrissman testified that members of the Leadership Circle are heavily engaged in TWC work and projects, influence TWC's direction and events, are provided additional insights into TWC projects

[6] ECF 99-18, PageID.5040-41 (Crissman 8-9; 11-13).

and advocacy, and have a direct line to raise relevant issues of community concern and serve as community ambassadors for TWC.[7]

Samantha Ogle, Leadership Circle member since 2021, elaborated on how Leadership Circle membership allows her and other members to: influence the policies, priorities, and strategic activities the TWC Board of Directors implements; help finance the organization, including litigation costs arising out of this case; act as a pipeline for the Board of Directors; and express collective views and protect collective interests in local water quality.[8]

Consistent with other cases finding indicia of membership in environmental organizations, members of TWC's Leadership Circle, including Ms. Ogle, exert influence over TWC activities, provide TWC with financial support, maintain direct access to and communication with TWC staff and board, serve in an advisory role, nominate TWC board members, and provide a means for these members to express their collective views and protect their collective interests. They are the functional equivalent of TWC members. *Hunt,* 432 U.S. at 345.

The three prongs for associational standing are demonstrably satisfied by the testimony of Ms. Ogle, TWC's standing witness.[9] First, Ms. Ogle would have standing to sue in her own right since she has suffered injury in fact that is concrete and particularized as well as actual or imminent, and her injuries are traceable to Burnette and will be redressed by a favorable outcome. *Laidlaw,* 528 U.S. at 180-81. Since 2019 and continuing still, Ms. Ogle does volunteer sampling and monitoring work in Spencer Creek and its outlet into Spencer Bay (Elk Lake) through TWC's Adopt-a-Stream program and her professional work for ESLA. The documented pollution, odors,

[7] *Id.*

[8] ECF 16-4, PageID.1683-1685 Par 10-19.

[9] *See* ECF 16, PageID.1621-24.

discoloration, and her observations of abnormal amphibians in Spencer Creek have adversely impacted Ms. Ogle's professional and recreational experience in and around Spencer Creek and its outlet. Among other responses, she has deployed personal protection including wearing a mask and thicker socks while sampling Spencer Creek to avoid odor and pollution; cleaned equipment to avoid staining and isolated equipment after exposure in the creek; and avoids swimming or recreating near the outlet of Spencer Creek due to the pollution.[10] Courts consistently recognize testimony averring diminished use and appreciation of waterways due to discharge concerns are sufficient to establish injury in fact. *Laidlaw,* 528 U.S. at 183 ("environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity.") (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-563 (1992) ("the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.").

Traceability is discussed below in Subsection **4**; it suffices that Burnette discharges wastewater high in BOD, *E.coli*, and other constituents consistent with pollution detected in Spencer Creek and harming Ms. Ogle's enjoyment of the creek. *See Am. Canoe Assoc.,* 389 F.3d at 543; *Am. Canoe Ass'n v. Murphy,* 326 F.3d 505, 520 (4th Cir. 2003) ("In order to satisfy the traceability requirement, rather than pinpointing the origins of particular molecules, a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern.") (cleaned up, quotes and citations omitted).

[10] ECF 16-4, PageID.1685-87; 99-5, PageID.4485-86, 4487-88, 4490-91, 4516-20 (Ogle 21-22, 29-30, 40-42, 145-46, 149-61); 99-86 (Ogle stream videos).

Redressability is unchallenged; an order directing Burnette to cease or relocate its wastewater discharges or comply with a discharge permit with pollutant limitations sufficiently protective of the downstream receiving waters likely redresses Mr. Ogle's injuries. *See Laidlaw,* 528 U.S. at 181.

Second, Ms. Ogle's interests described above are germane to TWC's mission and purpose to advocate for clean water in the Grand Traverse Bay watershed and to protect and preserve its waters, including by "reduc[ing] the amount of pollutants that are making their way into all the waterways that make their way out into the bay."[11]

Third, Ms. Ogle's individual participation here is unnecessary.

Burnette argues TWC donors generally lack indicia of membership, but TWC never alleged all donors are functionally equivalent to membership for Article III purposes. Burnette's assertion that TWC never identified any member with standing ignores the FAC, discovery, and Ms. Ogle's testimony.[12] TWC has Article III standing to pursue this litigation.

2. *GTB has standing*.

Burnette's contention that GTB lacks standing because no GTB property or member is impacted by Burnette misapprehends the nature of GTB rights and interests at stake in this case. GTB is signatory to the Treaty of Washington executed March 28, 1836, 7 Stat. 491 ("1836 Treaty"). In the 1836 Treaty, GTB reserved off-reservation fishing rights (*i.e.*, usufructuary rights) in the Great Lakes previously confirmed by this court. *See U.S. v. Mich.*, 471 F. Supp. 192 (W. D. Mich. 1979), *aff'd.* 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). In the 1836

[11] ECF 16, PageID.1620-21; 99-18, PageID.5042 (Crissman 15-18); 99-6, PageID.4560 (Smith 84).

[12] ECF 16, PageID.1624-25; 16-4, PageID.1681-88; **Ex 3** (TWC Resp to Interrogatory #9).

Treaty, GTB also reserved usufructuary fishing, hunting, trapping, and gathering rights in inland portions of the cession. The usufructuary rights of GTB in inland areas of the cession were confirmed by Consent Decree,[13] including the waters of Elk Lake.[14]

This Court previously observed that GTB's treaty-reserved rights "are property rights protected by the United States Constitution." *Grand Traverse Band of Ottawa and Chippewa Indians v. Dir. Mich. Dep't Nat. Res.*, 971 F. Supp. 282, 288 (W. D. Mich. 1995), *aff'd*. 141 F.3d 635 (6th Cir. 1998), *cert. denied*, 525 U.S. 1040 (1998). The treaty right belongs to the *tribe*, not its individual members. It is therefore incumbent upon GTB, as sovereign and holder of the treaty right, to take action to protect treaty-reserved resources. *See U.S. v. Mich.,* 471 F. Supp. at 271-72 ("The fishing right reserved by the Indians in 1836 and at issue in this case is the communal property of the tribes which signed the treaty and their modern political successors; *it does not belong to individual tribal members*.") (emphasis added, internal citations omitted). *See generally* Wenona T. Singel & Matthew L.M. Fletcher, *Indian Treaties and the Survival of the Great Lakes*, 2006 MICH. ST. LAW REV. 1285 (2006).

As a sovereign nation, GTB's Constitution expresses an objective of conserving natural resources and GTB works to protect and preserve natural resources and the environment guaranteed by Treaty rights. GTB staff manage Tribal members' inland usufruct activities, assess and monitor resources including Elk Lake and Spencer Creek, and undertake studies and surveys to understand the health and status of fish, and more.[15] GTB has standing because Burnette's

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[13] *U.S. v. Mich.,* Nov. 2, 2007, Consent Decree, W.D. Mich. Case No. 2:73-CV-26, ECF 1799, PageID.1689.

[14] *Id.,* ECF 1799-2, PageID.1654 (map); ECF 99-7, PageID.4571-72 (Mays 9:2-10:23).

