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 FOR SUMMARY JUDGMENT

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PLAINTIFFS RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This case is straightforward. An industrial polluter land-applies massive volumes of heavily-polluted wastewater, overwhelming under-sized spray fields and serially violating application rate and effluent limits in its groundwater discharge permit. Polluted wastewater reaches groundwater and vents into the adjacent wetland complex that drains to Elk Lake. Excess polluted wastewater also collects in a low ponded area and, when it rains more than minimally, added runoff overwhelms the ponded area, causing overflow from the lowest spot in the berm to the adjacent wetlands that drain to Elk Lake. These conditions have persisted for years, leading to chronic poor water quality in Spencer Creek, the connector between the wetlands and lake. These activities violate the federal Clean Water Act ("CWA") and Michigan Environmental Protection Act ("MEPA").

Three Plaintiffs sharing common interests in protecting water quality in Elk Lake and its tributaries sued Defendant Burnette Foods, Inc. ("Burnette" or "Defendant") to finally put an end to this unlawful conduct. Burnette seeks to avoid liability by advancing meritless defenses unsupported by record evidence and contrary to well-established legal precedent. The Court should deny Burnette's motion for summary judgment for the reasons discussed below.

II. BACKGROUND

Background facts are well-developed elsewhere, and Plaintiffs address record evidence on Burnette's substantive arguments in context. This section corrects some of Burnette's most egregiously misleading assertions.

A. Burnette operates an industrial facility that frequently violates the law.

Burnette operates an industrial fruit processing facility that produces tens of millions of gallons of industrial wastewater annually.[1] Burnette disposes of the wastewater by discharging it onto spray fields that are its "land treatment system" "designed and built as part of the wastewater treatment facility."[2]

Burnette misleadingly portrays its spray fields as an agricultural operation akin to a farm. As a threshold matter, Mr. Sherman's present understanding of Jack White's activities in the 1970s vis-à-vis Burnette predecessors in interest is irrelevant hearsay and should be disregarded. The portrayal is further improper because Burnette claimed in discovery to have no real information about any of its own current agricultural activities:[3]

> 6. Describe in detail Burnette Foods's crop production system for each year from 2018 to 2024, including the annual schedule for seed planting, crop mix in each field, acreage of each crop planted in each field, harvest schedule, production yield of each crop in each field, seed source, harvested crop disposition, identity of harvest purchaser/buyer (if sold), expenses incurred in crop production, and revenues received from crop production.
>
> RESPONSE: Defendant objects to this interrogatory because it is not relevant to Plaintiffs' claims. By way of further response, information relating to the spray field's crop mix, crop management system, crop harvest schedule, expected yield per acre, and nutrient uptake is available in the Discharge Management Plan (BFI##00005781-00005782) [ECF 99-2]. Further relevant information is available in the deposition testimony of Kevin Kalchik. Defendant does not track the other items requested in this interrogatory. There is no purchaser/buyer of Burnette's crop.

[1] ECF 99-42, PageID.5846 (2024 Technical Memorandum).

[2] ECF 99-1, PageID.4425-26 (Groundwater Discharge Permit ("GDP")); 99-2, PageID.4439 (Discharge Management Plan ("DMP")).

[3] **Ex 1** (Burnette Response, Interrogatory 6).

In response to the request to produce all documents supporting the interrogatory response, Burnette said, "No other documents other than the one referenced in Defendant's response to Interrogatory 6 is responsive to this request."[4]

Consistent with its discovery position, additional evidence confirms Burnette's spray field grass-growing is clearly an operational afterthought. Burnette generates zero income from the grasses.[5] Burnette does not always cut and bale grasses; whoever takes the bales often does.[6] Burnette keeps no records of who receives the grasses,[7] the percentage of various grass grown,[8] or where its seeds come from.[9] The only "business records" supporting hay bale numbers are miscellaneous notes jotted on random notepads:[10]

[4] *Id.* (Burnette Response, Request for Production 1).

[5] ECF 99-14, PageID.4893 (Kalchik 123:17-19).

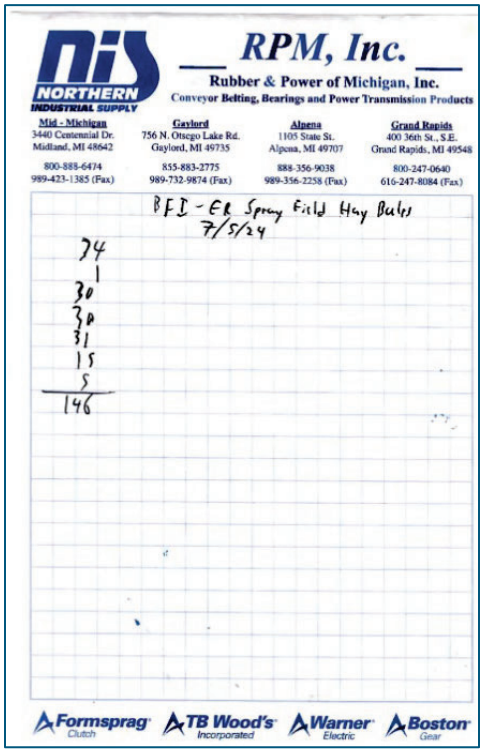
[6] *Id.,* PageID.4895 (132:3-9).

[7] *Id*., PageID.4893 (124:2-8).

[8] *Id*., PageID.4894 (126:4-12).

[9] *Id*. (127:7-13).

[10] ECF 99-59, PageID.6187-89.



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BFI - Elk Spray Field Hay Bales
7/5/24

74
1
30
30
31
15
5
146

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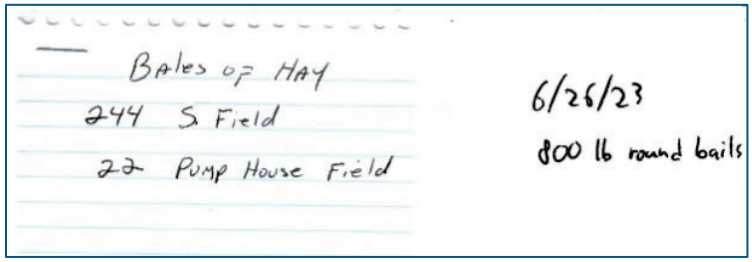
154 Bales South Field
27 Bales Pump House Field
2022



Bales of Hay
244 S. Field
22 Pump House Field
6/26/23
800 16 round bails

"Crop production" is not a meaningful function of the spray fields – Burnette operates a land treatment system to treat industrial wastewater, not a farm.

Burnette downplays its compliance history. In reality, Burnette has repeatedly ignored state regulations and regulators. Its hundreds of permit violations show Burnette's *modus operandi* is violate, then ask forgiveness.[11] The discharge violations are significant. The vast majority are depth violations, measured in inches. An inch spread over an acre is 27,154 gallons of water, so these violations result in significant volumes of excess wastewater applied to spray fields leading to runoff, ponding, and increased wetlands discharges. Another example of Burnette's regulation-flaunting is the installation of a new spray system in 2020 that concentrates spraying to a fraction of the permitted spray field acreage without the required prior authorization.[12] The new system

[11] ECF 99-81, PageID.6420-27 (violations summary).

[12] ECF 99-2, PageID.4439 (DMP).

means Burnette underreports discharge "depth" and masks the number and degree of violations.[13] Another example is Burnette ignoring its consultant's advice that a wetland fill permit was required to construct the secondary berm – Burnette built the new berm in wetlands sans permit.[14] Burnette also ignored direct state orders regarding another wetland permit that authorized a single farm road equalization culvert but denied a second culvert – Burnette built two, notwithstanding EGLE's concerns about impacts to the wetlands from Burnette's discharges.[15]

B. Plaintiffs have no reason to manufacture this lawsuit.

Plaintiffs are familiar with water quality conditions in streams, rivers, and tributaries in and around Elk Lake – their staff spend literally most of their professional waking hours evaluating, monitoring, sampling, and restoring these waters.[16] They know what comes out of wetlands, they've seen tannin-water, they recognize foam, they smell creeks, they observe frogs. They often get complaints from landowners about weird smells and odd events – they know when to take them seriously and when a little education is in order.

The conditions Plaintiffs discovered in Spencer Creek starting in 2019 are unnatural and serious.[17] Plaintiffs reacted by engaging the regulator (EGLE) while monitoring local conditions.[18] Plaintiffs searched for alternative explanations besides the obvious industrial processor

[13] ECF 99-22, PageID.5151-53 (Kendall Rep).

[14] ECF 99-71, PageID.6364 (Burnette, LEI emails); ECF 99-14, PageID.4888 (Kalchik 104:10-105:2).

[15] *Id.*, PageID.4890-91 (Kalchik 112:2-113:9); ECF 99-4, PageID.4477-78 (Part 303 Wetland Fill Permit Authorization); **Ex 3** (EGLE letter, emails).

[16] ECF 99-5, PageID.4483-4, 4487 (Ogle 13-16, 28); 99-6, PageID.4540-43, 4546 (Smith 5-6, 12-15, 27); 99-7, PageID.4571-72, 4574-75 (Mays 6-10, 18-21, 25).

[17] ECF 99-86 (Spencer Creek video); 99-49, PageID.5987-91 (2021 Violation Notice).

[18] ECF 99-49, PageID.5987 (2019 Violation Notice); 110-7, PageID.6923-36 (ESLA meeting minutes, 2019-2022).

discharging millions of gallons of untreated wastewater immediately adjacent to the wetland complex in the Spencer Creek watershed with limited surrounding land uses – but found none. EGLE issued three violation notices, an enforcement notice, and cited Burnette for hundreds of violations, but nothing changed – Spencer Creek remained unhealthy.[19] In November 2022, Plaintiffs issued a Notice of Intent to sue Burnette.[20] EGLE demonstrated no inclination to hold Burnette accountable; Burnette demonstrated no inclination to modify its discharges. So Plaintiffs sued Burnette in June 2023.

Burnette chides Plaintiffs for not doing more to prove Burnette is contributing to unhealthy conditions in Spencer Creek. Plaintiffs did plenty. They considered septic systems, road salts, dead animals, and more, but none made sense – adjacent septic systems would impact downstream not upstream waters with high *E.coli*; road salt would result in winter chloride spikes that flush out of streams in usually 12 to 24 hours, not Spencer Creek's summer levels and spiking; dead animals are common in wetlands and would not explain unusual results – plus sourcing proved inconclusive.[21] Burnette remained the most reasonable and likely explanation. Plaintiffs' litigation experts confirmed those conclusions.[22] So did EGLE.[23] To date, none of Burnette's many consultants and experts have brought forward any credible alternative explanation for unhealthy

[19] ECF 49-52 (Violation Notices), 99-80 (Summary of sampling results).

[20] ECF 16-1.

[21] *See, e.g.,* ECF 110-7, PageID.6973-74 (email to ESLA board describing alternative sources evaluations, including whether tannins and foam were natural, information from health department about residential septic systems as unlikely contributors, whether animals could explain *E.Coli,* conveying results of University of Alberta *E.Coli* source tracking study indicating human sewage associated marker gene); 99-5, PageID.4496, 4502-503 (Ogle 62-64, 87-93); 99-6, PageID.4549-50, 4554-57 (Smith 40-43, 61-72); 99-7, PageID.4581-82, 4584 (Mays 46-47, 52, 58-61).

