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 REPLY TO DEFENDANT'S BRIEF IN RESPONSE (ECF 108) TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (ECF 89)

Oral Argument Requested

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PLAINTIFFS REPLY TO DEFENDANT'S BRIEF IN RESPONSE (ECF 108) TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (ECF 89)

I. INTRODUCTION

There is no genuine issue of material fact that Burnette is liable for Clean Water Act ("CWA") and Michigan Environmental Protection Act ("MEPA") violations.

Through discovery and briefing, Burnette castigated Plaintiffs for using inference, correlation, deduction, and logic, as if improper legally and scientifically. There is nothing wrong with reasonable inferences drawn from circumstantial evidence. *See Gass v. Marriott Hotel Servs*., 558 F.3d 419, 433-434 (6th Cir. 2009)*; In re Flint Water Cases,* 579 F. Supp. 3d 971, 988-89 (E.D. Mich. 2022). Correlation supported by facts and reasonable exclusion of alternatives is properly part of scientific and legal rubric.[1] *Etherton v. Owners Ins. Co.*, 829 F.3d 1209, 1220 (10th Cir. 2016).

II. LEGAL STANDARD

Trs. of the Iron Workers Defined Contribution Pension Funds v. Next Century Rebar, LLC reiterated that a summary judgment movant who bears the burden of proof at trial (typically plaintiffs) must show the record satisfies their burden of persuasion, whereas a defendant-movant need only "'disprove' one element" or identify the absence of evidence supporting the opponent's case. 115 F.4th 480, 488-89 (6th Cir. 2024) (citation omitted). Plaintiffs met their burden by proving each element of each claim. *Id.* at 489 (citation omitted). It was then on Burnette to cite record evidence showing a triable issue of material fact, which it failed to do. Fed. R. Civ. P. 56(e); *Queen v. City of Bowling Green*, 956 F.3d 893, 898 (6th Cir. 2020).

[1] ECF 105, PageID.6647-48.

III. ARGUMENT

A. Burnette is violating the CWA.

1. Burnette's discharge is from a point source.

Burnette's discharge is not excepted from CWA permitting as an agricultural "return flow."[2]

Burnette asserts that a CWA point source must discharge "*directly*" into WOTUS, and since its sprayers discharge onto spray fields, not wetlands, they are not "point sources."[3] This misunderstands the CWA, which defines point source broadly – a discernable conveyance "*from which* pollutants are or may be discharged." 33 U.S.C. 1362(14) (emphasis added); *U. S. v. Earth Sciences, Inc*., 599 F.2d 368, 373 (10th Cir. 1979). Burnette's polluted wastewater is conveyed by pipe to sprayers then sprayers to fields; then *either* conveys through groundwater to wetlands *or* conveys through swales to a retention area then over its lowest point to wetlands; then through wetlands, culverts, and stream banks to Elk Lake. The spray heads do not become non-point sources by virtue of subsequent conveyances. *Rapanos v. United States,* 547 U.S. 715, 743-44 (2006) (plurality opinion; rejecting argument that CWA forbids only *direct* additions to WOTUS from point source).

Burnette improperly wields *Flint Riverkeeper, Inc. v. S. Mills, Inc*. sword-like. 276 F.Supp.3d 1359 (M.D. Ga. 2017). While Burnette cites it for the proposition that "the point source must provide a direct link to WOTUS," *Flint Riverkeeper* did not so hold. It recognized spray heads, a "land application system," and "ditches, runnels, seeps, and other discrete conveyances" were all point sources in a case involving a wastewater disposal system like Burnette's. *Id.* at 1367-

[2] ECF 117, PageID.7599-603.

[3] ECF 108, PageID.6726.

68. The *Flint River* sentence Burnette quotes parenthetically is from *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, which established the general rule that the point source need not "itself add any pollutants to the water it conveys" to be a point source. 541 U.S. 95, 105 (2004). This precedent does not immunize upstream "point sources" from CWA liability where there are also downstream "point sources."