[15] ECF 99-7, PageID.4573, 4576 (Mays 17:2-11, 26:20-28:22); *see generally* https://www.gtbindians.org/naturalresources.asp, last checked May 23, 2025.

unpermitted wastewater discharges may impair the usufructuary rights of GTB to hunt, fish, and gather within the 1836 Treaty-ceded territory, including Elk Lake, where GTB members can and do fish.[16] Those usufructuary rights are dependent on the ecological integrity of the land and waterways within the cession.[17] Actual or likely pollution in Elk Lake sufficiently confers standing on an Indian tribe to bring suit.

Under similar circumstances, courts hold a tribe possesses standing to pursue litigation seeking to prevent or mitigate environmental harm on the basis of treaty rights potentially impacted by the defendant's activities. In *Courte Oreilles Lakes Ass'n Inc. v. Zawistowski*, __ F. Supp. 3d __ (W.D. Wis. 2025), the court held the Lac Court Oreilles Band, citing treaty rights to hunt, fish and gather within Lac Court Oreilles, had standing to bring a CWA suit against a cranberry producer for phosphorus discharges into the lake. The court found that although "[p]laintiffs do not explain how increased phosphorus in the lake has affected any specific member's ability to exercise treaty rights" it was "reasonable to infer that the increased phosphorus leads to fewer fish in the lake, and fewer fish impairs the tribe [*sic*] treaty rights because it makes harvesting fish more difficult and less productive." *See also Oregon Nat. Desert Assn' v Thomas*, 940 F. Supp. 1534, 1538 (D. Or. 1996) (Tribe had standing to pursue CWA citizen suit where it claimed Forest Service lands leasing for cattle grazing would contribute to pollution in waters where tribe has treaty rights); *Grand Portage Band v. U.S. EPA*, 2024 U.S. Dist. LEXIS 57426 *22-24 (D. Minn. March 29, 2024) (Bands had standing to challenge EPA approval of Minnesota water quality standards; "[t]he Bands' treaty-reserved rights and existential interest in protecting Minnesota waters are not

[16] ECF 99-7, PageID.4572 (Mays 12:6-13:16).

[17] *Id.,* PageID.4573 (14:13-15:5, 16:1-11).

so marginally related to or totally inconsistent with the proposed implicit in the Clean Water Act to fall outside the protected zone of interests") (internal citation and quotation omitted).

In *Fond du Lac Band of Lake Superior Chippewa v. Cummins*, 657 F. Supp. 3d 1202 (D. Minn. 2023), the Fond du Lac Band challenged a land exchange between a mining company and the U.S. Forest Service, alleging the exchange would result in a loss of lands available for its members to exercise usufruct rights. The court, after surveying the significant caselaw holding that such treaty rights are *tribal* and not individual, rejected the standing argument that "the Band is required to show that individual Band members were hunting or fishing on the exchanged land at the time of the exchange" and found Article III jurisdiction "because the Band has alleged that the challenged land exchange directly injured the Band by physically diminishing the scope of the Band's treaty usufructuary rights." *Id*. at 1211. In so concluding, the court specifically rejected the mining company's argument, citing cases such as *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) and *Lujan, supra,* that the Band was akin to an environmental interest group claiming organizational standing:

> This line of cases is simply inapplicable here. The Band is not merely a private association of like minded individuals asserting recreational and other interests in public land to which they have no greater right than members of the general public.

Id. at 1210-11 (citations omitted). GTB has standing to protect its treaty-reserved rights from Burnette's threatened pollution of Elk Lake.

3. *ESLA has standing*.

ESLA, a membership organization, has associational standing to represent the interests of its member, Brian Taylor, who owns property traversed by Spencer Creek and on Elk Lake. For

orientation, Mr. Taylor owns the parcel through which Spencer Creek runs after exiting the Elk Lake Road culvert and before entering the Elk Lake culvert:

ECF 99-26, PageID.5530

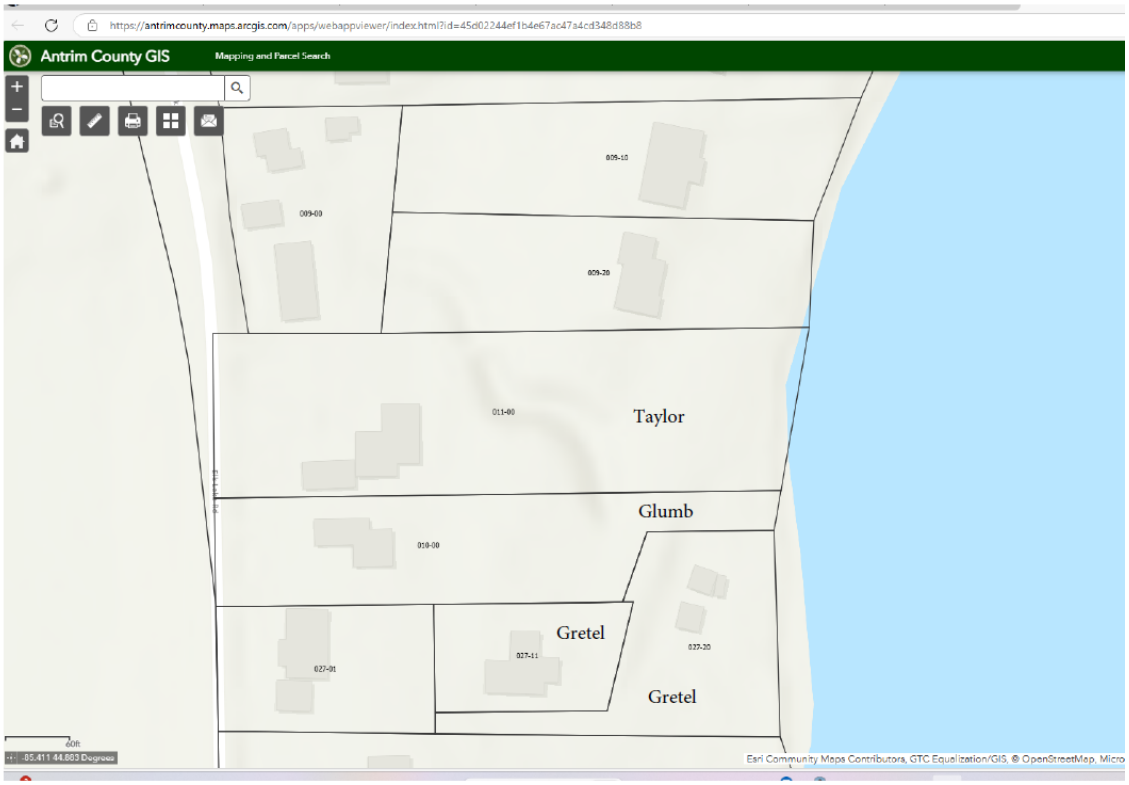

Exhibit 4, Antrim County Parcel Map

Mr. Taylor testified Spencer Creek turns from clear to a deep crimson red color for around four to five days in July following heavy rains most years (seven out of the last ten years), some years worse than others.[18] At times, like 2024, there was no discoloration; at other times like 2023, there was discoloration in the creek but not the lake; sometimes the discoloration events leave "a little red residue on the shore of the creek" upstream of the Elk Lake culvert; sometimes "discoloration was severe enough that it turned the lake red in an area in front of that culvert," with red stuff sometimes flowing from the culvert up to Mr. Taylor's shoreline and "as far out as 70 feet from shore" where Mr. Taylor keeps his boat docked.[19] Once in the 1990s, when the discoloration was "very severe" and spread out as far as the boat lift on his dock, "the outdrives on my inboard/outboard pleasure boat were in the red water of the lake for several days, and I noted that when I raised the boat out of the water, the paint on the outdrive had been affected, taken off," and another time his 18-foot Prindle sailboat that he kept in the water "got some strange accumulations of debris on the bottom of the sailboat."[20] After that, Mr. Taylor testified that he "never let the outdrive remain in the water during those events."[21]