[22] ECF 20-23 (Kogge, Kendall reports).

[23] ECF 99-69, PageID.6320, 6322 (EGLE Geologist Recommendation); 99-68, PageID.6304-05 (EGLE Surface Water Impacts Review).

conditions in Spencer Creek.[24] None. Zip. Nada. To the contrary, Burnette's non-testifying consultants acknowledge the problem and recommend Burnette treat or move its discharge.[25]

Plaintiffs – small organizations with limited resources – lack any motive to manufacture litigation or villainize Burnette. This case is about furthering their respective missions and improving local water quality, nothing more.

C. Plaintiffs' case is well-supported, Burnette's is not.

Burnette postulates that it is "impossible" for pollutants from its wastewater to reach Elk Lake. The cited geographic and hydrologic features include two low sandy dune-berms and multiple culverts that exist to ensure surface water passes through roads and under driveways to Elk Lake. Not only is it not impossible for water to flow through these features to Elk Lake, Plaintiffs' expert analysis, ample photographs, and other evidence confirm surface water regularly does pass them though them, as discussed below in context. Four of Burnette's assertions in its "Background" section are sufficiently misleading to warrant a brief response.

First, Plaintiffs have established Burnette's wastewater has and does occasionally reach the wetlands through surface water overtopping the main berm. Plaintiffs' expert Dr Kendall used Lidar data from 2016 showing, historically, the main berm's lowest point was less than one foot above the retention basin elevation,[26] and he estimated it is currently two feet above the retention basin.[27] He then compared discharge volumes, precipitation trends, and the volume required to fill

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[24] Burnette's two Google Earth images prove nothing relevant about whether its wastewater pollutes Spencer Creek and Elk Lake.

[25] ECF 99-40 (LEI 2020 Information Packet); 99-41 (2022 Technical Memorandum).

[26] ECF 99-22, PageID.5156 (Kendall Rep).

[27] *Id.,* PageID.5156-58.

and top the basin based on the main berm's lowest point, and he concluded wastewater likely overtopped the berm numerous times a year historically and continues to do so once or more annually.[28] Observations by state regulators[29] and local riparians,[30] and video evidence[31] of the wetlands, creek, and Elk Lake running red during Burnette's peak season following rain events corroborate Dr. Kendall's conclusions.

Burnette disputes Plaintiffs' evidence of direct surface overflows only in its background discussion and only with two vague statements to support a curiously vague assertion: "[e]vidence adduced during discovery" about the berm "forecloses the possibility of surface sheet flow into the Wetlands."[32] The "evidence adduced during discovery" is a flip comment by its *E.Coli* expert that he didn't "see how it's possible" for sheet flow to overtop the berm "at least from what we saw at the site visit," though he took no measurements and did no analysis.[33] Burnette's other citation is MacGregor's report: "[n]o evidence was observed indicating that surface water has or could over top this berm, and no breaks in the berm were observed."[34] In deposition, he confirmed this was mere speculation without foundational data: "I do want to note that I did not specifically make observations to determine the height and width of the [main] berm throughout its length."[35] This is the entirety of Burnette's evidence against Plaintiffs' claim that its wastewater enters the adjoining wetlands directly via surface water overflow. Notably absent from Burnette's expert

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[28] *Id.*

[29] ECF 99-49, PageID.5987 (2019 Violation Notice); ECF 99-50, PageID.5992 (2020 Violation Notice); ECF 99-52, PageID.6003 (2021 Violation Notice).

[30] ECF 99-9, PageID.4605 (Taylor 8:19-23; 10:5-19; 17:10-18:9, 22-24).

[31] ECF 99-84 (Video Elk Lake – July 30, 2021).

[32] ECF 96, PageID.4365

[33] ECF 99-13, PageID.4829 (Rediske 125:20-25).

[34] ECF 99-26, PageID.5315 (MacGregor 2025 Rep).

[35] ECF 99-12, PageID.4775 (MacGregor 153:25-154:2).

reports and many briefs is "evidence adduced during discovery" by Burnette non-testifying consultant a month before Burnette filed its expert reports: a "Berm Survey" with precise data confirming Dr. Kendall's berm height analysis supporting surface overtopping.[36] Plaintiffs' direct surface water discharge analysis is solid and unrefuted.

Second, there is no fabric filter installed along the bottom of Spencer Creek. MacGregor testified he saw old fabric filter "not in the bottom of" the creek but "along the side slope of the road. Or the side slope where the road meets the wetland area."[37] Admittedly, Burnette's undated images show remnants of something in the creek. But Burnette's assertion that it "explains why no plants are growing in the bottom of the ditch" is made up. MacGregor made no such assertion in the cited report.[38] In deposition, he explained, "I made the observation just, you know, as evidence that manmade activities or man-caused activities occurred in this area around the culvert."[39] And he testified that natural water movement along that area could create the scoured bottom he observed there during both site visits, and he has no evidence the scouring was from non-natural causes – *i.e.*, fabric.[40] The fabric is yet another Burnette distraction from the merits.

Third, there is not "frequently a gap" between the bottom of the Elk Lake Road culvert and Spencer Creek. While MacGregor made that statement in his 2025 report alongside an October 9, 2024, photograph that Burnette replicates in its motion, MacGregor conceded in deposition (after his recollection was refreshed by video) that he personally observed water *above* the culvert lip

[36] **Ex 2** (LEI Berm Survey, Dec. 19, 2024, at 4).

[37] ECF 99-12, PageID.4784 (MacGregor 189:1-5).

[38] ECF 99-26, PageID.5317 (MacGregor 2025 Rep).

[39] ECF 99-12, PageID.4783 (MacGregor 188:5-7).

[40] Id., PageID.4785 (195:17-196:3).

both times he visited the site, including on October 29, three weeks after the anonymous photograph.[41] Apparently there was a "frequent" gap once.

Fourth, citing MacGregor's report, Burnette asserts *no* surface water was observed at the Elk Lake Road culvert outlet other than "a small pool" during its site visit. Yet Burnette produced a video from MacGregor's October 29 site visit actually showing water trickling right out of the culvert.[42] While just a trickle (unsurprising considering the dry fall conditions, discussed below), it undermines MacGregor's credibility – he was there to assess surface water connections and testified he did not see water coming out of the culvert during his site visit.[43]

Plaintiffs address the rest of Burnette's wastewater migration assertions in context below.

III. ARGUMENT

A. Legal Standard

Burnette is not entitled to summary judgement here because it has not established that Plaintiffs have no evidence to support any essential element of their case. *Minadeo v. ICI Paints,* 398 F.3d 751, 761 (6th Cir. 2005).

B. Burnette discharges wastewater to WOTUS from a point source.

Plaintiffs assert that Burnette violates the CWA because its processing wastewater discharged from sprayer heads migrates to the wetlands through both surface water overflow and

[41] ECF 99-26, PageID.5317-18 (MacGregor 2025 Rep); 99-12, PageID.4785-86, 4790-91 (MacGregor 196:20-22, 197:6-198:24, 214:18-218:1).

[42] ECF 99-61 (Oct. 29, 2024, video at 3:15-24). MacGregor is seen in the video near the outlet wearing his neon vest. ECF 99-12, PageID.4761 (MacGregor 67:21-98:25).

[43] ECF 99-12, PageID.4761 (MacGregor 100:7-15).

groundwater as the functional equivalent of a discharge from a point source. Burnette argues its wastewater does not discharge from a point source because: (1) the wastewater is exempted agricultural return flow; and (2) any wastewater that reaches wetlands through groundwater is not the functional equivalent of a direct discharge from a point source. Both arguments are meritless. Notable for its absence is dispute over whether wastewater discharges to wetlands through surface overflows – summary judgment should be denied on that basis alone.

1. The agricultural return flow exception is inapplicable.

This Court already rejected Burnette's argument that its discharge qualifies as an excepted agricultural return flow.[44] Because Burnette reasserts the same issues relying on the same cases and no new evidence, without demonstrating palpable defect, this argument should be rejected. W.D. Mich. LCivR 7.4(a).

The argument remains meritless. The CWA broadly defines "point source" as "any discernible, confined, and discrete conveyance…" 33 U.S.C. § 1362(14). The Sixth Circuit acknowledged that courts have embraced "the broadest possible definition" of point sources in order to further the CWA's regulatory scheme. *Tenn. Clean Water Network v. TVA,* 905 F.3d 436 n. 2 (6th Cir. 2018) (quoting *U. S. v. Earth Scis., Inc*., 599 F.2d 368, 373 (10th Cir. 1979)). Spray apparatus, like what Burnette uses to spray wastewater onto its fields, are point sources. *See Peconic Baykeeper, Inc. v. Suffolk Cnyt.,* 600 F.3d 180, 188-89 (2d. Cir. 2010) (spray apparatus attached to trucks, helicopters are point sources); *Parris v. 3M Co.,* 595 F.Supp. 3d 1288, 1322 (N.D. Ga. 2022) ("Courts routinely find that land application systems, spray head sprinklers, and trucks constitute point sources when used to spread treated wastewater and manure on land.")

[44] ECF 26, PageID.3747-48.

(citing cases). In *Flint Riverkeeper, Inc. v. Southern Mills, Inc.,* the court found both a land application system ("LAS") and the spray heads used to irrigate spray fields and dispose of wastewater were point sources under factually similar circumstances – excess spraying and poor, oversaturated soils allegedly causing direct (overland) and indirect (groundwater) discharges to surface waters. 276 F. Supp. 3d at 1362, 1368, n. 52, 54 (M.D. Ga. 2017) (collecting cases). Burnette's spray system and heads are likewise point sources.

Burnette has not demonstrated it is entitled to a CWA exception for "agricultural return flows," which are "discharges composed entirely of return flows from irrigated agriculture." 33 U.S.C. § 1342(*l*)(1). The relevant regulations exclude from permitting "[a]ny introduction of pollutants from non point-source agricultural and silvicultural activities …" 40 C.F.R. § 122.3(e). The burden is on Burnette to demonstrate it qualifies for this exemption. *Pac. Coast Fed'n of Fishermen's Ass'ns v. Glaser,* 945 F.3d 1076, 1083 (9th Cir. 2019). Burnette has not carried this burden.

Glaser is instructive in three ways, notwithstanding Burnette's mistaken reading of it. First, *Glaser* addressed the purpose of the exception. It recognized Congress sought "to limit the exception to only those flows which do not contain additional discharges from *activities unrelated to crop production*" while also ensuring equal CWA treatment for "*farmers* relying on irrigation and those relying on rainfall." *Id* at 1084 (quotations, citations omitted; emphasis added). *Glaser* cited legislative history showing the exception aimed to ease the permitting burden on farmers "who depend on surface irrigation which is returned to a stream in discreet conveyances" versus those "blessed with adequate rainfall." *Id.* (citation omitted). The exception exists to support farmers doing farming activities.

Second, *Glaser* defined agriculture – "the science or art of cultivating the soil, harvesting crops, and raising livestock." *Id.* (quoting dictionary); *see also Waterkeeper Alliance, Inc. v. U. S. EPA*, 399 F.3d 486, 509 (2nd Cir. 2005) (agriculture means "work of cultivating the soil, producing crops") (quoting dictionary). *Glaser* recognized agriculture to have a "broad meaning that encompasses crop production." 945 F.3d. at 1084.

