UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, GRAND TRAVERSE BAY WATERSHED INITIATIVE, INC., AND ELK-SKEGEMOG LAKES ASSOCIATION,

Plaintiffs,

v.

BURNETTE FOODS, INCORPORATED,

Defendant.

Case No. 1:23-cv-00589

Honorable Jane M. Beckering

DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

(Oral Argument Requested)

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I. PLAINTIFFS LACK ARTICLE III STANDING.

A. THE COURT SHOULD EVALUATE STANDING ON A PLAINTIFF-BY-PLAINTIFF BASIS.

Plaintiffs argue that the Court should not evaluate the standing of each Plaintiff because of the "standing for one is standing for all" rule. *See, e.g., Thiebaut v. Colorado Springs Utilities*, 455 F. App'x 795, 802 (10th Cir. 2011). The Court should reject this argument, just as numerous other federal courts have. *See Kansas v. Biden*, 736 F. Supp. 3d 1020, 1040 (D. Kan. 2024) (collecting cases where courts examined standing on a plaintiff-by-plaintiff basis and dismissed individual plaintiffs for lack of standing); *see also M.M.V. v. Garland*, 1 F.4th 1100, 1010-11 (D.C. Cir. 2021) (holding that the district court "sensibly" dismissed plaintiffs that lacked Article III standing); *Connecticut Citizens Defense League, Inc. v. Thody*, 664 F. Supp. 3d 235, 246 (D. Conn. 2023) ("The presence of a plaintiff with valid standing does not, however, prevent a court from dismissing an organizational plaintiff where there is no clear basis for standing."). This approach aligns with the bedrock principle of constitutional law that "standing is not dispensed in gross." *Waskul v. Washtenaw County Community Mental Health*, 900 F.3d 250, 253 (6th Cir. 2018). Moreover, even if one plaintiff has standing, "paring down the case and dismissing the plaintiffs without standing aligns with the charter purposes recognized in Fed. R. Civ. P. 1." *Biden*, 736 F. Supp. 3d 1020. As the *Biden* Court aptly explained:

> At bottom, plaintiffs contend that uninjured plaintiffs can borrow another plaintiff's injury to satisfy Article III's standing requirement. But that's not the way the court would approach any kind of lawsuit—especially a complicated one. Narrowing the case to its viable claims and viable parties often narrows the burden of adjudicating the relevant issues, no matter whether the case is an auto accident or antitrust case.

Id. at 1040. These interests are particularly important in fee-shifting cases. Contrary to Plaintiffs' assertion, individual standing matters when a plaintiff seeks to recover fees. Fee shifting under the Clean Water Act ("CWA") depends on a litigant being "a prevailing or substantially prevailing party[.]" 33 U.S.C. § 1365(d). The Sixth Circuit has recognized that "[i]f the plaintiff never had

standing to bring the case, he is not a proper prevailing party." *Doe v. University of Michigan*, 78 F.4th 929, 954 (6th Cir. 2023). Because each Plaintiff here is seeking attorney fees to pay their separate counsel, each must establish its own Article III standing. *Waskul*, 900 F.3d at 255 ("[A] plaintiff must demonstrate standing separately for each form of relief sought."). Accordingly, the Court should evaluate standing on a plaintiff-by-plaintiff basis.

B. NO PLAINTIFF HAS SUFFERED AN INJURY-IN-FACT.

1. TWC

TWC has abandoned any argument that it has organizational standing. See Pl.'s Br. 6-12 (arguing only that TWC has associational standing "irrespective" of whether it has organizational standing). It relies solely on associational standing, admitting that it lacks members but arguing that Samantha Ogle is the "functional equivalent" of a member due to her participation in TWC's "Leadership Circle." *Id.* But the Leadership Circle does not satisfy the indicia-of-membership test established by *Hunt v. Washington State Apple Advertising Comm'n*, which defines "**all of** the indicia of membership in an organization" that may suffice. 432 U.S. 333, 344-45 (1977) (emphasis added). This is the test that is applied by the Sixth Circuit and is binding on this Court. *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578, 586 (6th Cir. 1995).