Mr. Taylor further testified, in the last 10 years:[22]

> as the situation escalated and as the discoloration became more severe, and eventually there was some odor that was present in the water during that time, it got a little bit more concerning, and I asked a few questions of some folks at ESLA that I thought would know, and they were basically unaware of what was happening, which I was a bit surprised to learn. So at that point, you know, I pursued it a little more aggressively and agreed to allow ESLA to do continuing testing.

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[18] ECF 99-9, PageID.4606-4609, 4618 (Taylor 10:5-15, 17-22, 61).

[19] *Id.,* PageID.4608, 4613-4614 (18:39, 38:21-39:10, 42:2-14); ECF 99-84 (Elk Lake video, July 30, 2021).

[20] *Id.,* PageID.4616-4617 (53:4-54:24).

[21] *Id.,* PageID.4617 (55:2-4).

[22] *Id.,* PageID.4609 (23:19-24:7).

Mr. Taylor testified he smelled the odor that he described as "unnatural" and "a chemical smell" periodically in July during about five or six stretches over the last ten years, for approximately two-to-three-day stretches each time, and the smell coincides with the red discoloration.[23] He testified he smells the odor when he is "in close proximity to the creek, within 15 to 20 feet," but not from his house or beach.[24] He conceded the smell is "noticeable, but it does not drive me away from the creek" nor is it severe enough to "start gagging" or prevent breathing.[25]

Mr. Taylor became more concerned when he learned about *E.coli* contamination in Spencer Creek from ESLA.[26] He testified the potential presence of *E.coli* in the creek has affected his attitude towards going into the creek when there is water in it and has been a factor in his decision to not spend as much time pulling debris out of the creek in recent years – he is his wife's caregiver and does not want to risk being affected by *E.coli* bacteria.[27] He testified historically he did not let his grandchildren swim in the lake during "a pollution event" but they are now old enough so they recreate beyond the discoloration area along the lake shoreline.[28] He testified he did not historically understand the red water was polluted but has come to assume the redness is pollution, and he has concern about the overall condition and health of the lake and creek, which is increasing as he gets older.[29]

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[23] *Id.,* PageID.4611 (30:7-33:5).

[24] *Id.,* (32:21-25).

[25] *Id.,* PageID.4612 (34:1-18).

[26] *Id.,* PageID.4606 (13:18-21).

[27] *Id.,* PageID.4615-16 (49:9-51:22).

[28] *Id.,* PageID.4615, 4613 (43:7-8, 39:23-40:24).

[29] *Id.,* PageID.4613, 4618 (41:4-21, 59:1-24).

ESLA also identified Dennis Gretel, who owns the property where Spencer Creek outlets into Elk Lake, as a standing witness.[30] As Burnette noted, Mr. Gretel clarified aspects of his affidavit testimony in deposition, noting discoloration and staining at the outlet were from natural causes, and any odors occurred long ago.[31] Plaintiffs respond briefly to Burnette's accusation that Mr. Gretel's affidavit is "false" because it was "directly contradicted" by deposition testimony.[32] Burnette notes that, in deposition, Mr. Gretel testified the reddish-brown water leaving the outlet is "from the leaves rotting across the stream from the swamp," which Burnette says contradicts his affidavit statement that the water near the outlet has an "unnatural discoloration."[33] Mr. Gretel never defined what he meant by "unnatural," but he did testify the water in Elk Lake is mostly "pristine" or "clear, beautiful looking water."[34] Mr. Gretel may characterize normally-clear water as "unnatural" when it turns red, *and* Mr. Gretel may simultaneously believe reddish water to be caused by decaying leaves in the wetlands (*i.e.*, "natural" causes); there is no false testimony. Burnette points to deposition testimony that Mr. Gretel is not presently, nor has been in in the last 20 years, affected by Burnette's spraying; his affidavit said his enjoyment of the lake has been negatively impacted "since Burnette's spraying operation began," which was over 20 years ago – not false.[35] The affidavit never said Burnette spraying had impacted Mr. Gretel's rental property income; it said, "[i]t is probable that, if the water becomes more polluted, we may lose business

[30] ECF 16, PageID.1623; ECF 16-2; **Ex 4** (Antrim County Parcel Map).

[31] ECF 91, PageID.4314-15, 4325-26.

[32] *Id.,* PageID.4326 n.2.

[33] ECF 91, PageID.4325 (citating deposition and affidavit).

[34] *Id.,* PageID.4598 (40:21-41:11, testifying that most of the time, the water is clear).

[35] ECF 91, PageID.4326; ECF 16-2, PageID.1673.

from our rental cottage business."[36] Again, not false. Notably, Burnette relies on Mr. Gretel's testimony to support stream conditions, so apparently considers him a credible witness.[37]

Mr. Gretel's testimony is not critical to ESLA standing because Mr. Taylor's is sufficient. Burnette asserts Mr. Taylor admitted he suffered "no real injury" when he testified his grandchildren enter the lake beyond the discolored water, thus discoloration does not impact "use of the lake."[38] Mr. Taylor made no such admission. Burnette ignores Mr. Taylor's testimony that he pulls his outboard motor out of the water when there is a pollution event to avoid impact to his boat. Burnette misunderstands that Mr. Taylor's injury is his concern about polluted water along his shoreline; Mr. Taylor's injury did not dissipate when his grandkids outgrew shoreline frolicking. And Burnette misstates the injury threshold for Article III standing – avoiding discolored lake water, avoiding creek clean-up activities, and pulling up the boat during pollution events are sufficiently concrete and particularized injuries for Article III standing. *See Interfaith Cmty. Org. v. Honeywell Int'l, Inc*., 399 F.3d 248, 254 (3d Cir. 2005) (although a plaintiff must have suffered an invasion of a concrete and particularized legally protected interest, "an identifiable trifle is enough."); *Laidlaw,* 528 U.S. at 183 (injury demonstrated by reasonable concerns that challenged activity lessens aesthetic, recreational value of area affiant used; acceptable that affiants provided "conditional statements -- that they would use the nearby [river] for recreation if Laidlaw were not discharging pollutants into it").