Third, at the same time *Glaser* held the term "agricultural irrigation" includes crop production, it also held that claims for exemption from CWA pollution prevention permitting requirements "must be narrowly construed to achieve the purposes of the CWA." *Id.* at 1085 (citation omitted). To that end, the exception only applies to "discharges composed *entirely* of return flows from irrigated agriculture" – not *mostly* or a *majority* – but *entirely* – "wholly, completely, fully." *Id* (quoting dictionary). "The text demonstrates that Congress intended for discharges that include return flows from activities unrelated to crop production to be excluded from the statutory exception, thus requiring an NPDES permit for such discharges." *Id.*

Burnette has not shown its discharge to and from its spray fields meets this narrow exception. Fundamentally, the record shows Burnette does not discharge to irrigate plants, it discharges to dispose of industrial wastewater. Burnette grows grass as part of a regulated "land treatment system," where all aspects of "crop management" are regulated – what to plant, where, how much, how often to harvest, what to test, and much more.[45] Burnette acknowledged as much in discovery – all information related to its crops is in the Discharge Management Plan.[46] As discussed above, Burnette has *no records* whatsoever related to grass-growing – not even the names of the people who cut and take hay. Burnette has *no* financial stake whatsoever in the grass

[45] ECF 99-2, PageID.4439-48 (DMP).

[46] **Ex 1** (Burnette Response, Interrogatory 6).

it is obligated to grow to support wastewater treatment.[47] Irrespective of irrigation, there is no *agricultural* operational component to Burnette's grass-growing. The grasses exist and grow entirely and solely to treat Burnette's wastewater; the wastewater doesn't exist to irrigate the grass. At bottom, Burnette is not growing grass in pursuit of the science or art of cultivating the soil or harvesting crops – *i.e.*, for agricultural purposes.

Burnette's discharges also are not made up "*entirely* of returns flows from irrigated agriculture" – the discharge is wastewater containing stormwater plus treatment and other additives.[48] And even if Burnette had proven its discharges qualify as an agricultural operation for the return-flow exception (they do not), its consistent violations of its groundwater discharge permit would exclude it from the exception. In *Waterkeeper Alliance*, the court noted the exception only applies so long as the discharger has "taken steps to ensure appropriate agricultural utilization" of the discharge. 399 F.3d at 509; *see also Nat'l Pork Producers Council v. U. S. EPA*, 635 F.3d 738, 744 (5th Cir. 2011) (consistent). Burnette regularly violates its permit in multiple ways, discussed above, including by irrigating only a fraction of the acreage needed to treat the wastewater. For all the foregoing reasons, Burnette has not shown it is entitled to the agricultural return flow exception.

Burnette's reliance on *Hiebenthal v. Meduri Farms* is misplaced under the facts here. 242 F. Supp. 2d 885 (D. Or. 2002). That case addressed processing wastewater generated and stored onsite to support a farmer irrigating prune orchards and grass fields, where there was no question the farmer was engaged in farming operations. Similarly, *Courte Oreilles Lakes Ass'n v. Zawistowski* was entirely about fertilizing cranberry farms, not wastewater treatment, so it is

[47] ECF 99-14, PageID.4893 (Kalchik 123:17-19).

[48] ECF 99-14, PageID.4869, 4878 (Kalchik 26:17-18, 62:17-24); 99-41, PageID.5834 (MET 2022 Technical Memorandum: noting additions); **Ex 4** (Water Treatment Additives).

unhelpful here. 2025 U.S. Dist. LEXIS 22780 (W.D. Wis. Feb. 7, 2025). *Waterkeeper Alliance* is unenlightening: it upheld regulations treating concentrated animal feed operations as agricultural in character because they rear livestock and cultivate soil. 399 F.3d at 509.

Burnette is not entitled to summary judgment on the basis its discharge qualifies as an agricultural return flow.

2. *Burnette's Groundwater Discharges are the Functional Equivalent of a Point-Source Discharge.*

a. *Maui* Background

The Supreme Court made clear the CWA prohibits the discharge of pollutants into WOTUS via groundwater when that discharge is the "functional equivalent" of a direct discharge. *County of Maui v. Hawaii Wildlife Fund,* 590 U.S. 169 (2020). *Maui* listed seven factors a trial court may consider when determining functional equivalency, which are addressed in turn below. *Id.* at 184. *Maui* also provided outside extremes when only the distance and travel time factors need be considered: a discharge of a few feet requires a permit; pollutants travelling 50 miles and entering WOTUS "only many years later" do not. *Id*. Burnette's discharges are the prototypical pollutant discharges that meet the former threshold so require a CWA permit. The spray fields are mere dozens of feet from the receiving wetlands. The subsurface groundwater is relatively shallow and flows directly toward the wetlands. The wastewater reaches the wetlands in a couple of weeks to a handful of months. These short distances and transit times negate the impact of the remaining factors on the composition of wastewater discharging into WOTUS.

Burnette, eager to obfuscate the obvious, attempts to muddy the analysis by raising issues irrelevant to Plaintiffs' claims, misstating the legal standards, and mischaracterizing the evidence. First, Burnette invokes its state-issued groundwater discharge permit (that it regularly violates) in

an attempt to avoid CWA liability. *Maui* expressed no interest in "undermining state regulation of groundwater" but also rejected the argument that the CWA does not cover any surface water pollution that first travels through groundwater for risk of "creating loopholes that undermine the statute's basic federal regulatory objectives." *Id* at 185. Otherwise, a pipe owner simply moves the pipe a few yards from WOTUS and avoids CWA liability. This case fits that description: Burnette's spray heads discharge millions of gallons of wastewater that run off and under overwhelmed fields for short distances into adjacent wetlands, so denying CWA liability creates exactly the "loophole" *Maui* warned against. *Conservation Law Foundation, Inc. v. Town of Barnstable* does not support Burnette's reliance on its state permit to disfavor CWA liability. 615 F.Supp. 3d 14 (D. Mass. 2022). *Barnstable* acknowledged the functional equivalency standard in *Maui* balances the creation of blatant CWA loopholes against state groundwater regulatory authority. *Id.* at 22-23. Thus, *Barnstable* did a *Maui* analysis and found no functional equivalency because the wastewater took **21 years** to reach WOTUS – the outside extreme noted in *Maui*. *Id* at 24 (citing *Maui*, 140 S.Ct. at 1465). *Barnstable* deferred to the state permit *after* finding *Maui* inapplicable. That is not this case. At bottom, the existence of a state groundwater permit does not foreclose the functional equivalency analysis or CWA liability. *See* EPA Draft Guidance "Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the CWA Section 402 NPDES Permit Program to Discharges though Groundwater," at 7 (Dec 2000) ("[g]roundwater protection programs aim to protect the quality of groundwater, often for drinking water uses, while the CWA aims to protect the quality of surface water for a wide variety of uses.").

Even if the existence of a state groundwater permit weighed against functional equivalency and CWA liability, the facts disfavor Burnette, whose permitted land treatment system is ineffective in preventing pollutants from entering WOTUS. It is uncontested Burnette has been discharging high-strength wastewater to these spray fields for decades. The result is decreasing

capacity for the fields to function properly – infiltration capacity has been compromised, leading to regular wastewater ponding adjacent to the wetlands, exacerbated by regular discharge rate and depth violations, and further exacerbated by Burnette's unilateral decision to reduce "wetted acreage."[49] Even if Burnette never violated permit discharge rates, its long-term application of high strength wastewater has resulted in fields with high salinity and low DO that increase pollutant mobility in the groundwater. Thus, even wastewater properly infiltrating the fields has its constituent pollutants flowing more freely into WOTUS, which the state permit is not designed to abate.[50] Burnette's groundwater discharge permit is no shield for CWA liability.

Burnette argues "functional equivalent" means a groundwater discharge must be the exact replica of a pipe discharge and *"all"* pollutants must reach WOTUS without "*any*" dilution or chemical change. This extreme characterization misstates *Maui* and contradicts its clear holding that time and travel distance are typically most important. 590 U.S. at 185. A strict requirement that *all* pollutants reach WOTUS without *any* alteration in form would make Factor 4 (extent of dilution or chemical change) dispositive of every case, regardless of the time and travel distance. *Maui* made no such distinction, and that interpretation would render the rest of *Maui* practically meaningless: pollutants travelling through any appreciable volume of groundwater are unlikely to have 100% of pollutants discharging into WOTUS chemically unchanged – plus that would be an impossible proof burden. Tellingly, on remand, the *Maui* discharge was determined to be the functional equivalent despite some constituent pollutants appreciably decreasing before reaching the ocean. *Hawai'i Wildlife Fund v Cnty. of Maui*, 550 F. Supp. 3d 871, 889 (D. Haw. 2021). For instance, between 30 and 90 percent of nitrogen was removed by "microbial processes" during

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

[50] *Id*.

pollutant transit. *Id* at 883. Likewise, only around 2% of the discharge had a precise known discharge point, with the majority entering WOTUS in unknown and diffuse locations. *Id* at 877. Further, *Maui* itself undermines Burnette's strict (mis)interpretation – it would render nugatory any comparison of the amount of pollutant entering WOTUS relative to leaving the point source (Factor 5) and the degree to which the pollution maintains its specific identity (Factor 7).

Burnette wrongly asserts all *Maui* factors must be established in every case to find functional equivalency. *Maui* said the seven enumerated factors are "just some of the factors that *may* prove relevant (*depending upon the circumstances of a particular case*)." 590 U.S. at 184. (emphasis added). This conditional language, plus the emphasis on time and travel distance being most important – even dispositive in the "few feet" to "50 miles" examples – confirm *Maui* does not demand each factor be proven nor necessarily considered in every case. *See* EPA, *Maui* Draft Guidance at 3 (individual sites necessitate varying levels of weight given to various factors; some sites "may not require consideration of all, or even several of, the factors laid out by the Court."). In many cases, time and distance are the "*only* factors that need to be considered." *Id* at 4 (emphasis added). Site conditions here support time and distance as the determinative factors.

Burnette's *Maui* arguments are particularly thin considering what is notably but consistently absent – <u>*any*</u> counter analysis from its two hydrologists to the analyses presented by Plaintiffs' hydrologist, Dr. Kendall. Burnette provided no quantitative data or expert analysis to assist this Court in ascertaining whether Burnette's discharges to WOTUS are the functional equivalent of a direct discharge:[51]

> Q: You didn't feel that you were supposed to try and make any determinations quantitatively about how the Maui Factors apply specifically to this site?

[51] ECF 99-15, PageID.4932 (Sklash 68:11-14).

A: Correct.

This evidentiary void leaves Dr. Kendall's analysis unrebutted. And while unrebutted, Dr. Kendall's analysis does not stand alone – EGLE staff consistently concluded that Burnette's polluted wastewater discharged to the spray fields reaches the wetlands still polluted.[52].

b. "Transit Time"

Dr. Kendall calculated a transit time for Burnette's wastewater to reach the wetlands in a time span that is indicative of a "functionally equivalent" discharge: as little as 17.5 days with central estimates ranging from 128-200 days.[53] These calculations are based on the commonly-accepted Darcy's law equation for groundwater velocity with data inputs from reliable sources including Burnette's data[54] and published literature.[55] These travel times strongly favor a finding of functional equivalency. *See Maui*, 550 F. Supp. 3d at 886 (functional equivalent found when transit time in as little as 84 days and average time being 14-16 months).