Cordiano v. Metacon Gun Club, Inc. does not support Burnette's argument. 575 F.3d 199 (2d Cir. 2009). A berm was built on the edge of a wetland as a munitions backstop. The point source theory was: bullets lodge in the berm; bullet lead leaches into berm soil; stormwater falls onto the berm, picking up lead from soil; potentially-contaminated stormwater runs into adjacent wetlands. The court acknowledged stormwater runoff is a *non*point source when it is caused by rainfall not "traced to any identifiable point of discharge." *Id. at 220* (quoting *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984)). *Cordiano* noted EPA guidance defining *non*point source pollution does not result from a discharge at a specific, single location, whereas EPA defines a discharge of pollutants to include "surface runoff which is collected or channelled [*sic*] by man," and concluded surface runoff *un*collected and *un*channeled is a *non*point source. *Id.* at 221-22 (citing EPA Office of Water, Nonpoint Source Guidance 3 (1987), quoting 40 C.F.R. § 122.2, collecting cases). Without evidence stormwater on the berm "collected or channeled," it was not a point source. *Cordiano* was explicitly fact-specific. *Id.* at 224 ("To be clear, our holding is not that a berm can never constitute a point source"). It distinguished its facts from *Concerned Area Residents for the Environment v. Southview Farm,* where liquid manure field-applied with "manure-spreading vehicles" collected and channelized within a field swale then into a ditch to a stream; both the swale and vehicles were point sources. 34 F.3d 114, 119 (2d Cir. 1994).

This case is nothing like *Cordiano.* To start, the gun club berm was not wetlands, unlike Burnette's main berm, which has become wetland.[4] *Id.* at 217. Critically, Burnette's spray discharge traces to "identifiable" points and is the result of "a discharge at a specific, single location," so it does not originate as *non*point source stormwater runoff. Finally, Burnette's wastewater sprayed on Fields 36 and 37 slopes in swales towards, then collects in, the human-made retention area, where collected wastewater flows from its lowest point into adjacent wetlands during periodic rain events:[5]

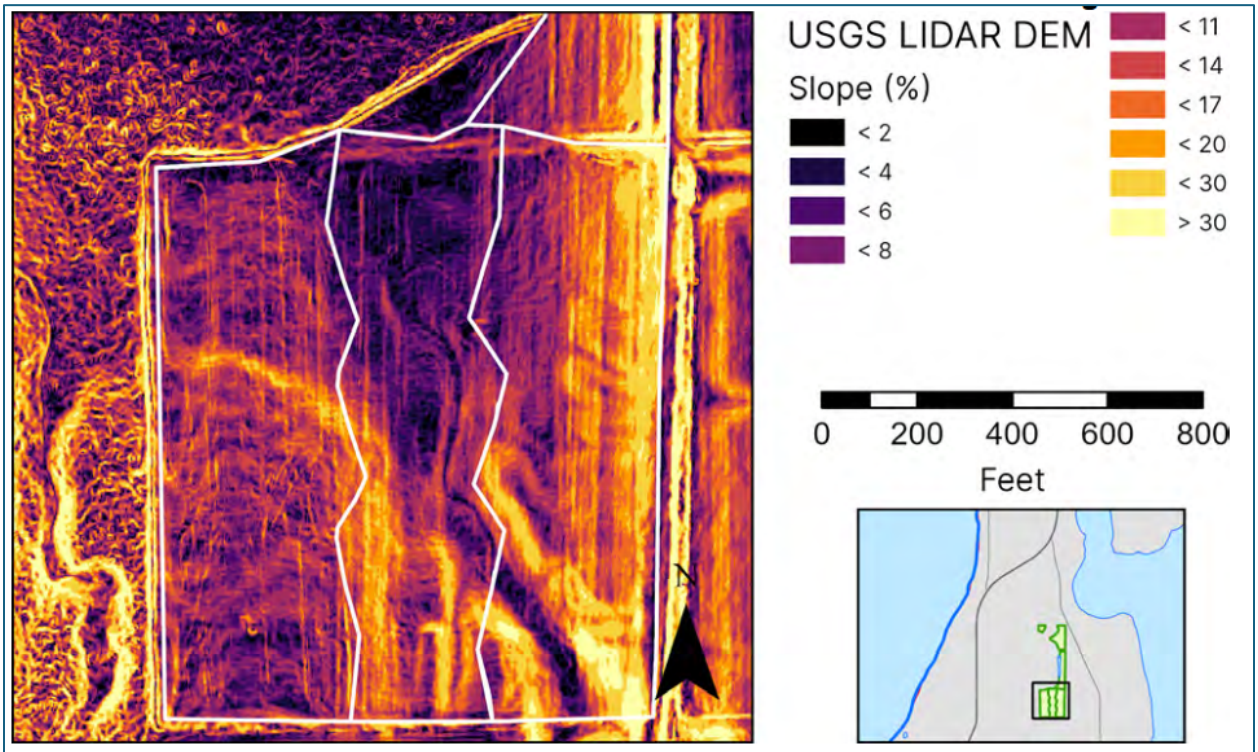

Figure 24: Slope of the land surface, calculated from the 1 meter resolution LIDAR DEM.