Burnette also minimizes Mr. Taylor's testimony about Spencer Creek, which traverses his property, specifically that pollution and odors impact his activities and enjoyment of the creek.

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[36] *Id.*

[37] ECF 96, PageID.4360, 4396-97.

[38] ECF 91, PageID.4327.

Again, that suffices for standing. Contrary to Burnette's characterization, Mr. Taylor's concerns about creek odor are not vague – he described precisely what, where, and when he smells the odor. Burnette's claim that Mr. Taylor must prove injury from the odor misunderstands that the unnatural odor is sufficient injury for standing. *See St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C.,* 354 F. Supp. 2d 697, 702 (E.D. La. 2005) (standing established where plaintiffs alleged smelling odors without connecting odors to health effects) (citations omitted); *see also Laidlaw,* 528 U.S. at 183 (lessened aesthetic value constitutes injury); *Lujan,* 504 U.S. at 562-63 (purely aesthetic interest cognizable for standing purposes).

Moreover, Burnette disregards that Mr. Taylor doesn't just use Spencer Creek and Elk Lake shoreline for recreational or aesthetic activities; he is a riparian property owner on these waters. Mr. Taylor's use of his *own* riparian property is diminished by discoloration, smells, and pollutants in Spencer Creek and Elk Lake from Burnette's spray fields. *See Paterson v. Dust*, 190 Mich. 679, 682; 157 N.W. 353 (1916) ("a riparian owner has a right to the enjoyment of the waters that flow past his premises in an unpolluted state."); *Attorney General v. City of Howell*, 231 Mich. 401, 403; 204 N.W. 91 (1925) ("The riparian owners along this branch of the river had a right to enjoy the advantages of the water for their stock, unpolluted by sewage, and not be driven to fence the stream to keep their stock away from its waters."); *White Lake Improv. Assoc. v. Whitehall,* 22 Mich. App. 262, 271-72; 177 N.W.2d 473 (1970) ("Where a private nuisance affects water, a riparian landowner may commence an action for its abatement. True, the plaintiff association owns no land, but its sole purpose is to represent the interest of its members, many of whom are riparian landowners, in preventing the pollution of White Lake."); *Trout Unlimited Muskegon-White River Chapter v. White Cloud,* 195 Mich. App. 343, 349; 489 N.W.3d 188 (1992) ("As a riparian landowner on the Middle White River, [plaintiff] has standing to challenge the legality of the new

dam construction due to the damage that it may cause his property."); *see also Tri-Realty Co. v. Ursinus Coll.,* 124 F. Supp. 3d 418 n.17 (E.D. Pa. 2015) ("Tri-Realty has presented evidence that it is a riparian owner of polluted jurisdictional waters, thereby showing an injury to its property and, therefore, to itself" and conferring standing) (citation and internal quotation omitted); *see also Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,* 204 F.3d 149, 156-57 (4th Cir. 2000) (property owner in path of toxic plume "anything but a roving environmental ombudsman seeking to right environmental wrongs wherever he may find them").

Further misleading is Burnette's summary of George Seifried's testimony. To clarify, Mr. Seifried did not testify as ESLA's corporate representative. Burnette separately noticed a deposition under Fed. R. Civ. P. 30(b)(6) of a person designated by ESLA to be its corporate representative to address, *inter alia,* "All facts relating to any injuries and/or impacts incurred by ESLA or any ESLA members that are alleged to result from the alleged discharges from Defendant's Elk Rapids facility and/or its spray fields."[39] ESLA prepared its corporate deponent accordingly, but Burnette made no inquiry into ESLA membership.[40] Later, Burnette noticed the deposition of Mr. Seifried, ESLA board president since June 2024.[41] Mr. Seifried is not authorized by ESLA to speak for the organization about this litigation.[42] Mr. Seifried testified repeatedly that he has limited personal knowledge about litigation-related details.

Contrary to Burnette's assertions, Mr. Seifried never testified that no ESLA members have identified any injury or damages from Burnette's operations. He testified members came to him at

[39] **Ex 5** (ESLA Dep Notice).

[40] Ex 99-5, PageID.4481-82 (ESLA 30(b)(6) Ogle 5:13-7:20).

[41] ECF 99-19, PageID.5070 (Seifried 14:8-9).

[42] *Id.,* PageID.5075 (20-24) ("The ESLA board has said – had determined, decided that any communication about this lawsuit should be directed to Steve Francis.").

meetings to express awareness of the pollution even if not presenting specific complaints, though he didn't remember who, and *he* did not know which members have specific complaints, *he* had not been contacted by them, and any financial injuries were not brought to *his* attention.[43] Mr. Seifried testified that he contacted Janet Hubbell, whose family owns property on Spencer Creek, and she shared concerns about what was in Spencer Creek.[44] He confirmed that Ms. Hubbell sent emails and pictures to Mr. Francis (ESLA's designated contact).[45] And he testified that ESLA's membership generally is concerned about pollution and ensuring the organization stands up to protect and preserve water quality.[46]

Irrespective of Mr. Seifried's personal knowledge, the record is clear that Ms. Hubbell, whose family owns the Glumb parcel (**Ex 4**), notified ESLA of specific complaints about pollution in Spencer Creek and Elk Lake from Burnette's operations.[47] It is clear that Mr. Taylor notified former ESLA board president (Bob Campbell) about his concerns about Spencer Creek and Elk Lake pollution resulting from Burnette operations.[48] It is clear that ESLA responded to members' concerns about pollution in Spencer Creek and impacting Elk Lake by investing heavily to fully investigate and then pursue litigation against Burnette and has kept its board and membership aware of these activities in an effort to address the threat to Elk Lake water quality posed by Burnette's wastewater discharges.[49] Mr. Seifried testified unequivocally that ESLA's interest in

[43] *Id.*, PageID.5076, 5079 (40:24-41:17, 42:11-43:1, 52:4-7).

[44] *Id.,* PageID.5074-5075 (33:4-36:25)

[45] *Id.*, PageID.5080 (55:23-56:10).

[46] *Id.,* PageID.5079 (51:5-20).

[47] **Ex 6** (Hubbell email, article); *see also* ECF-99-9, PageID.4605 (Taylor 8:17-9:19).

[48] ECF 99-19, PageID.5070 (Seifried 15:10-14); 99-9, PageID.4605, 4607 (Taylor 8:17-9:19, 14:19-15:8).

[49] ECF 99-19, PageID.5070-71, 5076-77, 5079 (16:11-18:2, 38:2-39:11, 41:18-42:2, 50:11-17); **Ex 7** (ESLA newsletters, minutes).

this case is to end pollution coming down Spencer Creek and entering Elk Lake.[50] ESLA has standing to pursue this case on Mr. Taylor's behalf.

4. *Plaintiffs' injuries fairly trace to Burnette wastewater discharges*.