Burnette fails to refute Dr. Kendall's calculations. First, Burnette's experts made no attempt to calculate a transit time contradicting Dr. Kendall's conclusions.[56] Nor did they calculate a factor by which Dr. Kendall's calculations may be inaccurate nor how that may impact the *Maui* analysis.[57] Dr. Gagnon even admitted, "the data exist to make reasonable estimates of the transit time of the

[52] ECF 99-68, PageID.6305-306 (EGLE Surface Water Impacts review); 99-69, PageID.6320 (EGLE Geologist Recommendation).

[53] ECF 99-22, PageID.5138-40 (Kendall Rep).

[54] *See generally* ECF 99-39 (MET 2009 Hydrogeological Report); 99-23-34 (MET Site Status Reports – groundwater monitoring data).

[55] ECF 99-22, PageID.5130 (Kendall Rep); 99-23, PageID.5193 (Kendall Reb, citing Woessner and Poeter (2020)).

[56] ECF 99-15, PageID.4932 (Sklash 67:22-68:5); 99-16, PageID.4985 (Gagnon 113:1-6).

[57] ECF 99-15, PageID.4940, 4951 (Sklash 98:10-99:4, 143:4-24).

groundwater at the Site."[58] Nor did Burnette's experts address or dispute Dr. Kendall's conclusion that the "conservative assumptions" he used to produce transit time ranges likely *over*estimate rather than *under*estimate transit times.[59]

Rather than present substantive data or expert analysis to refute Dr. Kendall's transit time calculations, Burnette raised unpersuasive and unsupported theoretical arguments questioning Dr. Kendall's analysis. First, the calculation of groundwater transit time is clearly relevant to the CWA claim. Burnette's wastewater and the constituent pollutants flow along with the groundwater as it migrates to the wetlands. So calculated groundwater transit time is a good estimate for pollutants, particularly ones, such as chloride, that flow freely in the groundwater.[60] While attenuation rates of different pollutants may vary depending on their respective chemical properties, those differences are minimized at Burnette's site because: 1) continuous wastewater loading limits the attenuation factors[61]; 2) low DO levels at the site limit attenuation[62]; and 3) the short distance to the wetlands limits the impact of attenuation to overall transit time.[63] Further, Dr. Kendall evaluated the sodium transit time in Field 38 from Burnette's monitoring well data, which confirmed his other transit time calculations.[64]

Burnette argues the distance pollutants travels to reach the wetlands varies, resulting in different travel times that make it impossible "to establish any reasonable idea" of transit times for a *Maui* analysis. Burnette's argument for a pinpoint distance travelled and an exact transit time calculation is contrary to the fundamental nature of transit time. As both parties' experts noted, different constituents in wastewater travel at different rates and result in a range of transit times. Likewise,

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[58] ECF 99-24, PageID.5215 (Gagnon Rep).

[59] ECF 99-23, PageID.5192-94 (Kendall Reb).

[60] ECF 99-16, PageID.4987 (Gagnon 121:15-17).

[61] ECF 99-23, PageID.5198 (Kendall Reb).

[62] *Id*.

[63] *Id*., PageID.5197-98.

[64] ECF 99-22, Page.ID.5159 (Kendall Rep).

various infiltration points into the groundwater and discharge points in the wetlands also result in a range of transit times. It is unnecessary to pinpoint an amount of time to determine functional equivalency. The *Maui* trial court recognized this basic principle and observed the *minimum* travel time for pollutants in that case was 84 days whereas the *average* travel time was 14-16 months. *Maui*, 550 F. Supp. 3d at 878*; see also Black Warrior River-Keeper, Inc. v Drummond Co., Inc.,* 579 F. Supp. 3d 1310, 1316 (N.D. Ala. 2022) (transit time 4.4 to 14.6 days). Burnette's argument that a specific transit time is necessary is unsupported.

Burnette's experts also did not contest Dr. Kendall's statement that wastewater infiltrating closest to the wetlands will have the shortest transit times.[65] Given the evidence that a significant portion of wastewater runs off the fields into lowlands immediately adjacent to the wetlands, significant volumes of wastewater discharged to Field 36 will tend towards the shortest travel times calculated by Dr. Kendall. Burnette likewise presented no evidence contradicting Dr. Kendall's analysis of sodium travel times from Field 38 to the wetlands.

In sum, Burnette had ample opportunity to contradict Dr. Kendall's transit time analysis but failed to do so. Dr. Kendall's transit time calculations are supported and reasonable and undisputed, and they favor functional equivalence.

c. "Distance Travelled"

Burnette also attacks Plaintiffs for offering a range of wastewater travel distances to reach the wetlands. A distance *range* is as appropriate as a transit time *range*. *See Maui,* 550 F. Supp. at 887-88 (functional equivalency where minimum distance 0.3 to 1.5 miles). Again, absent is any counter-analysis from Burnette experts – if not 0.3-1.5 miles, then how far? Crickets.

[65] ECF 99-23, Page.ID.5188, 5194 (Kendall Reb).

Dr. Kendall explained groundwater under the spray fields – along with the Burnette's wastewater – discharges into the wetlands.[66] Burnette's consultants have consistently acknowledged groundwater under the fields flows toward the wetlands.[67] Dr. Kendall plotted groundwater elevations in the spray fields nearest the wetlands showing it is almost always above the wetland surface level, evidence the groundwater discharges into the wetlands.[68] Dr. Sklash confirmed this data in deposition.[69]

Dr. Kendall also explained groundwater percolating to the subsurface nearest the wetland is first to enter the wetland and at the closest point, which is undisputed.[70] Significant volumes of Burnette's wastewater percolates into the ground after it collects in the "retention basin."[71] This wastewater travels roughly 70 feet to the wetland.[72] The range of distances for *all* of the wastewater to reach the wetlands is from 70 to under 1,000 feet;[73] the vast majority travels a few hundred feet or less. Dr. Sklash also confirmed that shallow groundwater under the spray fields will be pushed up into the wetlands at points "from the edge of the wetlands perhaps to the middle of the wetland would be the distance."[74] Dr. Kendall calculated these distances, which support functional equivalency. Burnette's claim that modelling is necessary to determine the distance wastewater flows before reaching the wetlands is undermined by Burnette's expert's testimony and

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[66] *Id.,* PageID.5187-91.

[67] ECF 99-39 Page ID.5704 (MET 2009 Hydrogeological Report); 110-10, PageID.7014 (LEI letter to EGLE).

[68] ECF 99-23, PageID.5189 (Kendall Reb).

[69] ECF 99-15, PageID.4945 (Sklash 117:24-118:3).

[70] ECF 99-23, PageID.5188 (Kendall Reb).

[71] ECF 99-22, PageID.5145-55 (Kendall Rep); 99-23, PageID.5194 (Kendall Reb Par 3.2).

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

[73] ECF 99-23, PageID.5194 (Kendall Reb Par 3.2).

[74] ECF 99-15, PageID.4934 (Sklash 74:1-3).

consultants' modelling of groundwater flow. Since Burnette offered no evidence contradicting Dr. Kendall's distance calculations, this factor is undisputed and favors functional equivalency.

d. "The Nature of the Material Through which the Pollutant Travels"

Burnette's attack on Plaintiffs' analysis of the nature of the material the wastewater travels through is vague and unsupported. Dr. Kendall stated the general nature of the materials under the site consists largely of coarse glacial till "including sands and layers of finer textured materials."[75] Dr. Kendall adopted Burnette consultant MET's site porosity value based on conservative values for fine sandy aquifers that MET found prevalent consisting of sand, silty sand, and silty clay.[76] MET and Dr. Kendall based the porosity value on published literature.[77] Dr. Sklash confirmed this is the common practice.[78] Dr. Kendall's value is conservative – actual transit times are likely shorter.[79] Dr. Sklash conceded a conservative porosity value results in slower velocities than may actually be occurring.[80]

Dr. Kendall acknowledged the transit medium in *Maui* has a higher hydraulic conductivity value than the soils here.[81] However, Dr. Kendall determined the impacts of the materials the groundwater travels through are minimized by key factors: the extremely short time and distance the groundwater travels limits the materials impacts;[82] and the "intensive water loading" with high

[75] ECF 99-22, PageID.5130 (Kendall Rep).

[76] ECF 99-39, PageID.5703 (MET 2009 Hydrogeological Report).

[77] *Id.,* PageID.5702; ECF 99-23, PageID.5193 (Kendall Reb).

[78] ECF 99-25, PageID.5280 (Sklash Rep).

[79] ECF 99-23, PageID.5199 (Kendall Reb).

[80] ECF 99-15, PageID.4944 (Sklash 115:14-22).

[81] ECF 99-23, PageID.5200 (Kendall Reb).

[82] *Id.,* PageID.5197-98 (Par 4.1.1).

BOD concentrations creates "anoxic conditions" (extremely low DO) that limits any alteration to the wastewater as it flows subsurface, discussed *infra*.[83]

While Burnette tries to sow doubt, any differences are *de minimus*. While Dr. Kendall did not calculate individual porosity values for each material underneath the spray fields, he determined the general nature of materials underlying the fields based on literature and MET data and concluded the impacts of these materials would be minimal. Burnette's experts, who had unlimited site access, produced no contrary data or analysis – if the precise material through which Burnette's pollutants travel materially alters the pollutants, surely they would have reported that, right? Burnette's motion infers the absence of "pipe like flow" undermines functional equivalency but provides no support, only conjecture. *Maui* could have but did not determine "the nature of the materials" to carry such extensive weight as Burnette's "pipe-like" requirement suggests. The Court explicitly stated time and distance are the most important factors. *Maui* U.S. at 184.

e. "The Extent to which the Pollutant is Diluted or Chemically Changed as it Travels"

Burnette's arguments about dilution and chemical alteration are misleading and notably unsupported by any citations to any analysis from either of its hydrologist-experts, and they fail to undermine Plaintiffs' functional equivalency analysis.

First, Burnette's expert conceded only water in the wastewater evaporates – not the constituent pollutants, so pollution concentration actually *increases* through evaporation.[84]

Next, Burnette offers misleading conclusions regarding the dilution impacts of precipitation. First, dilution with groundwater will always occur. The *Maui* wastewater was only

[83] ECF 99-22, PageID.5162 (Kendal Rep).

[84] ECF 99-16, PageID.4983 (Gagnon 107:2-8).

approximately 60% of the groundwater springs.[85] 550 F.Supp. at 877. Dr. Kendall calculated Burnette's discharges to be similar concentrations or higher.[86] Second, Burnette inappropriately generalizes an entire year's precipitation over the entire acreage of the permitted spray fields in comparison to the wastewater applied to limited acres and in highly concentrated volumes lasting only two months of the year.[87] Third, Dr. Kendall confirmed "groundwater does not 'mix' in the sense that fluids do in an open container"; they are more stratified as they move laterally.[88] Thus, precipitation in months pre- and post-peak cherry season does not mix with wastewater to any significant degree. Additionally, Burnette's use of the entire permitted acreage to calculate precipitation volume is inaccurate since approximately 54% of the fields receive wastewater.[89] Wastewater discharged to that limited acreage has minimal mixing with precipitation on the rest of the field acreage either laterally or vertically.[90]

Burnette's argument that agricultural stormwater discharge is excluded from the CWA's definition of a point source is irrelevant. First, as discussed above, the spray fields function as a wastewater treatment system and do not qualify for agricultural stormwater and return flow exceptions. While the definition of a point source excludes "[a]ny introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff," 33 U.S.C. § 1362(14), that does not give Burnette license to discharge pollutants on a land treatment system, let rain wash the pollutants into WOTUS, then label it "agricultural stormwater" to absolve liability. This would create an unintended loophole, as the Second Circuit acknowledged:

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[85] ECF 99-23, PageID.5198 (Kendall Reb Par 3).