[4] ECF 99-36, PageID.5619-21, 5626 (LEI 2020 Delineation, wetlands flanking main berm "are connected as a portion of the created berm that separates them has become wetland."); 99-14, PageID.4882 (Kalchik 80-83); 99-12, PageID.4776, 4780 (MacGregor 159-60, 173-74).

[5] ECF 99-22, PageID.5145, 5156-58 (Kendall Report Fig. 24, 26); 99-11, PageID.4696-97 (Kendall 83-86); 99-26, PageID.5314 (MacGregor, "The spray fields generally slope to the north and west toward the low-lying wetland area."); 99-78, PageID.6396 (EGLE 2020 Inspection Report, "ponded effluent [] runs down the slope and collects in this low area").

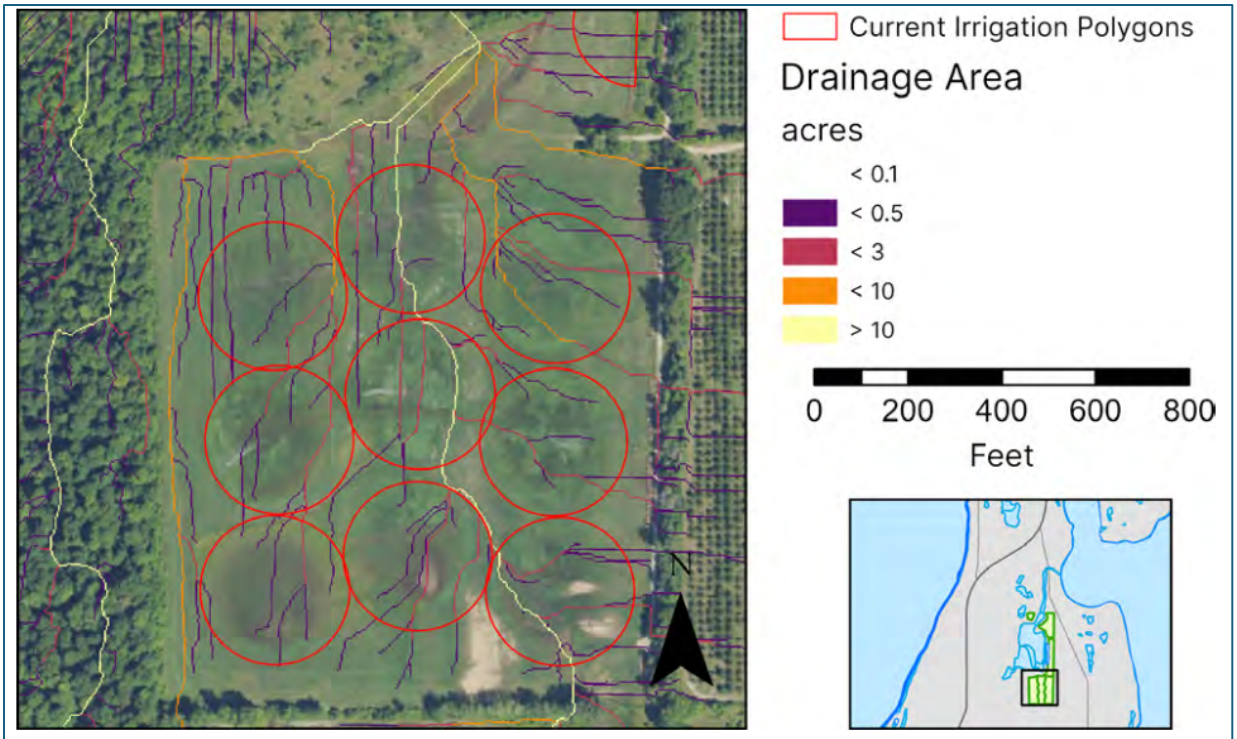

Figure 26: NAIP 2022 image of South field #36, overlain with a drainage network computed from the LIDAR DEM.

Figure 1: Field 36 Channelization (ECF 99-83, PageID.6434)

The point sources are sprayers, sloping fields and swales, and the retention area, which all direct wastewater to flow through a discernable conveyance (low berm spot) into the wetlands. *Southview Farm,* 34 F.3d at 119 (collecting cases).