Burnette argues that discoloration and odor in Spencer Creek and Elk Lake cannot be fairly traced to wastewater discharged in the upstream spraying fields, speculating there might be some other explanation for these conditions. Because the traceability element of Article III standing is intertwined with the merits of Plaintiffs' CWA claim, namely whether Burnette has discharged pollutants into WOTUS in violation of the CWA, this argument should be evaluated under Rule 12(b)(6) and resolved only after the merits of Plaintiffs' CWA are resolved. *See Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co*., 491 F.3d 320, 330 (6th Cir. 2007) (if factual attack on subject matter jurisdiction implicates element of cause of action, then "the district court should *find that jurisdiction exists* and deal with the objection as a direct attack on the merits of the plaintiff's claim.") (internal citations and quotations omitted, emphasis in original). While traceability is no impediment to standing, the Court should nevertheless find jurisdiction and address this argument via the pending summary judgment motions.

Notwithstanding Burnette's idle theorizing, Plaintiffs' injuries are fairly traceable to Burnette's wastewater discharges. Traceability requires a causal connection between the injury and complained-about conduct. *Sierra Club v. Tenn. Dep't of Env't & Conservation,* 133 F.4th 661, 672 (6th Cir. 2025). Traceability does not require plaintiffs to show with "scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the

[50] ECF 99-19, PageID.5076, 5077 (38:22-39:11, 44:24-45:6).

plaintiffs." *Public Interest Research Group, Inc. v. Powell Duffryn Terminals, Inc.,* 913 F.2d 64, 72 (3d Cir. 1990). Instead, "plaintiffs must merely show that a defendant discharges a pollutant that "causes or contributes to the kinds of injuries alleged by the plaintiffs." *Id.*; *see also Natural Resources Defense Council, Inc. v. Watkins,* 954 F.2d 974, 980 (4th Cir. 1992) (same); *Am. Canoe Ass'n*, 326 F.3d at 520 (pinpointing origins of particular molecules unnecessary to show traceability); *Am Canoe Ass'n*, 389 F.3d at 543 (injury fairly traceable because affidavits stated river had unpleasant odor, defendants exceeded effluent limitations on numerous occasions, and "these specific types of effluent discharges could cause conditions similar to that complained of").

The unrefuted record shows discoloration observed by the state regulator and documented by Burnette in effluent and ponded wastewater *upstream* of the wetlands by Field 36 and consistent discoloration observed *downstream* in Spencer Creek and Elk Lake.[51] The regulator also noted odor in Burnette's ponded wastewater.[52] When neighbors lodged complaints, Burnette acknowledged its wastewater odor problems in soil and wastewater and sought chemical fixes.[53] If that were all, it would suffice for standing traceability.

Burnette's characterization of the nature of Plaintiffs' members' injuries is too narrow – besides discoloration and odor, they complain about pollution in the creek and lake, including specifically (but not only) *E.coli*. It is uncontroverted that Burnette regularly discharges significant volumes of high-BOD wastewater,[54] and EGLE and Burnette detected high levels of unpermitted

[51] ECF 99-78, PageID.6396 (Aug. 4, 2020, inspection report); PageID.6505 (July 27, 2021, inspection report); 99-14, PageID.4903 (Kalchik 163-64); 104-3, PageID.6561-64 (inspection photos show reddish stained vegetation, water); **Ex 8** (effluent photos); 99-84 (Elk Lake video).

[52] ECF 99-78, PageID.6404, 6411 (July 27, 2021, inspection report).

[53] **Ex 9** (odor emails).

[54] ECF 99-73, PageID.6371; 99-67, PageID.6286; 99-40, PageID.5816.

E.coli in its wastewater.[55] Plaintiffs and EGLE sampling confirms high *E.coli* levels in Spencer Creek and at the outlet in Elk Lake.[56] High BOD in wastewater fuels low dissolved oxygen ("DO") downstream as microbes consume BOD, also activating metals in the groundwater, which vents to the wetlands and Spencer Creek, which regularly detects low DO levels.[57] Low DO impacts water quality and aquatic species.[58] The limited timing of discoloration and odor events (July) coincides with Burnette's peak discharges.[59] Burnette's discharge is capable of causing the kinds of injuries Ms. Ogle and Mr. Taylor identified – "a potent combination of high sodium, high metals, high phosphorus, low DO water" travels through the wetlands to Spencer Creek and into Elk Lake in rapid flushes when summer and early fall rains come, creating "acute water quality impacts downstream."[60] Ample evidence supports the conclusion that Burnette's discharges cause or contribute to the kinds of injuries Plaintiffs suffer.

Burnette's argument that Plaintiffs "have done zero work to rule out other potential sources"[61] is incorrect yet irrelevant. Plaintiffs' witnesses considered reasonable alternative explanations for *E.coli* and other pollution and conditions in Spencer Creek and Elk Lake – septic systems, animals, other land uses, natural conditions – and identified none.[62] And Plaintiffs' hydrologist undertook comprehensive evaluations to ascertain whether, when, and in what

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[55] ECF 99-80, PageID.6419.

[56] *Id.*

[57] ECF 99-22, PageID.5162-63 (Kendall Rep 36-37); 99-23, PageID.5200 (Kendall Rebuttal 16 par 4); 99-11, PageID.4707, 47267 (Kendall 127-128, 203-204); 99-80, PageID.6417 (DO sampling results).

[58] ECF 99-6, PageID.4544-45 (Smith 20:14-21:5, 22:5-23:8).

[59] ECF 99-9, PageID.4608-609 (Taylor 21:4-22:14); 99-84 (Elk Lake video).

[60] ECF 99-22, PageID.5163 (Kendall Rep 37).

[61] ECF 91, PageID.4329.

[62] *See. e.g.,* ECF 99-5, PageID.4496, 4502-503 (Ogle 62-64, 87-93); 99-6, PageID.4554-57 (Smith 61-72); 99-7, PageID.4581-82, 4584 (Mays 46-47, 52, 58-61); 99-20, PageID.5094 (Kogge Rep 13), 99-10, PageID.4644 (Kogge 90-93).

condition Burnette's wastewater reaches the stream – depending on mode (overtop berm, under berm, groundwater), it gets there in hours or days (surface), or at most a few months (groundwater), still polluted.[63] The creek is small and so is its drainage watershed; there are no other industrial discharges into the system; and EGLE and Burnette consultants consistently recognize the wastewater drains to the wetlands to the creek.[64] While Burnette's expert hypothesized wildlife in the wetland might cause high *E.coli* in the creek and lake, he did not test that hypothesis and never saw Burnette or EGLE effluent nor local septic system *E.coli* sampling.[65] He also was apparently unaware of leaking village wastewater pipes intermingling with Burnette wastewater pipes.[66] Moreover, Burnette presented no alternative explanation for creek and lake pollution, discoloration, and odors. *See Gaston Copper*, 204 F.3d at 162 ("Where a plaintiff has pointed to a polluting source as the seed of his injury, and the owner of the polluting source has supplied no alternative culprit, the 'fairly traceable' requirement can be said to be fairly met."); *Sierra Club v. Franklin County Power of Ill., LLC,* 546 F.3d 918, 926-27 (7th Cir. 2008) (same).