[86] *Id*.

[87] ECF 96, PageID.4383.

[88] ECF 99-23, PageID.5198 (Kendall Reb Par 3).

[89] *Id*.

[90] *Id.*

> [T]he real issue is not whether the discharges occurred during rainfall or were mixed with rain water run-off, but rather, whether the discharges were the *result* of precipitation. Of course, all discharges eventually mix with precipitation run-off in ditches or streams or navigable waters so the fact that the discharge might have been mixed with run-off cannot be determinative.

Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 121 (2nd Cir. 1994) (emphasis added). Pollutants in Burnette's wastewater flowing into the wetlands result not from precipitation but spray fields overwhelmed by industrial wastewater misapplied by Burnette. Congress explicitly enumerated fruit processing wastewater to be regulated under the CWA. 33 U.S.C. § 1316(b)(1)(A). Burnette does not avoid CWA liability when rain washes its untreated wastewater into WOTUS. It also does not matter whether actual stormwater pollutants are similar to the pollutants in Burnette's wastewater. Burnette is prohibited from adding its pollutants to WOTUS without a permit, irrespective of whether other sources add similar pollutants.

Burnette next argues the pollutants are chemically changed so cannot be the functional equivalent of a direct discharge. This is a misapplication of the law and a misleading statement about Plaintiffs' evidence. Every constituent pollutant of industrial wastewater need not reach WOTUS for an addition of a pollutant to be the functional equivalent of a direct discharge, per *Maui*. There, it was estimated 86% of nitrogen was removed from wastewater due to microbial processes, and the court found functional equivalency. *Maui*, 550 F. Supp. 3d at 883. This comports with EPA's guidance that a single indicator pollutant can trigger the requirement to obtain a CWA permit. EPA Draft *Maui* Guidance at 3.

Further, Dr. Kendall described how the high strength of Burnette's wastewater creates an extremely low-oxygen environment in the groundwater, supported by Burnette's groundwater

monitoring data.[91] This is also supported by EGLE's site soil review expressing "great[] concern" that "[t]his is a high strength wastewater and the organic loading that is being shown would greatly stress the site soil's ability to effectively treat the waste overtime."[92] The low oxygen in the site data shows that effectiveness has already been limited. Without oxygen, the microbes cannot break down BOD, which then flows unmitigated with the groundwater.[93] Burnette's assertion that BOD is consumed by "bacteria in the soil" ignores the groundwater's extreme low oxygen levels that inhibit BOD microbial consumption.[94] Dr. Rediske concedes he did no analysis of BOD attenuation in Burnette's spray fields that would take into account the extremely low DO.[95] In fact, EGLE and Burnette sampling in the wetlands corroborated high concentrations of BOD entering the wetlands.[96] EGLE staff reached conclusions consistent with Dr. Kendall's.[97]

Finally, the constant inundation of wastewater onto the spray fields, particularly in the peak season, means the wastewater is "moving rapidly through the unsaturated zone," further minimizing any impact that "the nature of the materials" it is travelling through has on altering the chemical makeup of the pollutants.[98]

Burnette experts had unlimited opportunity to demonstrate that Burnette pollutants are diluted or changed as they travel, but did not. Burnette failed to refute Plaintiffs' evidence that

[91] ECF 99-22, PageID.5162 (Kendall Rep Par 5.3).

[92] ECF 99-67, PageID.6286 (EGLE Soil Review).

[93] ECF 99-22, PageID.5162 (Kendall Rep Par 5.3).

[94] ECF 99-22, PageID.5162 (Kendall Rep Par 5.3).

[95] ECF 99-13, PageID.4860, (Rediske Dep 250:4-251:11).

[96] ECF 99-52, PageID.6005, 6010-11 (2021 Violation Notice, Par 5, pp 9-10 (sampling data)).

[97] ECF 99-67, PageID.6286 (EGLE Soil Review); 99-68, PageID.6305 (EGLE Surface Water Impacts Review).

[98] ECF 99-23, PageID.5199 (Kendall Reb).

wastewater reaches the wetlands in high percentages of the groundwater with significant constituent pollutants relatively unaltered, further supporting functional equivalence.

f. "The Amount of Pollutant Entering the Navigable Waters Relative to the Amount of the Pollutant that Leaves the Point Source"

Burnette's argument that Plaintiffs lack enough data to show that a significant percentage of Burnette's pollutants are reaching the wetlands is meritless. The record includes ample data regarding Burnette's discharges, groundwater flow rates, wetland recharge rates, and groundwater concentrations of indicator pollutants and conditions that, combined with hydrological principles, support Dr. Kendall's conclusion that most pollutants in Burnette's wastewater reach the wetlands. Burnette's hydrologists might have provided contradictory analysis but did not. Burnette argues Plaintiffs failed to calculate specific quantities of pollutants being sprayed on the fields and entering the wetlands, ignoring that this factor is more akin to a ratio than a quantity measurement.

Dr. Kendall conducted multiple analyses that show nearly all of the groundwater under the spray fields vents to the wetlands. For instance, he compared water inputs to the wetlands including precipitation, groundwater recharge, and surface water runoff against water output from the wetlands through evaporation and transpiration to conclude the wetlands require almost all of the entire watershed's groundwater recharge to maintain its wetlands classifications.[99] With the spray fields being the closest groundwater source to the wetlands in the watershed, essentially all Burnette wastewater percolating into the groundwater vents to the wetlands. Burnette's experts made no attempt dispute Kendall's wetland recharging calculations.[100] Dr. Gagnon admitted Dr.

[99] ECF 99-23, PageID.5188 (Kendall Reb).

[100] ECF 99-15, PageID.4947-48 (Sklash 125-29); 99-16, PageID.4992 (Gagnon 141-44).

Kendall's data seemed reliable.[101] Dr. Kendall testified "essentially all" sodium and chloride in the wastewater reaches the wetlands.[102] Dr. Sklash agreed factors such as dilution, dispersion, and diffusion would prevent little, if any, of the chloride and other conservative pollutants from entering the wetlands if the wastewater reached the wetlands.[103] Dr. Kendall concluded that again, due to low oxygen, "most pollutants are at most slowed, not permanently removed" because the "intense applications of wastewater over a small area overwhelm the few remaining mechanisms to remove pollutants."[104]

Since Burnette's experts offered no contradictory calculations, Burnette resorts to inaccurate jabs. Burnette states "common sense dictates that if all the wastewater discharged at the Spray Fields actually discharged to surface waters in the Wetlands, then there would be an equal amount of surface water flowing out of the Wetlands."[105] That is not how the wetland hydrology works. Wetlands lose a significant amount of water through evaporation and transpiration, particularly in the hot dry summer months.[106] Burnette's own experts refuted Burnette's "common sense" assertion. Dr. Sklash conceded, "[i]f the groundwater discharged into - all discharges into the wetland are less than the amount used by the plants [transpiration] and evaporation, then there will be no discharge [to downstream waters]."[107] Dr. Rediske further explained that the "thing that happens to wetlands, is they, they dry up, you know, during the summer" because higher

[101] *Id.*, PageID.4992 (144:13-24).

[102] ECF 99-11, PageID.4726 (Kendall 204:20-24).

[103] ECF 99-15, PageID.4954 (Sklash 155:3-24).

[104] ECF 99-23, PageID.5200 (Kendall Reb Par 5).

[105] ECF 96, PageID.4387.

[106] ECF 99-15, PageID.4946, (Sklash 124:7-13); 99-23, PageID.5187-88 (Kendall Reb, citing Mazur et al (2014)).

[107] ECF 99-15, PageID.4946 (Sklash 124:3-6).

temperatures leads to more evaporation.[108] Likewise, plants transpire more in the summer growing season and in higher temperatures.

Burnette failed to produce any substantive evidence to refute Dr. Kendall's conclusions that most of the pollutants reach the wetlands. This factor also favors functional equivalence.

g. "The Manner by or Area in Which the Pollutant Enters the Navigable Waters"

Burnette argues Plaintiffs did not utilize Burnette's preferred methodology of tracer dye testing to determine the manner in which the wastewater reaches the wetlands. Plaintiffs are under no obligation to utilize Burnette's preferred methodology to show the manner or area where the pollutants enter wetlands. *See U.S. v. L.E. Cokee Co.*, 991 F.2d 336, 342 (6th Cir. 1993); *Innovation Ventures, L.L.C., v. Custom Nutrition Labs., L.L.C.*, 520 F. Supp. 3d 872 (E.D. Mich. 2021) (expert's methodology not required to be the most appropriate to be reliable). If Burnette believes a tracer dye test may have shown the pollutants do not enter the wetlands, its experts may have conducted such testing to refute Dr. Kendall, but they did not.

As discussed above, Dr. Kendall applied several analyses to show nearly all the shallow groundwater under the spray fields vents into the wetlands. Burnette's experts produced no substantive data disputing this conclusion. Indeed, Dr. Sklash corroborated Dr. Kendall's conclusions regarding the manner by which the groundwater gets into the wetlands. He testified "groundwater flows from under the hills . . . and then laterally it comes up in the valley. . . because there is water coming from both sides."[109] That is precisely the geography around the wetlands in this case. He goes on to say the discharge would be "from the edge of the wetland perhaps to the

[108] ECF 99-13, PageID.4832 (Rediske 138:2-9).

[109] ECF 99-15, PageID.4933 (Sklash 71:3-8).

middle of the wetland."[110] Thus, it is undisputed the wastewater flowing in the groundwater under the spray fields vents into the wetlands in a limited zone. This factor also favors functional equivalence.

h. "The Degree to Which the Pollution (At that Point) has Maintained its Specific Identity"

Finally, Burnette erroneously argues Plaintiffs would need to sample groundwater at the point where it enters the wetlands to prove the degree to which the pollutants maintain their specific identity. Again, Burnette might have done this analysis – sampled the wetlands to show Burnette's pollution is absent – but did not. This factor is similar to the dilution and chemical alteration factor and the same arguments apply: the pollutants are in the groundwater for a short period of time, for a short distance, and in a low oxygen environment that limits mechanisms that might alter the pollutants.[111]

Burnette contends that the designed plant uptake of phosphorous and nitrogen of the land treatment system results in too much loss of the pollutants' specific identity to find functional equivalency. False. First, the well-documented and undisputed occurrences of wastewater running off the fields into the retention basin[112] means a substantial amount of phosphorous and nitrogen are not removed by plants on the land treatment system.[113] In addition, Burnette's groundwater monitoring data show the sodium/chloride ratios of the groundwater near the wetlands are, on average, similar to the wastewater at the point of discharge from the spray heads, as both Dr. Sklash

[110] *Id.,* PageID.4934 (74:1-2).