Burnette's position that Plaintiffs lack "any evidentiary support" that wastewater flows over the main berm into the wetlands is wishful ignoring. Dr. Kendall testified overtopping the main berm's low point occurred historically (per EGLE observations) and is likely during rainfall events of a "not uncommon" magnitude that occur multiple times a year.[6] Dr. Kendall's analysis of how surface water collects in a retention area Burnette created then flows over its lowest point into the wetlands is comprehensive and factual, undisputed by Burnette experts, and supported by Burnette's "Berm Survey."[7] Burnette's distinction between wetlands south and north of the main berm is unsupported and practically meaningless – they are indisputably part of the wetland complex connected by the main berm – itself wetland (see *supra*). The 2021-built secondary berm is functionally irrelevant as it fails at preventing wastewater from ponding.[8]

Burnette's position rests on two faulty premises. First, contrary to Burnette's position, the contents of EGLE inspection reports and violation notices are non-hearsay – they are public records containing factual findings from legally authorized investigations. Fed. R. Evid. 803(8); *Miller v. Field,* 35 F.3d 1088, 1090-91 (6th Cir. 1994). There is no question EGLE is authorized to investigate Burnette's operations and compliance, and Burnette has not shown any untrustworthiness in any EGLE documents invoked by Plaintiffs.[9] Second, Burnette wrongly

[6] ECF 99-11, PageID.4695-96 (Kendall 80-85).

[7] ECF 106, PageID.6683-85; 117, PageID.7595-97; 99-22, PageID.5145-58 (Kendall Report); 117-2 (Berm Survey).

[8] ECF 99-14, PageID.4887 (Kalchik 100); 99-52, PageID.6005 (EGLE 2021 Violation Notice); 99-12, PageID.4476, 4778 (MacGregor 158-59, 165-68).

[9] ECF 99-17, PageID.5017, 5032 (MacAuliffe 91-92, 149-50).

demands photographs, video, or eyewitness testimony of berm overtopping. Such evidence is neither necessary nor practical to find Burnette's wastewater discharges violate the CWA – circumstantial evidence suffices. *See Southview Farm,* 34 F.3d at 120 (jury could infer discharges based on circumstantial evidence) (citing cases); *San Francisco Baykeeper v. City of Sunnyvale,* 627 F.Supp.3d 1102, 1125 (N.D. Cal. 2022) (circumstantial evidence established continuing violation using historic violations data plus absence of remedial measures). Though Burnette is obligated to monitor site conditions, its records are reliably unreliable.[10]

Burnette reiterates its uncompelling argument that a point source must discharge "directly" into navigable waters.[11] Contrary to Burnette's interpretation, *Maui* did not make it harder to prove non-functional-equivalent discharges, only easier to prove functional-equivalent (groundwater) discharges. 590 U.S. 169, 183-86 (2020) . *Maui* expressly addressed pollutant movement "through groundwater;" point sources to and through surface conveyances were nonissues. *Id.* at 169. *Maui* affirmed *Rapanos'* rejection of the "*directly* from a point source to the navigable water" theory of CWA liability: "the statute here does not say 'directly' from or 'immediately' from." *Id.* at 182, 187. Burnette improperly relies on the part of *Ky. Waterways All. v. Ky. Utils. Co.* that *Maui* overturned – whether groundwater functioning as an intermediary medium carrying pollutants can be a point source (*Waterways* said no, *Maui* said yes). 905 F.3d 925, 934 (6th Cir. 2018); 590 U.S. at 172.

[10] ECF 104, PageID.6489-92.

[11] ECF 108, PageID.6732-35.

2. Plaintiffs satisfy *Maui.*

Plaintiffs responded to Burnette's *Maui* arguments.[12] Burnette's reliance on *Stone v. High Mountain* to argue all *Maui* factors must be analyzed is misplaced for two reasons: Plaintiffs produced evidence and analysis on all *Maui* factors;[13] and this case is factually different. 89 F.4th 1246,1259-60 (10th Cir. 2024). *Stone* involved wastewater from a gold mining operation discharged to settling ponds allegedly seeping to a river. Because the district court evaluated only transit time, travel distance, and pass-through material, "in the particular circumstances here," the circuit court remanded for consideration whether the pollutant was changed in transit and the amount entering navigable waters. *Id.* at 1259. *Stone* recognized the *Maui* list is illustrative not exhaustive and time and distance are most important in most cases, but factual circumstances put the case in "middle ground," warranting further analysis: water quality testing indicating river background levels upstream of the mine "quite similar" to downstream, raising question about the impact of seeping water, if any; complex topography, making the functional-equivalent discharge speculative, given the mine's "close neighbors" (highway, wastewater treatment plant, additional mines); plus concern for "complicated and overlapping regulatory impacts that surround the State of Colorado's 10,380 *active* mines …." *Id.* at 1260-61.