Burnette's speculation about potential alternative explanations is also irrelevant. Even if there were reasonable alternative explanations for the pollution and unnatural conditions in Spencer Creek and Elk Lake – if wetlands add color and smell or wildlife contribute *E.coli* – that would not defeat traceability. The Fourth Circuit explained:

> There were other upstream farms, which could have independently discharged waste into the waters. The fact that other farms may have contributed to the pollution problems complained of by the affiants in this case does not negate the fact that the defendants' discharges still potentially

[63] ECF 99-22, PageID.5140, 5158-63 (Kendall Rep 14, 32-37).

[64] *See, e.g.*, ECF 99-33, PageID.5540 (MET Site Status Report); 99-38, PageID.5671 (LEI 2022 Rep); **Ex 10** (LEI 2019 letter p 2); 99-69, PageID.6632 (EGLE Geologist Recommendation); 99-68, PageID.6306 (EGLE Surface Water Impacts memo).

[65] ECF 99-13, PageID.4807-808, 4812 (Rediske 36, 38, 40-42, 59-60).

[66] ECF 99-72.

> harmed them. It would be strange indeed if polluters were protected from suit simply by virtue of the fact that others were also engaging in the illegal activity.

Am. Canoe Ass'n, 326 F.3d at 520. It is enough to demonstrate traceability by showing the challenged actions are partly responsible for the injury. *See Massachusetts v. EPA*, 549 U.S. 497, 523-24 (rejecting argument that insignificant contributions to injuries should not support standing); *Sierra Club v. United States DOI,* 899 F.3d 260, 284 (4th Cir. 2018) ("the causation element of standing does not require the challenged action to be the sole or even immediate cause of the injury") (citations omitted).

Burnette notes that leaflitter and natural biological debris in a wetland or stream system can discolor streams and plume where they outlet, plus foam can be natural. Plaintiffs don't dispute these points, as far as they go. Plaintiffs' witnesses testified that while discoloration and foam can be natural, the observed and documented conditions and variability in Spencer Creek and Elk Lake are *not* natural.[67] Nor is high conductivity and low DO.[68] That's why Plaintiffs investigated the conditions, collected samples to ascertain whether pollutants in Spencer Creek are consistent with Burnette's discharge, then brought this lawsuit against Burnette – because the documented conditions in Spencer Creek and Elk Lake are *un*natural. Notably, while Burnette's *motion* shows a couple of Google Earth images purportedly of creek outlet plumes, Burnette's *experts* did not dispute that documented conditions in Spencer Creek are unnatural.

Burnette's assertion that correlation is *per se* insufficient to prove causation is illogical. All environmental pollution cases involve correlation – pollutants in the air around or water downstream from where defendant's facility emits or discharges those types of pollutants. *See,*

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[67] *See. e.g.*, ECF 99-5, PageID.4487-88, 4490-92 (Ogle 29-33, 40-49), 99-6, PageID.4555, 4562 (Smith 62, 90-91).

[68] ECF 99-7, PageID.4575 (Mays 24:13-25:18); 99-6, PageID.4544 (Smith 19:17-21:21),

e.g., NRDC v. Ill. Power Res., LLS, 202 F. Supp. 3d 859, 873 (C.D. Ill. 2016) (particulate matter from defendant plant made it into geographic area at issue, so recreational injuries that result from reasonable fear of particulate matter fairly traced defendant's conduct); *Gaston Copper,* 204 F.3d at 158 (pollutants found on the plaintiff's property were type discharged from defendant plant and plaintiff's property was downstream of defendant's). Burnette's theory that a plaintiff must trace the literal particles their members breathe or paddle in back to the defendant's pipe to litigate unpermitted discharges would be unprecedented. *See id.* at 160 (no circuit requires "additional scientific proof where there was a direct nexus between the claimant and the area of environmental impairment" and courts are clear that threatened injury is sufficient for standing) (discussing cases). Plaintiffs' injuries fairly trace to Burnette's discharges, and they have standing to pursue this litigation.

B. <u>Burnette's CWA violations continue unabated still.</u>

Burnette's alternative "standing" argument rests on the vacuous assertion that its violations are wholly in the past. Its legal foundation is sound – CWA citizens suits require "either continuous or intermittent violation" after filing. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc*., 484 U.S. 49, 57 (1987). But it is factless – Burnette's offending discharges since June 2023 have not changed in quality or quantity, nor has local hydrology.[69]

To put a finer point on it, since June 2023, Burnette has continued to discharge untreated, high-strength industrial wastewater to shrunken wetted acreage in fields that naturally drain to a wetland complex that is the headwaters of Spencer Creek, which flows to Elk Lake. Burnette's

[69] This is intertwined with and should be considered alongside the merits of the CWA case. *Gentek Bldg. Prods, supra.*

wastewater BOD levels continue to range from an average of 4,560 mg/L to a high around 15,046 mg/L; EGLE determined the proposed level to protect surface waters would be 30 mg/L, significantly below current discharges.[70] Burnette adds sodium hydroxide to its wastewater to treat pH; Burnette self-reported violations of its permitted sodium limit three times since June 2023.[71] Burnette self-reported two violations of the application rates in its discharge permit since June 2023.[72] Burnette identifies no operational or discharge modifications since it installed fixed sprayers in 2020 and the dune-berm in 2021 – neither resolved the violations; the former shrunk and concentrated discharge acreage; the latter at best temporarily delays inevitable wastewater-to-wetlands infiltration.[73] The shrunken acreage also means Burnette continues to miscalculate and underreport its discharge depths. Sampling in Spencer Creek since June 2023 shows continued pollution consistent with Burnette's BOD- and sodium-laden discharges – low DO and high conductivity.[74] Burnette's efforts to remedy leaky village wastewater infiltrating its wastewater – potentially the *E.coli* source – post-dates the complaint.[75]

Ward v. Stucke, which Burnette leans on heavily, is factually inapposite. 2021 U.S. Dist. LEXIS 167486 (S.D. Ohio Sept. 3, 2021); *aff'd,* 2022 U.S. App. LEXIS 12624 (6th Cir. May 10, 2022). Ward alleged Stucke's pre-litigation unpermitted wetland filling caused post-litigation flooding, but no post-litigation dredging, filling, or pollutant discharging. Burnette's unpermitted discharges transcend June 2023.

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[70] ECF 99-73, PageID.6371 (Aug. 2024 email).

[71] ECF 99-41, PageID.5834 (Technical Memo); 99-81, PageID.6426 (GDP violations).

[72] ECF 99-81, PageID.6420.

[73] *See* ECF 89, PageID.4257-60.

[74] ECF 99-80 (sampling summary).

[75] ECF-99-14, PageID.4912-13 (Kalchik 200-03); 99-72.