[111] ECF 99-23, PageID.5200 (Kendall Reb).

[112] ECF 99-14, PageID.4898, 4902 (Kalchik 141:11-19; 144:8-25; 158:14-159-24).

[113] ECF 99-22, PageID.5162 (Kendall Rep).

and Dr. Kendall observed.[114] This supports the pollutants are maintaining their specific identity as they reach WOTUS.

Even if the land treatment system removed most of the nitrogen and phosphorous, that does not significantly alter the specific identity of polluted wastewater. The *Maui* trial court determined even an 86% reduction of nitrogen before discharge into WOTUS did not alter the specific identity to find against functional equivalency, explaining, "[e]ven if the wastewater that reaches the ocean from the wells contains lesser levels of pollutants than at the start of the wastewater's journey from the wells, that wastewater maintains its specific identity as *polluted water* emanating from the wells." *Maui*, 550 F. Supp. 3d at 890 (emphasis added). Again, this factor favors functional equivalence.

At bottom, Plaintiffs have fully demonstrated that Burnette's wastewater discharge system is the functional equivalent of a point source discharge with unrebutted expert testimony that is consistently corroborated by EGLE's analysis. Burnette experts had the opportunity to demonstrate otherwise through evaluation and analysis but did not. Burnette's limited invocation of its own expert reports to support summary judgment is telling. Burnette is not entitled to summary judgment on this issue.

C. <u>The Wetlands and Spencer Creek are WOTUS.</u>

Contrary to Burnette's arguments, Plaintiffs have established that the wetland complex adjoining its spray fields are WOTUS under the two-part *Sackett* test because (1) Spencer Creek is a relatively permanent body of water connected to Elk Lake (traditional navigable waters), and (2) the wetlands have a continuous surface water connection with Spencer Creek and it is difficult

[114] ECF 99-25, PageID.5286, 88 (Sklash Rep); 99-23, Page.ID.5200 (Kendall Reb).

to determine where Spencer Creek ends and the wetland complex begins. *Sackett v E.P.A*, 598 U.S. 651, 678-79 (2023).

1. Spencer Creek is WOTUS

Burnette's argument that Plaintiffs cannot establish Spencer Creek is a relatively permanent body of water is based on an incorrect interpretation of legal precedent and a misleading recitation of the fact record.

Burnette's argument that *Raponos* – as adopted by *Sackett* – excludes intermittent and ephemeral streams from the definition of a "relatively permanent" water body rests on an incomplete foundation. *Sackett* adopted the *Rapanos* definition of WOTUS tributaries – "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Id.* at 671 (quoting *Rapanos v. U.S.*, 547 U.S. 715, 739 (2006) (cleaned up). The *Rapanos* plurality further explained this definition:

> 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 []. Common sense and common usage distinguish between a wash and seasonal river. Though scientifically precise distinctions between "perennial" and "intermittent" flows are no doubt available [], we have no occasion in this litigation to decide exactly when the drying-up of a stream-bed is continuous and frequent enough to disqualify the channel as a "wate[r] of the United States." It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's "intermittent" and "ephemeral' streams, [] – that is, streams whose flow is coming and going at intervals . . . broken, fitful" [], or existing only, or no longer than, a day; diurnal . . . short-lived," [] – are not.

Id. at 732 n. 5 (cleaned up, internal citations omitted). The plurality continued by juxtaposing streams to "ordinarily dry channels through which water occasionally or intermittently flows." *Id.* at 733. *Rapanos* does not impose a per-se exclusion of streams that do not flow every day – it explicitly reserved questions about when a stream "drying-up" is sufficiently "continuous or frequent" to disqualify the channel from WOTUS.

Since *Rapanos,* courts evaluate when channel drying-up is sufficiently "continuous and frequent" based on the facts of the case. For example, in *Ragsdale v. JLM Const. Servs., Inc.,* the court found a "wet-weather creek" failed *Rapanos* where photos and testimony confirmed the creek is mostly dry and only held water following rain events. 737 F.Supp.3d 449, 464 (W.D. Tex. 2004). In *U.S. v. Brink,* the court found La Para Creek was a seasonal creek subject to CWA jurisdiction, relying on a public map depicting the creek flowing into a river and a few photographs showing the creek containing water, while discounting unsupported contrary evidence consisting of testimony that there was seldom water flowing in the creek. 795 F.Supp.2d 565, 578 (S.D. Tex. 2011). In *Foster v. U.S. EPA,* the court found RR4, an "intermittent" stream that flowed "at least four months a year" and connected to navigable water, had "relatively permanent flow"., 2019 U.S. Dist. LEXIS 147416, *58 (S.D. W.Va. Aug. 29, 2019), *see also* 2024 U.S. Dist. LEXIS 149747 (S.D. W. Va. Aug. 21, 2024) (prior jurisdictional analysis under *Rapanos* plurality unchanged after *Sackett*). And in *Lewis v. U.S.,* the court found the Corps failed to "show Switch Cane Bayou flows either year-round or continuously during a three-month period." 2025 U.S. Dist. LEXIS 15652 *31 (M.D. La. Jan. 29, 2025). Unlike *Ragsdale* and *Lewis,* Plaintiffs present ample evidence that Spencer Creek is not ordinarily dry, flows continuously about 10-months a year (some years all year), and not only following rain events, as discussed below.

Burnette leans on the magistrate opinion in *U.S. v. Sharfi* that denied CWA jurisdiction over wetlands for multiple reasons. 2024 U.S. Dist. LEXIS 171175 (S.D. Fl. Sept. 21, 2024). On the "relatively permanent" definition, the opinion found the closest channels to the wetlands were not "geographical features" (river, stream) nor "the upstream reach" of winding, non-straight Bessey Creek, but instead "manmade ditches that were excavated in straight lines." *Id.* at *32. While there was some evidence of seasonal water flow in the ditches, the opinion concluded seasonality as discussed in *Rapanos* "applies to rivers and not ditches." *Id.* at *35. The key factual difference between this case and *Sharfi* is that Spencer Creek is a natural curvaceous creek, not a ditch. To the extent *Sharfi* is not limited to ditches, the analysis is inconsistent with the prevailing consensus finding intermittent streams with continuous seasonal flow at least three months of the year to be "relatively permanent" under *Rapanos. See, e.g., Lewis, supra; Foster, supra; U.S. v. Mlaskoch,* 2014 U.S. Dist. LEXIS 43314 *53 (D.C. Minn. Mar. 31, 2014) (water flow in tributaries for at least three months); *U. S. v. Moses*, 496 F.3d 984, 989-91 (9th Cir. 2007) (intermittent tributary holding water continuously for two months); *U. S. v. Vierstra*, 803 F. Supp. 2d 1166, 1170 (D. Idaho 2011) (canal with water flow for six to eight months); *Sequoia Forestkeeper v. U.S. Forest Serv*., 2011 U.S. Dist. LEXIS 26447 *14 (E.D. Cal. Mar. 14, 2011) ("Fay Creek is a stream that flows throughout certain seasons of the year, even in its lower stretches, drying up in the summer months"); *Baykeeper v City of Sunnyvale*, 2023 U.S. Dist. LEXIS 220102, at *12 (N.D. Cal. Dec. 11, 2023) ("the creeks here flow intermittently in the sense that they flow seasonally, whereby they contain a continuous flow during some months and no flow during dry months, and more than in direct response to precipitation"). Burnette's theory that an intermittent stream is *per se* non-WOTUS misunderstands *Rapanos* and its progeny.

Burnette fails to refute the substantial evidence that Spencer Creek flows nearly every month of the year. With the exception of late fall 2024 when it was exceptionally dry, it is indisputable that the upper reaches of Spencer Creek are perennial – always flowing.[115] There is also consistently water coming out of the Elk Lake Road culvert, into a permanent elongated plunge pool.[116] Over sixty photographs and videos show flow in the creek many months annually since 2019.[117] ESLA's annual reports and creek sampling field notes since 2019 corroborate creek flow in all months save the driest stretches in late summer some years.[118] ESLA's 2021 weekly flow testing from mid-July through early-October shows consistent flow.[119] This evidence is undisputed and unaddressed by Burnette.

Late 2024 was historically arid – precipitation July through October was 37% of the region's normal; September and October combined precipitation was 24% of normal:[120]

Month	2024 monthly precipitation (inches)	Normal monthly precipitation (inches)
July	1.11	2.71
August	1.87	2.98
September	0.38	3.37
October	1.26	3.60

[115] **Ex 5** (Spencer Creek headwaters photos); ECF 99-20, PageID.5093 (Kogge Rep); 99-21, PageID.5124 (Kogge Reb); 99-12, PageID.4785, 4786-87 (MacGregor 193-96, 199-201).

[116] ECF 99-82 (Spencer Creek photos); 99-86 (Spencer Creek video). Even in late October 2024, when the creek was at its driest documented, Burnette's video captured a persistent trickle coming out of the culvert: ECF 99-61 (Burnette video at 3:15-20).

[117] ECF 99-82, 86 (Spencer Creek photos, videos).

[118] ECF 99-43-48 (2019-2024 ESLA Reports); 99-76 (Ogle 2020 Field Notes).

[119] ECF 99-45, PageID.5298-97 (2021 ESLA Report).

[120] ECF 99-21, PageID.5123-24 (Kogge Reb).

These are the lowest precipitation levels for these months in over 10 years.[121] Photos from 2022, 2023, and 2024 confirm fall 2024 was uncommonly arid:[122]

One Burnette expert (MacGregor) visited the creek east of Elk Lake Road once on October 29, 2024 – and all Burnette photos and videos of this stretch of the creek are from October 29 and 30, 2024 – during this extended dry spell.[123] Burnette also references eight of Plaintiffs' photographs over five dates in July and August, 2022 and 2023 – a period when Plaintiffs acknowledge parts of Spencer Creek typically dry up.[124] These images fail to counter the substantial evidence that Spencer Creek typically flows at least ten months a year except in particularly arid years.

[121] National Weather Service monthly precipitation summary for Cherry Capital Airport, Traverse City, Michigan 2014-2024. Available at: https://www.weather.gov/wrh/climate?wfo=apx. Last visited 5/22/2025.

[122] **Ex 5** (Spencer Creek headwaters).

[123] ECF 99-12, PageID.4758 (MacGregor 85-86); 99-61 (video), 65, PageID.6225-40 (photos).

[124] ECF 99-65, PageID.6217-24; **Ex 6** (JX 65 PLFS photos with dates).

Burnette resorts to testimony cherry-picking to support its position. Kogge was clear and consistent: Spencer Creek is "perennial" in its upstream reaches and becomes "intermittent" farther downstream, where those terms have the defined meanings:[125]

> perennial means it's 365 days a year, it's got to flow year round, every single day to be perennial, it's got to be continuous. And then intermittent is where we know that we have flow periodically, but it's not 365 days. So we typically – that's really where we have the difference between perennial and intermittent flow.

Kogge's conclusion that Spencer Creek is "intermittent" in parts does not condemn the creek to non-relative permanence under *Rapanos*.