Burnette's claim of a disconnect between testimony about downgradient water levels being low in July and August during peak spraying season misunderstands the evidence. Dr. Kendall computed data showing that during the growing season the wetlands' water inputs are equal to or below the elevated evaporation and transpiration rates, so the wetlands will not necessarily have

[12] ECF 117, PageID.7603-20.

[13] *Id.*; ECF 89, PageID.4283-84; 99-23, PageID.5192-200 (Kendall Rebuttal).

excess water at the surface or outflowing downstream.[14] He also explained the intermittent process whereby Burnette's discharges load contaminants into the wetlands during the summer, then summer and fall rains "flush out the system rapidly, creating acute water quality impacts downstream."[15] This pattern is consistent with observed conditions downstream.[16] If there was an evidentiary or scientific disconnect or error, Burnette's experts might have addressed it but did not.

3. The wetlands are WOTUS.

Spencer Creek is relatively permanent, with continuous surface connection with the wetlands.[17] This section addresses new WOTUS points in ECF 108.

Burnette's attempt to distinguish CWA treatment of seasonal *rivers* versus seasonal *streams* is unsupported and facially untenable. *Rapanos* used both terms interchangeably. 547 U.S. at n. 5. Courts find seasonally flowing creeks, streams, and tributaries are WOTUS; *Sharfi* distinguished *natural* versus *built* features.[18]

Plaintiffs needs no flow meter on Spencer Creek to establish continuous flow. Plaintiffs presented photographs, videos, sampling data, field notes, and Ms. Ogle and neighbor testimony supporting stream flows most of the year, sometimes all year, including from winter months (January through April 2024), and typically all year at the headwaters.[19] Regular sampling,

[14] ECF 99-23, PageID.5187-88 (Kendall Rebuttal).

[15] ECF 99-22, PageID.5163 (Kendall Report).

[16] ECF 110, PageID.6869-70.

[17] ECF 117, PageID.7621-36.

[18] *Id.*, PageID.7622-23.

[19] ECF 117, PageID.7624-29; 99-5, PageID.4512-13, 4536-37 (Ogle 129:13-130:8, 224:22-226:8); 99-82, PageID.6432-38 (Spencer Creek photos); 99-86 (Spencer Creek video, March 1, 2024); 117-5 (Spencer Creek headwaters).

including Burnette's quarterly surface samples at Spencer Creek headwaters, support the inference that water was present.[20] Courts find continuous flow from less. *See U.S. v. Brink*, 795 F.Supp.2d 565, 578 (S.D. Tex. 2011) (photographs taken on two dates plus federal map depicting creek flowing toward river); *U.S. v. Mlaskoch,* 2014 U.S. Dist. LEXIS 43314, *53-*54 (D.C. Minn. Mar. 31, 2014) (flow data, photographs for "April 13 to June 25" one year plus site visits two days in fall plus experts assuming flow during spring thaw). The volume and consistency of observed conditions support the reasonable conclusion that Spencer Creek flows continuously most months, not solely on the date the photograph or video was taken. Burnette accuses ESLA of "selection bias" without supporting evidence and articulated motivation.

4. The CWA violations continue (addressed elsewhere).[21]

B. Plaintiffs are entitled to summary judgment on their MEPA claim.

1. The Court may grant relief for Plaintiffs' MEPA claim.

Plaintiffs addressed pre-enforcement judicial review and groundwater discharge permit ("GDP") judicial review elsewhere.[22]

Burnette argues *Burford* abstention bars Plaintiffs' MEPA claim because of "EGLE's continuing regulation of the Spray Fields."[23] *Burford* abstention is exceedingly narrow and only applies "(1) when difficult questions of state law concerning policy problems of substantial public import transcend the case at bar; or (2) where federal judicial review would disrupt state efforts to

[20] ECF 99-33, PageID.5553 (MET Site Status Report); 99-80 (Sampling Summary).

[21] ECF 110, PageID.6881-82.

[22] *Id.,* PageID.6883-90.