C. MCL § 324.20137(6) does not defeat jurisdiction over Plaintiffs' MEPA claim.

Before unpacking Burnette's third argument, a primer on four Parts of the Michigan Natural Resources and Environmental Protection Act ("NREPA") follows:

- *Part 17* is the Michigan Environmental Protection Act ("MEPA"), MCL§ 324.1701 *et seq*, a source of supplementary substantive and procedural environmental law. *State Highway Comm'n v. Vanderkloot*, 392 Mich. 159, 184; 220 N.W.2d 416 (1974). MEPA is the statutory mechanism for non-state plaintiffs to bring environmental actions against polluters. *Nemeth v. Abonmarche Dev, Inc.,* 457 Mich. 16, 31; 576 N.W.2d 641 (1998).
- *Part 31*, Water Resources Protection Act, MCL § 324.3101 *et. seq*., protects state waters by, in part, controlling pollution discharges into surface and ground waters.
    - *Part 22*, Groundwater Quality, provides the state regulations promulgated administratively pursuant to Part 31 applicable to groundwater discharges, including spray application. Mich. Admin. Code R. 323.2201 *et seq.*
    - *Part 201*, Environmental Remediation, MCL § 324.20101 *et seq.,* addresses clean up response activities from facilities containing hazardous substances. *See* MCL § 324.20102. Part 201 is the Michigan counterpart to federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and shares regulatory features. *Genesco, Inc. v. Mich. Dep't of Envtl. Quality*, 250 Mich. App. 45, 50; 645 N.W.2d 319 (2002).

Plaintiffs assert a MEPA claim under Part *17* alleging Burnette's wastewater discharges have polluted, impaired, or destroyed state waters, and are likely to continue unless judicially

abated. Specifically, Plaintiffs' MEPA claim seeks to abate ongoing wastewater discharges from Burnette's wastewater spray system in violation of Parts *31* and *22*.

Burnette argues that Plaintiffs' Part *17* MEPA claim for Burnette's violations of Part *31* and *22* is subject to the procedural provision in Part *201* precluding judicial review of state-approved response activities to remediate hazardous waste sites until the response activity is completed. MCL § 324.20137(6) ("A state court does not have jurisdiction to review challenges to a response activity selected or approved by the department *under this part*") (emphasis added). Burnette's argument is unprecedented nonsense. To state the obvious first: this argument is premature because it precedes any state approval of anything under any NREPA Part.

Moving on, Burnette wrongly asserts that Part 22 response activities are conducted pursuant to Part 201 – they are conducted under Part 22. Where a groundwater discharge permittee exceeds the concentration of a "substance" (pollutant) in effluent or groundwater, Part 22 authorizes a buffet of regulatory response requirements: change the monitoring program, revise operational procedures, change the design or construction of wastewater operations, initiate an alternative treatment or disposal method, reduce or eliminate the use of a substance, close the facility or end the discharge, define the extent of groundwater exceeding Part 201 standards ("criteria"), remediate contamination to comply with Part 201 criteria, and more. Mich. Admin. Code R. 324.2227(2). Independent of Part 201, Part 22 grants EGLE broad authority to require dischargers to respond to groundwater discharge exceedances.

EGLE citations and ACO negotiations are under Parts 22 and 31, not Part 201. Part 22 prohibits groundwater permittees from creating a Part 201 hazardous waste facility; being a Part *201* facility is a Part *22* violation. Mich. Admin. Code R. 324.2204(2)(f). Burnette's discharges have led to groundwater levels exceeding Part 201 criteria for arsenic, manganese, and iron; EGLE

cited these as Part 22 violations.[76] The state never cited Burnette for violating Part 201 nor initiated Part 201 remedial action. The draft ACOs are explicitly authorized pursuant to EGLE's Part 31 authority, including Sections 3106 and 3112(4).[77] While Burnette argues that "an evaluation of hydrological conditions at the Spray Fields" meets the Part 201 definition of a "response activity,"[78] the state never characterized the study that way. To the contrary, the state directed Burnette in 2019 and 2020 to evaluate hydrological conditions at the spray fields to address Burnette's Part 22 and 31 violations.[79] Neither draft ACOs nor EGLE's corporate witness identified contemplated future hydrogeological studies as Part 201 "response activity."[80] In fact, the latest draft ACO says, "*If,* based on the results of the Hydrogeological Studies or data from other areas of the site determines that BFI is a Part 201 facility, *than* BFI shall comply with Part 201 cleanup requirements [*sic*]."[81] The Hydrogeological Work Plan developed by Burnette's consultants and submitted to EGLE explains wells will be constructed and sampling completed under "Part 22 Guidesheet I, 'Hydrogeologic Study Requirements'"; Part 201 is never mentioned.[82] There is no evidence the some-day-maybe hydrogeological study contemplated in a draft Part 31 ACO to resolve Part 22 citations is a remedial response activity approved by EGLE under Part 201.

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[76] ECF 99-52, PageID.6005 (2021 Violation Notice), 99-53, PageID.6017 (2023 Violation Notice).

[77] ECF 99-55, PageID.6029 ("EGLE is authorized by Sections 3106 and 3112(4) of Part 31, MCLs 324.3106 and 324.3112(4), to enter orders requiring persons to abate pollution or otherwise cease or correct activities in violation of a specific part."); 99-56, PageID.6103 (same).

[78] The Part 201 definition of "response activity" broadly includes evaluation, interim response, remedial action, demolition, and more. MCL § 324.20101(vv); not every state-ordered evaluation or demolition or remedial action is a Part 201 "response activity."

[79] ECF 99-49, PageID.5991 (2019 Violation Notice), 99-50, PageID.5997 (2020 Violation Notice).

[80] ECF 99-55, 56 (Draft ACOs); 99-17, PageID.5032-33 (McAuliffe 152-54).

[81] ECF 99-56, PageID.6117 (Draft ACO Par 3.18) (emphasis added).

[82] **Ex 2** (Hydrogeologic Work Plan).

Burnette's argument is not saved by MCL § 324.3109b ("remedial actions that satisfy Part 201 requirements satisfy a person's remedial obligations under this part"). The state has not ordered any "remedial action" – defined as a cleanup "of a hazardous substance," MCL 324.20101(1)(qq) – under Part 201 or otherwise, nor is there evidence it ever will.

Burnette's wielding of the Part 201 pre-enforcement bar to foreclose subject matter jurisdiction over Plaintiffs' MEPA claim to pursue Part 31 and 22 violations lacks precedent. Burnette invokes *Genesco,* which involved a defendant-polluter seeking judicial review of a state-ordered clean-up of a contaminated lakebed. 250 Mich. at 46. *Genesco* undermines rather than supports Burnette's argument. The state ordered active remediation, including dredging contaminated toxic chemicals from lake bottomlands, whereas Genesco preferred to leave lake bottomlands undisturbed via restrictive covenant. The case pitted judicial review of the Part 201 clean-up against a Part 17 defense. The court noted the limitation on pre-enforcement judicial review in Part 201 and CERCLA serves "to encourage cleanup of contaminated sites without being delayed by litigation." *Id* at 51. The court acknowledged Parts 17 and 201 codify conflicting judicial review approaches: "the approach of Part 17 is to preserve the environment through the obtaining of declaratory and injunctive relief in court, while Part 201 encourages the prompt cleanup of hazardous substances through administrative or private action and assignment of financial liability." *Id*. at 49. *Genesco* concluded that "principles of statutory construction dictate that claims under Part 17 may not be brought where the underlying controversy is over a 'response activity' as defined in Part 201." *Id.* at 53.