Kogge also refuted MacGregor's assertion that Spencer Creek is "ephemeral," a defined term based on whether the channel lacks bed and bank and is rain-dependent: "My observations of defined banks and beds and the presence of aquatic life (dragonfly naiad) provide evidence that Spencer Creek in this stretch between Elk Lake Road and Elk Lake is a stream with season flow not reliant on individual rainfall events."[126] Kogge testified Spencer Creek is fed by sources beyond individual rain events, including groundwater and the upstream wetlands, which function as "sponges, during storm events it will soak up a lot of the water and then it will release it during dry times and that's what helps balance out our streams."[127] Kogge's testimony is consistent with the ample evidence proving Spencer Creek ordinarily has flow and is only dry seasonally or during atypical dry periods. To the extent MacGregor theorized Spencer Creek is ephemeral – only flows in direct response to distinct rain events – he confirmed he never checked precipitation records to ascertain whether rainfall exclusively fed water observed in Spencer Creek and lacked enough

[125] ECF 99-20, PageID.5093 (Kogge Rep); 99-10, PageID.4665 (Kogge 175:2-7).

[126] ECF 99-21, PageID.5124 (Kogge Reb); 99-10, PageID.4669 (Kogge 190-91).

[127] ECF 99-10, PgeID4670-71 (Kogge 197-98).

information to define it as ephemeral or intermittent.[128] Given the record of consistent creek flow most months most years, there is no basis to conclude Spencer Creek is ephemeral.

Burnette makes three misleading points related to the last section of Spencer Creek before the lake culvert. First, Burnette truncates Kogge's explanation for why the last <50-foot stretch of Spencer Creek before the lake culvert lacks obvious scour and deposition – because landowners dispose of leaves and debris in this area, leading to blockage and water impoundment that reduces evidence of channelization and the formation of well-defined banks and bed.[129] This impounding that limits scour does not mean the creek stops flowing.[130] Second, Burnette shows a picture of the area covered in leaves on October 29, 2024, then pretends it shows normal conditions.[131] The area may have been obscured but that would not prevent Spencer Creek from reaching Elk Lake.[132] Third, Burnette gets even small facts wrong – Burnette asserts this area is on Gretel's property when it is on Glumb's.[133]

Burnette also mischaracterizes local residents' testimony about creek flow out of the lake culvert. Gretel did not testify outflow is "infrequent"; he testified flow is regular (December, January, February, March, April, May, June), albeit "a little bit," and it slows in July "to hardly anything."[134] A little or hardly anything is not *no* flow. Gretel did not testify outflow is "rain-

[128] ECF 99-12, PageID.4762, 4787 (MacGregor 101-104, 201-204)

[129] ECF 99-20, PageID.5093 (Kogge Rep).

[130] ECF 99-86 (Spencer Creek video, July 22, 2020, September 8, 2023, showing pooling and flowing at C-2).

[131] ECF 99-65, PageID.6232.

[132] **Ex 7** (C-2 Photos); ECF 99-86 (Spencer Creek video, July 22, 2020, September 8, 2023); ECF 99-8, PageID.4595 (Gretel 29, indicating culvert "takes care of itself" in terms of water getting through without cleanout).

[133] ECF 99-8, PageID.4595 (Gretel 28:20-29:2).

[134] *Id.*, PageID.4595, 4601 (23-24, 50).

dependent"; he testified flow is "weather dependent" – it depends on "what kind of spring you have" and "on what the weather is going to do" and "how much rain we get through early summer" and how much rain "in the fall" and "how much snow we had" and "what the weather has been across the street for the swamp, if we get any rain."[135] Gretel's reference to "weather" and "how much rain we get through early summer" are not tied to isolated rain events that cause water to wash through an "ordinarily dry channel" but lay statements about weather patterns affecting water flow. Gretel's testimony corroborates creek photos show flow through winter and spring at least.[136]

Gretel also acknowledged conditions were then-dry – for context, by the November 5, 2024, deposition, there had been several dry months following atypical precipitation, discussed above. Burnette asked Gretel this leading question, "are there periods of time where you might go months without any flow out of the pipe?" Gretel responded honestly: "Yea. Like this year, yeah. There has been nothing flowing."[137] Gretel then testified that "normally there would be some little bit of flow coming out of that pipe," but not "this year," and "not right now."[138] As for Burnette's implication that Gretel's testimony was "consistent with" two October 30, 2024, images showing the outlet culvert with sand inside, Plaintiffs acknowledge dry conditions with no creek outflow that date and little in preceding months. Gretel's testimony is consistent to the extent he, too, acknowledged fall 2024 was atypical – "it's been so dry."[139] As for Burnette's characterization of the outlet as "plugged," Gretel did not say that; rather, he does *not* "dig the sand out," he "let[s]

[135] ECF 99-8, PageID.4593-95 (Gretel 21-23, 25:17-19, 26).

[136] ECF 99-87 (Spencer Creek photos).

[137] ECF 99-8, PageID.4594 (Gretel 23).

[138] *Id.*, PageID.4595 (26).

[139] *Id.*

the water do its own job. There is no reason for me to touch it" – the water will push it out.[140] Again, Gretel's testimony is not inconsistent with Spencer Creek typically flowing continuously out to Elk Lake most months.

Taylor's testimony is also consistent – for 40-plus years, Spencer Creek typically has water flowing until early July and then again in September.[141] And like Gretel, Taylor acknowledges precipitation influences creek flow – this year, a dry fall unsurprisingly resulted in a dry creek.[142] Throughout his deposition, Taylor addressed creek conditions – water changing color, polluted water, water carrying debris – consistent with a flowing creek.[143] Nothing in Taylor's testimony undermines the evidence that Spencer Creek has continuous flow seasonally, most months of most the year.

Burnette is not entitled to summary judgment because Spencer Creek is a relatively permanent water body – ample evidence indicates it typically flows continuously for *at least* three months annually.

2. The wetlands and creek have a continuous surface connection.

Burnette also attacks the second part of the *Sackett* standard for identifying wetlands that are WOTUS under the CWA – "that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Sackett v. EPA,* 598 U.S. 561 at 698-79 (quoting *Rapanos,* 547 U.S. at 742). Burnette relies on an incorrect

[140] *Id.,* PageID.4595, 4601 (27, 52)

[141] ECF 99-9, PageID.4612 (Taylor 35:23-36:17).

[142] *Id.* (36:18-37:5).

[143] ECF 99-9.

interpretation of the legal standard, an inaccurate recitation of the factual record, and two inapplicable cases to support its argument.

Burnette's position is that the second part of the *Sackett* test requires the WOTUS proponent to prove wetlands are indistinguishable from WOTUS, meaning that it is difficult to tell where the water ends and wetlands begin. This misunderstands *Sackett,* which establishes a **two**-part test to support whether wetlands are practically indistinguishable from WOTUS: (1) adjacency to WOTUS plus (2) "a continuous surface connection." *Sackett,* 598 U.S. at 678-79. Burnette would add a third part (c), practical indistinguishability, such that it is difficult to determine where water ends and wetlands begin. Courts have explicitly rejected this interpretation because it does not square with what *Sackett* actually requires. *See White v. U.S. EPA,* 737 F. Supp. 3d 310, 326-27 (E.D.N.C., 2024) (rejecting argument that *Sackett* requires continuous surface connection plus be practically indistinguishable; "a wetland with a continuous surface connection is a [WOTUS] *because* that continuous surface connection renders the wetland practically indistinguishable from the jurisdictional water to which it is connected. The continuous surface connection powers the test.") (emphasis in original); *see also U.S. v. Valentine,* 751 F. Supp. 3d 617, 623 (E.D.N.C., 2024) (rejecting contention that indistinguishability is necessary for CWA jurisdiction over wetlands); *see also U.S. v. Andrews,* 677 F. Supp. 3d 74, 88 (D.C. Conn. 2023) (second part of Sackett "easily satisfied" by undisputed evidence showing continuous surface flow paths linking wetland with tributary), aff'd, 2025 U.S. App. LEXIS 6391 (2d Cir. Mar. 19, 2025).

But even if *Sackett's* two-part test were a three-part test requiring Plaintiffs to show it is difficult to tell where wetlands end and water begins, that is easily and indisputably satisfied here, where the wetland complex connects with Spencer Creek. Video and photos across the seasons over several years show Spencer Creek forms indistinguishably from within the matted cattails in

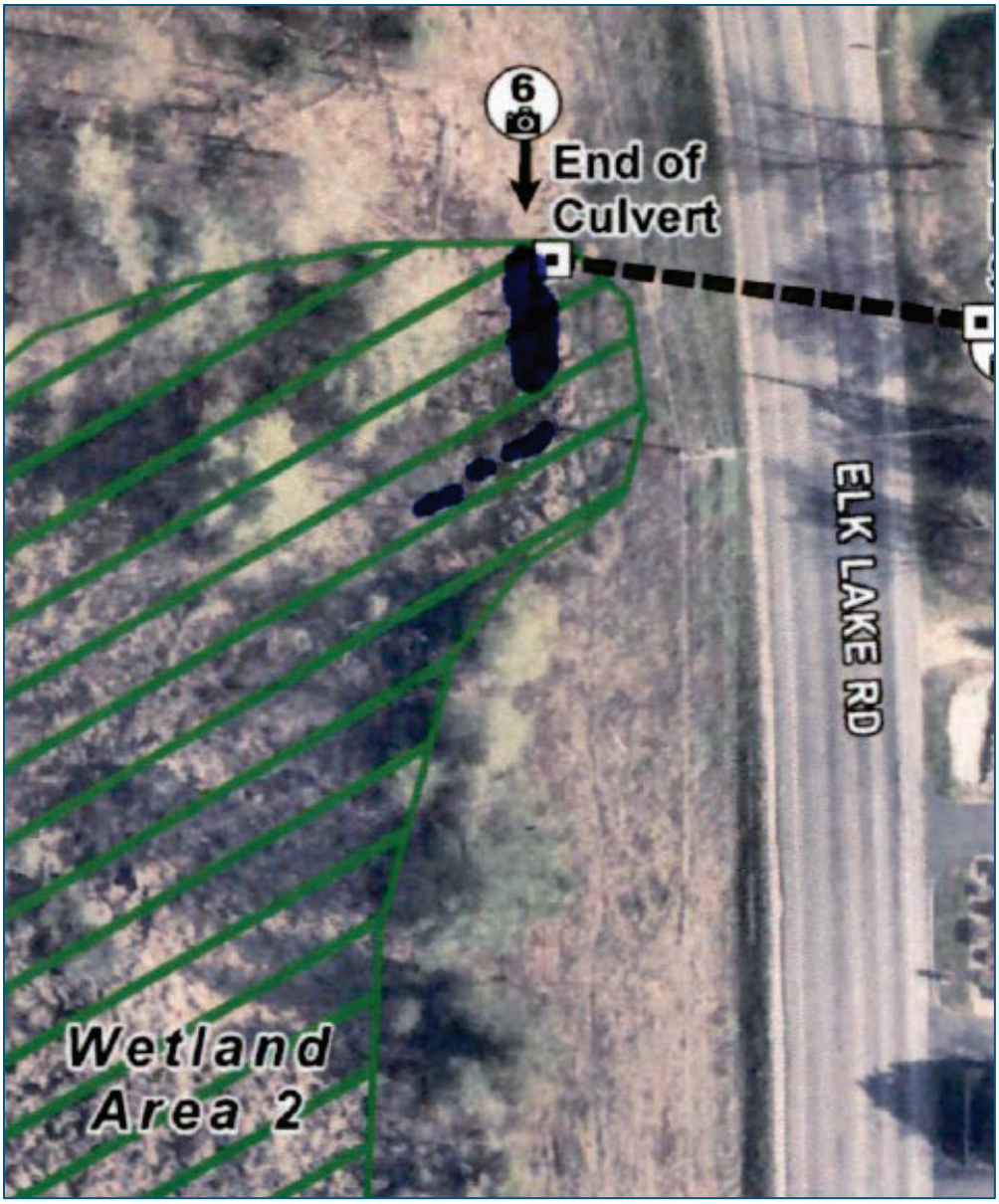
the northern reaches of wetland complex.[144] *See U.S. v. Sweeney,* 2024 U.S. Dist. LEXIS 190360 *14 (E.D.Cal. Oct. 18, 2024) (photo exhibit showed difficulty in distinguishing between marsh, tidal channels). Kogge confirmed the same – the creek forms defined banks, bed, and flow for a stretch about 16 feet out of the emergent wetland complex before entering the road culvert.[145] Likewise, Burnette's expert MacGregor confirmed he twice observed a 20-foot long surface water feature with scour along the bottom caused by water movement, with banks, and containing water, surrounded by vegetation within the wetland's northern reaches.[146] He opined the wetlands continue essentially to the road and up its slope as evidenced by cattails growing up the slope, hydric soils, and hydrology, with entrance to the road culvert inside wetlands:[147]

[144] **Ex 5** (Spencer Creek headwaters photos); ECF 99-85 (wetland video); 99-86 (Spencer Creek video, April 28, 2022); 99-61 (Spencer Creek video, 5:00 to end).