[23] ECF 108, PageID.6749.

establish a coherent policy as to a matter of substantial public concern." *Flint Riverkeeper,* 276 F Supp. 3d at 1369 (citing *New Orleans Pub. Serv., Inc. ("NOPSI") v. Council of City of New Orleans,* 491 U.S. 350, 361 (1989)). "[A]bstention is the exception, not the rule." *Olden v. LaFarge Corp.,* 203 F.R.D. 254, 267 (E.D. Mich. 2001). This MEPA case is straightforward. MEPA is by design "supplementary to existing administrative law and regulatory procedures" and serves to broaden environmental enforcement beyond administrative agencies. *Her Majesty the Queen in Right of Province of Ontario v. City of Detroit,* 874 F.2d 332, 337 (6th Cir. 1989); MCL § 324.1701. Plaintiffs are not asking the Court to meddle in whatever *EGLE* is doing, they seek remedy for what *Burnette* is doing. *See Lakeshore Group v. State,* 2018 Mich. App. LEXIS 3701 (Mich. Ct. App. Dec. 18, 2018). Burnette fails to explain how Plaintiffs' MEPA claim would actually disrupt any state efforts to establish coherent policy. Plaintiffs' claims are "based on the enforcement of the current regulatory scheme, which is not the sort of state policy decision typically warranting abstention." *Tenn Riverkeeper, Inc. v. City of Lawrenceburg,* 2023 U.S. Dist. LEXIS 123416, *18 (M.D. Tenn. Jul. 18, 2023); *see NOPSI ,* 491 U.S. at 362 ("potential for conflict with state regulatory law or policy" insufficient basis for abstention); *Olden,* 203 F.R.D. at 267-68 (abstention improper even if injunctive relief had "potential" to interfere with state consent judgment). Burnette's *Burford* theory grounded in the mere fact that EGLE still regulates the spray fields would effectively preclude federal jurisdiction over *every* MEPA case. There is no basis for abstention here.

2. Burnette's permit violations establish a prima facie MEPA case.

It is undisputed Burnette has and continues to violate its groundwater discharge permit, including discharge volume and constituent limits, prohibitions on ponding and runoff, unauthorized water treatment additives, discharges to state surface waters, and more.

Burnette argues Plaintiffs have not established a prima facie MEPA case since Plaintiffs' assert impairment of *surface* waters (wetlands, Spencer Creek, Elk Lake), while Burnette's permit protects *ground*water. This is doubly inaccurate. First, Plaintiffs' MEPA claim is based on Burnette's polluted wastewater impacting waters of the state – both ground *and* surface.[24] Second, the regulation authorizing the GDP specifically incorporates surface water quality standards[25] and specific permit provisions to protect surface waters include: discharges "shall not be, or not be likely to become, injurious to the protected uses of the waters of the state," "shall not cause runoff" offsite, and must be "absorbed and held within the effective rooting zone" of the spray field vegetation. [26] These and others require treatment of constituent pollutants within the spray field boundaries to prevent polluting or impairing downstream state waters, including surface water. Burnette's numerous violations are well-documented, plus compounded by self-restricted "wetted acres," inadequate vegetative cover, reduced infiltration capacity, and more.[27] Given these violations, Plaintiffs have made their prima facie showing that Burnette's conduct has or is likely to pollute or impair groundwater and surface water. MCL § 324.1703(1); *Dwyer v. Ann Arbor*, 79 Mich. App. 113, 123-24; 261 N.W.2d 231 (1977) (establishing violations of discharge permit

[24] ECF 16-1, PageID.1643 (Par 119); 89, PageID.4293-94.

[25] Mich. Admin. Code R. 323.2218(1) (groundwater discharge permit to meet Rule 323.2204, requiring discharge be "consistent with" Rules 323.1041 to 323.1117, state water quality standards).

[26] ECF 99-1, PageID.4425 (GDP Part 1 Sec 8(a), (b), 9(2), 10(a)(1)).

[27] ECF 89, PageID.4257-61, 4293-94; 99-22, PageID.5163 (Kendall Report); 78-1, PageID.3925-26 (Gabris Report).

conditions is sufficient to constitute a prima facie case that the defendant's conduct has or is likely to pollute, impair or destroy natural resources." (rev'd on other grounds, 402 Mich. 915 (1978)).

3. Burnette has not rebutted Plaintiffs' MEPA case.

In response to Plaintiffs' prima facie case that Burnette's effluent application has or is likely to pollute or impair state resources, the burden shifts to Burnette to produce contrary evidence. *Ray v. Mason County Drain Comm'r.,* 393 Mich. 294, 311; 224 N.W.2d 883 (1975). MEPA does not require "actual environmental degradation but also encompasses probable damage to the environment as well." *Id.* at 309; *see also Nemeth v. Abonmarche Dev.,* 457 Mich. 16, 25; 576 N.W.2d 641 (1998). MEPA provides defendants with alternative responsive tracks: (a) "rebut the prima facie showing by the submission of evidence to the contrary," or (b) "show, by way of an affirmative defense, that there is no feasible and prudent alternative" to the conduct and the conduct is consistent with MEPA's goals. MCL § 324.1703(1).