Genesco's rationale for finding Part 201 trumped Part 17 for judicial review was the urgency of cleaning up toxic contamination. Not only is there no state Part 201 order here, the state has demonstrated no urgency to have Burnette remediate contamination (hazardous or otherwise),

complete a hydrogeological study, or even cease ongoing unlawful exceedances. It's been nearly 6 years since the state issued the 2019 violation notice directing Burnette to study conditions at the site and nearly 5 years since the state issued a Part 31 Enforcement Notice for over 1,000 documented violations.[83] Inspections and sampling in 2021 and 2023 document more violations but not more urgency to address them.[84] An ACO has been forthcoming since 2020.[85]

Burnette's reliance on *Abnet v. Coca-Cola Co.* also misses the mark. 786 F. Supp. 2d 1341 (W.D. Mich. 2011). Coca-Cola operated the Minute Maid fruit juice and drink processing facility that generated wastewater containing cleaning agents, salts, sugars, and other organic compounds, which Coca-Cola sprayed onto open fields from 1979 to 2002, which allegedly "depleted oxygen in the affected soil, creating conditions which caused naturally occurring heavy metals such as manganese, iron, lead and arsenic, to leach into groundwater." *Id.* at 1342. The state and Coca-Cola executed a consent order phasing out land application, providing bottled or replacement water to nearby property owners, evaluating groundwater contamination, and requiring Coca-Cola undertake "broader action to alter soil or groundwater conditions." *Id.* at 1343. Years after spraying ceased, with Coca-Cola dilatory in undertaking remediation, adjoining landowners sued Coca-Cola under multiple theories. The court dismissed their MEPA claim seeking additional "response activities," relying on MCL § 324.20137 and *Genesco. Id.* at 1347. Like *Genesco,* the underlying controversy was the efficacy of state-sanctioned Part 201 hazardous waste response activities. This is not that case. Unlike *Genesco* and *Abnet,* "the underlying controversy" here is not a Part 201

[83] ECF 99-51 (2020 Enforcement Notice).

[84] ECF 52, 53 (2021, 2023 Violation Notices).

[85] ECF 99-51, PageID.6000 (2020 Enforcement Notice).

clean-up of toxic contamination but cessation, relocation, or pretreatment of Burnette's wastewater discharge.

In contrast to the clear language and rationale of Part 201, Burnette cites no conflict in the judicial review approaches of Part 31 and Part 17, nor any precedent supporting its argument. To the contrary, private citizens *may* enforce Part 31 and other environmental statutes through Part 17. *See Zanke-Jodway v. City of Boyne City*, 2009 U.S. Dist. Lexis 89362 *52-59 (W.D. Mich. Sept. 28, 2009) (plaintiff may pursue MEPA Part 17 claims to enforce sections of NREPA Parts 31, 91, 301); *see also Anglers of the AuSable, Inc. v. Dep't of Envtl. Quality,* 283 Mich. App. 115, 127; 770 N.W.2d 359 (2009), *rev'd in part on other grounds*, 485 Mich. 1067, 777 N.W.3d 407 (2010) (plaintiff may pursue MEPA Part 17 claim to enforce NREPA Part 615). The *Anglers* court rejected the argument that the Part 201 jurisdictional limitation foreclosed a MEPA Part 17 challenge to a hazardous waste "corrective action plan" issued under Part 615,[86] which referenced Part 201 to establish the cleanup goal for the site, even where that meant potential delay of "cleanup efforts of contaminated sites approved under part 615." 283 Mich. App. at 126. The court found the legislature intended to limit the Part 201 pre-enforcement bar to hazardous waste remedial plans approved under Part 201. *Id.* at 127. Section 20137(6) provides no basis to limit subject matter jurisdiction over Plaintiffs' MEPA claim.

D. <u>The Court has jurisdiction to provide declaratory and equitable relief under MEPA.</u>

Burnette argues that Plaintiffs' sole forum for declaratory or equitable relief relating to Burnette's excessive wastewater discharges was to seek judicial review of the groundwater

[86] Part 615 regulates oil and gas well facilities and grants authority to EGLE over matters relating to unreasonable damage to groundwater resulting from the use of such facilities. MCL § 324.61501 *et seq.*

discharge permit issued in 2017. This argument is odd – Plaintiffs' MEPA claim does not seek judicial review of Burnette's 2017 discharge permit – and untenable under MEPA's plain language and long-standing precedent, including the single case Burnette cites.

MEPA authorizes citizens to sue for declaratory and injunctive relief against any person for the protection of water and other natural resources from pollution, impairment, or destruction, and empowers the court to determine the validity, applicability, and reasonableness of an existing pollution standard, and – if found deficient – to specify another standard. MCL § 324.1701. MEPA is thus "supplementary to existing administrative and regulatory procedures provided by law." *Her Majesty the Queen in Right of Province of Ontario v. City of Detroit*, 874 F.2d 332, 337 (6th Cir. 1989); *Ray v. Mason County Drain Comm'r.*, 393 Mich. 294, 305 (1975) (MEPA signaled "a dramatic change from the practice where the important take of environmental law enforcement was left to administrative agencies without the opportunity for participation by individuals or groups of citizens.").

Lakeshore Group v. State undermines Burnette's argument. 2018 Mich. App. LEXIS 3701 (Mich. Ct. App. Dec. 18. 2018); *aff'd*, 510 Mich. 853, 977 N.W.2d 789 (Mich. 2022). The *Lakeshore* court affirmed dismissal of a MEPA claim against then-DEQ (now EGLE) for issuing a permit authorizing a permittee (not before the court) to develop a residential subdivision in a critical sand dune area. The lower court reasoned that MEPA authorizes challenges to a defendant's *conduct* that is likely to harm the environment, but DEQ's permit eligibility decision is not "'conduct' under MEPA." *Id.* at *7 (citation omitted, quoting MCL § 324.1703(1), which requires "showing that the conduct of the defendant" harms environment). Unlike *Lakeshore,* Plaintiffs did not sue EGLE for issuing the 2017 groundwater discharge permit, they sued Burnette for its polluting conduct. Ironically, in language that Burnette underscores then ignores, *Lakeshore*

confirms this is the right approach: "A plaintiff can also challenge the permit holder's actual conduct *in a separate lawsuit* ***without having to go through any administrative review***. MCL 324.1701." *Id.* at *7 (emphasis added).

Burnette block-quotes part of an opinion concurring in denying leave to appeal *Lakeshore.* The concurring opinion reiterated the lower court's assessment – the proper path for judicial review of the regulator's decision to issue a critical dunes permit is through the critical dunes statute, not MEPA. 510 Mich. at 854-55. That is inapplicable here. Applicable here is what the dissent said: "At this point, *no one disputes that plaintiffs have a right to sue the permittee under MEPA* or to participate in the administrative review process." *Id.* at 859. Burnette's argument is groundless, Plaintiffs' MEPA claim is proper, and this Court has jurisdiction over it.

V. CONCLUSION

The Court should deny Burnette's motion to dismiss Plaintiffs' complaint.

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Respectfully submitted,

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