[145] ECF 99-20, PageID.5092 (Kogge Rep); 99-21, PageID.5123 (Kogge Reb).

[146] ECF 99-12, PageID.4785, 4786-87 (MacGregor 193-96, 199-201)

[147] ECF 99-12, PageID.4788-89 (MacGregor 207-211); **Ex 8** (from MacGregor Dep Exhibit 19).



Following his July 2023 site visit, MacGregor noted "[s]urface water within these wetlands generally flow from south to north" and "[s]aturated soils and shallow surface puddles were observed throughout the thickly vegetated wetland areas," though "no large areas of permanent open water were observed."[148].

[148] ECF 21-1, PageID.3582-83 (MacGregor 2023 Report).

Burnette's *E.coli* research expert, Dr. Rediske, visited the site in December 2024. He observed open surface water as he walked south from the culvert along what he described as a cattail mat along the banked "ditch" that extends about 20 feet south then "disappears" into an inundated wetland area where "vegetation is much thicker and it's hard to find any water" about 20 yards south of the culvert:[149]

[149] ECF 99-13, PageID.4803, 4820-21 (Rediske 22:11-14, 90:3-95:14); 99-27, PageID.5340 (Rediske Rep).

Burnette twice asserts "it is easy to tell" where Spencer Creek ends and the wetlands begin but never identifies that point. Burnette simply postulates - but dismisses as "ridiculous" - that Spencer Creek must begin inside the culvert under Elk Lake Road.[150] Burnette then ignores the evidence that Spencer Creek forms indistinguishably from within the northern stretches of wetlands that surround the creek up to the culvert, instead inventing a strawman argument about where the creek starts. Plaintiffs have established both a continuous surface connection between Spencer Creek and wetlands plus difficulty identifying where the water ends and wetlands begin.

This case is nothing like *Lewis v. U. S.,* which Burnette relies on. 88 F.4th 1073 (5th Cir. 2023). The *Lewis* Circuit Court overturned a U.S. Corps of Engineers finding of jurisdiction over wetlands "connecting (a) roadside ditches and (b) a culvert to (c) an unnamed non-'relatively permanent water' tributary, then to (d) Colyell Creek (a 'relatively permanent water') several miles away, and ultimately to (e) the traditionally navigable waterway of Colyell Bay ten to fifteen miles from the Lewis property." *Id.* at 1077. On those facts alone, this case bears no resemblance – the wetlands here are inextricably connected with a relatively permanent tributary of Elk Lake. Plus, in *Lewis,* the Corps had earlier *conceded* the wetland parcels failed to satisfy the *Rapanos* "adjacency" test, which became the *Sackett* test while the case was pending. *Id.* at 1078. The lack of "continuous surface connection" was undisputed in *Lewis*.

Burnette's argument that the lack of regular "surface water" within the wetlands establishes a lack of continuous surface connection is flawed. First, Burnette invokes only *U.S. v. Sharfi,* where the court found "no evidence of any continuous surface water connection" between the wetlands and nearest ditches. 2024 U.S. Dist. LEXIS 171175 *39-40. However, the closest relatively permanent waters in *Sharfi* were approximately two miles from the site and the ditch area closest

[150] ECF 96, PageID.4399-400.

to the wetlands was completely dry. *Id.* at *32-35. This case is factually different from *Sharfi* since there is ample, consistent evidence of regular surface water in the wetlands around Spencer Creek's headwaters and beyond.[151]

Second, Burnette's assertion that the wetlands at issue "are generally lacking in surface water" is unsupported; Ogle and Mays offered general observations during their July 2024 site visit that both described as notably a dry period.[152] Dr. Gagnon also observed standing water in the wetlands around the culverts and north of the farm road during his site visit in December 2024.[153]

Third, Burnette's argument misunderstands wetlands. Plaintiffs' expert Kogge explained that wetlands need not exhibit ponding surface water:[154]

> [S]ome wetlands never have standing or flowing water on their surface (e.g. in some forested wetlands soils are only saturated within 12-18 inches of the ground surface and the upper soil profile is relatively dry). Though there is not always water at the surface of these wetlands or in the culverts, there is water within these wetlands' subsurface, which sustains them as wetlands ….

Even so, Kogge also identified ample evidence of surface water in the wetland complex, including specifically the northern reaches where Spencer Creek forms.[155]

Fourth, and consistent with Kogge's perspective, *U.S. v. Andrews* explicitly rejected an argument that case dismissal was proper "because there is no surface water on his property":

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[151] *See, e.g.,* ECF 99-85 (wetlands video, July 18, 2024); 99-86 (Spencer Creek video, April 28, 2022);99-61 (Spencer Creek video, October 29, 2024, from 5:00 to end); 99-36, PageID.5619-20, 5621 (LEI 2020 Wetland Delineation: noting clear surface water in wetlands and flowing north through culvert, into stream that empties into Spencer Bay); 99-37, PageID.5648 (LEI 2021 Wetland Delineation: observing surface water in wetland); **Ex 5** (Spencer Creek headwaters photos).

[152] *Id.;* ECF 99-5, PageID.4501 (Ogle 82:12-17); 99-7, PageID.4577-78 (Mays 33:19-20, 34:3-24).

[153] ECF 99-16, PageID.4979 (Gagnon 89:5-90:21); ECF 99-24, PageID.5253-54 (Gagnon Rep).

[154] ECF 99-21, PageID.5122 (Kogge Reb).

[155] *Id.*, PageID.5122-23 (Kogge Reb).

> The CWA applies to wetlands that have "a continuous surface connection" with "relatively permanent bod[ies] of water connected to traditional interstate navigable waters." *Sackett v. EPA*, 598 U.S. 651, 678, 143 S. Ct. 1322, 215 L. Ed. 2d 579 (2023) (cleaned up). So the CWA does not require surface water but only soil that is regularly "saturated by surface or ground water." 33 C.F.R. § 328.3(c)(1). And Andrews fails to rebut the expert report concluding that his property had wetlands connected to traditional navigable waters.

2025 U.S. App. LEXIS 6391, *3 (2d Cir. Mar. 19, 2025). Burnette's argument lacks both factual support and legal precedent.

D. <u>Irrespective of the CWA claim, the Court should exercise supplemental jurisdiction over Plaintiffs' MEPA case.</u>

Even if Burnette were entitled to summary judgment on Plaintiffs' CWA claim (which Plaintiffs dispute), the Court should retain supplemental jurisdiction over Plaintiffs' MEPA claim in the interests of judicial economy and fairness.

This Court has "broad discretion" whether to exercise supplemental jurisdiction over state-law claims related to federal law claims such that they are part of the same case or controversy. *Gamel v. of Cincinnati*, 625 F.3d 949, 951 (6th Cir. 2010); 28 U.S.C. § 1367(a). Supplemental jurisdiction is "a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values. *Basista Holdings, LLC v. Ellsworth Twp*., 710 Fed. Appx. 688, 694 (quoting *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350 (1988).

The Court's broad discretion to exercise supplemental jurisdiction extends to decisions to retain jurisdiction over state-law claims even if all federal claims are dismissed. *See* 28 U.S.C. § 1367(c)(3); *Harper v. Auto Alliance Int'l, Inc*., 392 F.3d 195, 210 (6th Cir. 2004) (dismissal of state claims after dismissal of federal claims "is not mandatory" because supplemental jurisdiction is doctrine of discretion, not of plaintiff's rights). Even when all federal claims have been dismissed,

"[a] district court should consider the interests of judicial economy and the avoidance of multiplicity of litigation and balance those interests against needlessly deciding state law issues." *Landefeld v. Marion Gen. Hosp., Inc*., 9943 F.2d 1178, 1182 (6th Cir. 1993). In such circumstances, relevant factors to retaining supplemental jurisdiction include the length of time the case has been on the district court's docket, whether the parties have completed discovery, the stage of the litigation, and the extent of the district court's familiarity with the case. *Gamel*, 625 F.3d at 952.

In this case, it would be proper for the Court to retain supplemental jurisdiction over the state-law claims in the interest of judicial economy and fairness. First, this case is in its later stages and has been on the Court's docket for nearly two years. *Harper*, 392 F.3d at 211 (district court did not abuse its discretion in retaining supplemental jurisdiction over the plaintiff's state-law claims after all federal claims were dismissed in part because case had been on district court docket 11 months); *Taylor v. America Bank-Wayne*, 973 F.2d 1284, 1288 (6th Cir. 1992) (upholding district court decision retaining supplemental jurisdiction in interests of judicial economy and fairness when case was on district court docket nearly two years). Second, discovery is complete and a voluminous record compiled. *Harper*, 392 F.3d at 211; *Taylor*, 973 F.2d at 1288. Third, the parties have submitted extensively-briefed summary judgment motions on all federal and state-law claims and those motions are ripe for ruling. *Harper,* 392 F.3d at 211; *Taylor*, 973 F.2d at 1288. Fourth, the Court has gained insights regarding the case through earlier motions filed by the parties, including Burnette's three motions to dismiss, three motions in limine, and motion for summary judgment, and Plaintiffs' summary judgment motion. *Harper*, 392 F.3d at 211. Each of these factors favor exercising supplemental jurisdiction in the interest of judicial economy and fairness. The Court should retain jurisdiction over Plaintiffs' MEPA claim regardless of its CWA ruling.

IV. CONCLUSION

Burnette has not shown it is entitled to summary judgment on any claim or issue.

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

Because this Brief does not comply with the word count limit of L. Civ. R. 7.2(b)(i), Plaintiffs filed a motion requesting leave of the Court to exceed the word count. This brief was written using Microsoft Word 365 and has a word count of 13,231 words.

Respectfully submitted,

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