Fundamentally, Burnette lined up at the wrong starting point by arguing "Plaintiffs have failed to demonstrate any pollution, impairment, or destruction of natural resources, *notwithstanding any violations of its [GDP]*."[28] This argument is contrary to *Nemeth,* the lone case Burnette cites in support. The Michigan Supreme Court is clear and consistent: a MEPA plaintiff may establish their MEPA prima facie case by showing violation of a legislatively or administratively enacted pollution control standard – or a different standard if that standard falls short of MEPA's requirements. *Nemeth,* 457 Mich. at 25-31 (discussing *Ray, supra*); MCL § 324.1701(2). Plaintiffs have no obligation under MEPA to prove pollution (actual or likely) *over and above* proving GDP violations – the permit violations are the MEPA violations. *Id.* at 36.

[28] ECF 108, PageID.6751 (emphasis added).

Nemeth footnote 10, which Burnette cites for support, did not modify Section 1703(1), it reiterated that MEPA defendants may show either: (1) plaintiffs established no prima facie case (*i.e.*, rebut it), or (2) lack of alternatives (no go here). Burnette instead attacked the *degree* of pollution ("there is no *material* pollution"), a novel approach contravening MEPA by requiring demonstrated permit violations *likely to* result in pollution *plus actual*, "material" pollution.

Irrespective of whatever Burnette means by "material" pollution levels (discussed *infra*), Plaintiffs demonstrated Burnette's wastewater impairs downstream water quality. Burnette says low DO concentrations and high metals (iron, manganese, arsenic) concentrations are natural. In Field 36 groundwater wells, DO levels (directly related to Burnette's wastewater's extremely high BOD levels) are typically below 0.5 mg/L - the level where microbes can no longer use oxygen, far below what EGLE considers necessary to "prevent acute toxicity" downstream.[29] Sampling shows high BOD and low DO downstream in the wetlands and below the warm water stream standard for Spencer Creek.[30] Low DO conditions have also mobilized heavy metals in the soil to flow with groundwater and into the wetlands at levels above groundwater, hazardous waste, and drinking water standards.[31]

Burnette's expert Dr. Gagnon noted low DO and high metals are common in wetlands due to the breakdown of organic materials, and Burnette cited an article on arsenic occurrence. These

[29] ECF 99-22, PageID.5162-63 (Kendall Report); 99-23, PageID.5200 (Kendall Rebuttal Par 4); 99-11, PageID.4707, 4726-27 (Kendall 127-28, 203-204); 99-33, PageID.5546 (MW 10, 11 DO levels); 99-68, PageID.6305 (EGLE, Potential Surface Water Impacts); 117, PageID.7614-15.

[30] *Id.;* ECF 99-52, PageID.6005, 6010-11 (2021 Violation Notice); 99-34, PageID.5578 (Groundwater Monitoring Report); 99-47, PageID.5903 (ESLA 2023 Report); 99-80, PageID.6417 (Spencer Creek DO Sampling Results); 99-68, PageID.6305 (EGLE, Potential Surface Water Impacts); 99-13, PageID.4830, 4831 (Rediske 132, 136); Mich. Admin. Code R. 323.1064(2)(b).

[31] ECF 99-22, PageID.5162-63 (Kendall Report); 99-52, PageID.6005, 6010-11 (2021 Violation Notice); 99-53, PageID.6017 (2023 Violation Notice); 99-69, PageID.6320, 6333-36 (EGLE Geologist Recommendations).

general observations fail to refute evidence documenting these conditions *upstream* of the wetlands in the wastewater and spray field wells. Moreover, it does not rebut the evidence that Burnette's wastewater is *contributing* to the polluted and impaired conditions.

While Burnette speculates there might be other explanations for E.coli detected in Spencer Creek, Burnette's representative admitted that, after finally sampling its effluent and detecting high E,coli levels, an investigation discovered a surprise E.coli source – municipal wastewater collection pipe adjacent to Burnette pipe, both suffering cracks and degradation.[32] Burnette downplays its culpability, instead leaning on academics. Dr. Rediske critiqued four ELSA reports and confessed the *only* materials he reviewed (apart from academic research) were those four reports.[33] His report ticks off alternative E.coli theories – deer, wetlands, culvert pipe, septic systems – but he did not consider Burnette effluent as a source; Burnette obviously told him nothing about village sewer infiltration.[34] Burnette provided a study showing E.coli deposited into constructed wetlands via dairy farm runoff persisted, grew inside the wetland, and exited the wetland at increased levels– *i.e.*, E.coli deposited into wetlands thrives.[35] The study also found wildlife defecation in the wetland was "unlikely to be of sufficient magnitude" to explain E.coli increases downstream.[36] Even where conditions are ripe for E.coli to thrive – pipe biofilm and wetlands – an upstream source is necessary. Burnette tested its riparian septic system theory but the results produced no evidence of E.coli sources – nor would downstream riparian septic systems

[32] ECF 99-14, PageID.4912 (Kalchik 197-203); 99-72 (Euster email); 99-72 (E.coli effluent sampling); **Ex 2** (BFI v. Village of Elk Rapid Complaint, Par 8-14).

[33] ECF 99-13, PageID.4807, 4807-808 (Rediske 25-27, 36-44).

[34] ECF 99-13, PageID.4815 (Rediske 69-71).

[35] ECF 108-3, PageID.6787, 6797.

[36] *Id*., PageID.6796-97.

explain E.coli detected upstream in wetlands and Spencer Creek headwaters.[37] While deer might contribute, there is no evidence of unusual deer numbers to explain unusual E.coli results.[38] Burnette's wastewater at least contributed to E.coli pollution in the wetlands, Spencer Creek, and Elk Lake.

Burnette ignores evidence that sodium and chloride in its wastewater pollute groundwater and Spencer Creek, including resulting in consistently high conductivity in Spencer Creek.[39]

Plaintiffs showed Burnette's wastewater is polluting water resources, and Burnette's speculation about alternative potential explanations for some but not all pollutants falls short of its evidentiary burden to rebut Plaintiffs' case.

4. Plaintiffs are entitled to judicial remedial relief.

Burnette's argument that a "significant level of impairment" is necessary to warrant judicial action under MEPA is legally incorrect and factually baseless. *Nemeth* is decisive – it overturned the court of appeals decision that did precisely as Burnette invites this Court to do: evaluate whether plaintiffs prove their MEPA case based on the level of natural resource impairment. 457 Mich. at 23-37. Instead, *Nemeth* declared that violation of a state law intended to protect natural resources or to prevent pollution and environmental degradation can establish a prima facie MEPA case. *Id.* at 36. And *Nemeth* declared that, rather than set factors, it is for the trial judge to determine if pollution is actual or likely based on the facts of the case, natural resources involved, and evidence presented – "each alleged MEPA violation must be evaluated

[37] **Ex 1** (SOS Lab E.coli results).

[38] ECF 99-13, PageID.4818 (Rediske 81-84).

[39] ECF 89, PageID.4287-89.

by the trial court using the pollution control standard appropriate to the particular alleged violation." *Id* at 34-35.

Burnette pulls snippets from pre-*Nemeth* cases not involving violations of pollution control permits. *Oscoda Chptr. v. Dep't of Natural Res.* involved a finding that the possibility of pollutants even reaching the environment "is almost nonexistent." 403 Mich. 215; 268 N.W.2d 240 (1978). *Nemeth* expressly rejected arguments, pulled from the historic cases Burnette invokes, that a resource be "scarce" or "unique" or that "a multitude of natural resources" are affected for MEPA protection. 457 Mich. at 34-35, n. 7 (discussing *West Michigan Environmental Action Council v Natural Resources Comm*, 405 Mich. 741; 275 N.W.2d 538 (1979) and *Kimberly Hills Neighborhood Ass'n v Dion*, 114 Mich. App. 495; 320 N.W.2d 668 (1982)). *Nemeth* also held the four *Portage* "environmental risk" factors Burnette emphasizes are "not mandatory, exclusive, or dispositive" since each case must be decided based on the standards for the particular violation. *Id* at 36-37.

Plaintiffs' MEPA case shows Burnette persistently violates pollution control standards in its GDP, which is intended to "prevent unlawful pollution" of state waters, and also has actually impaired groundwater, wetlands, Spencer Creek, and Elk Lake, evidenced by unhealthy levels of DO, sodium, metals, E.coli, and more. MCL § 324.3112(3); *Dwyer,* 79 Mich. App. at 122-23. There is no basis to deny Plaintiffs' relief based on Burnette's unsupported argument that Plaintiffs must demonstrate some nebulous level of resource impairment.

IV. CONCLUSION

Plaintiffs are entitled to summary judgment on their CWA and MEPA claims.

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

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Respectfully submitted,

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