The *Nestle* factors to determine functional membership are (1) if the individuals "**alone** elect" the organization's leadership; (2) if the individuals "**alone** serve" on the organization's board; and (3) if the individuals "**alone** finance" the organization through "assessments levied upon them." *Id.* at 586 (emphasis added). **The Leadership Circle does not satisfy any of these factors**. It does not elect board members—the board does that. It is not the sole pool of prospective board members. And assessments are not levied against the Leadership Circle to fund the TWC's operations. **It is an advisory board**. Under *Nestle*, this is insufficient.

Even if the Leadership Circle qualifies, Ms. Ogle has not suffered a sufficient injury-in-fact. As previously explained, a plaintiff cannot establish an Article III harm based on voluntarily directing resources toward the defendant's conduct. *See FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 395 (2024). That is all that Ms. Ogle asserts. Pl.'s Br. 10-11 (describing alleged harms derived from "volunteer sampling and monitoring work"). And to the extent that Ms. Ogle asserts that she does not swim or boat in Elk Lake due to a fear of pollution, she is pointing to the wrong place. There is no evidence that any alleged pollutant is making its way to Elk Lake. That would be difficult indeed given that the Elk Lake culvert is *plugged with sand*. (ECF No. 96, PageID.4398). Only a *reasonable* fear of pollution is sufficient to confer standing. TWC cannot derive its standing from Ms. Ogle.

2. GTB

Plaintiffs fundamentally misunderstand Burnette's argument regarding GTB's standing. The issue is not whether GTB has treaty rights, but rather whether GTB can identify any treaty right that has been or will be violated by Burnette. As admitted by GTB's corporate representative, it cannot. Mays Dep. 10:18-23, 11:13-16, 12:2-5, 15:15-25, 16:21-24; 61:23-62:10, JX 7. Regardless of whether GTB could hypothetically bring a suit to protect water integrity under some circumstances (which is all that Plaintiffs' cited cases could establish), discovery confirmed it cannot do so here because it has not identified any injury it has experienced, is experiencing, or might experience due to Burnette's activities.

3. ESLA

Burnette largely relies on its prior briefing regarding ESLA's lack of associational standing. Suffice to say that the alleged harms suffered by ESLA's identified members, specifically its star standing witness Mr. Taylor, were disclaimed during discovery. Mr. Taylor confirmed that any discoloration in Spencer Creek has not affected his use of Elk Lake for at least five years, Taylor

Dep. at 40:14-24, JX 9; that Burnette's spray operations has not affected him or his family in their use and enjoyment of this property, *id*. at 40:25-41:3; that it was "fair" to say that his inability to clean Spencer Creek had "as much to do with time constraints" as with any fears of contamination, *id*. at 51:5-13; and that the boat paint-peeling incident occurred about thirty years ago, *id*. at 56:24-57:2. The fact that ESLA's own handpicked members virtually ran away from ESLA's position when under oath during a deposition (outside the comfort of an attorney-drafted affidavit) confirms that this suit was reverse-engineered: Plaintiffs decided to sue Burnette and then drafted the closest landowners, regardless of whether those owners were actually harmed.

C. PLAINTIFFS' ALLEGED INJURIES ARE NOT TRACEABLE TO BURNETTE.

Plaintiffs have not established that any pollutants identified in the Wetlands or Spencer Creek were caused by or are otherwise "fairly traceable" to groundwater discharges occurring in the Spray Fields. Every single injury asserted by Plaintiffs is premised on alleged impacts *to surface water* in Spencer Creek or Elk Lake. Thus, to be fairly traceable, Plaintiffs would necessarily have to establish that any pollutants observed in surface water in Spencer Creek originated from discharges at the Spray Fields. Plaintiffs cannot meet that burden.

Plaintiffs' entire argument connecting its supposed injuries to the Spray Fields is premised on its conclusion that groundwater from the Spray Fields drains toward the Wetlands (ECF No. 110, PageID.6879). The fact that groundwater from the Spray Fields may flow toward the Wetlands does not establish that groundwater is discharged into surface water. In fact, as previously noted, the lack of surface water in the Wetlands for the majority of the year shows that very little, if any groundwater is discharged into the Wetlands. Moreover, Plaintiffs' own witnesses have acknowledged that flow out of Spencer Creek is weather-dependent as flow is generally observed following significant precipitation, which further demonstrates that it is precipitation (and not groundwater) that is the primary source of surface water in Spencer Creek. Gretel Dep.

at 21:25-22:8, 23:6-11, JX 8; Taylor Dep. at 37:16-24, JX 9. Because groundwater from the Spray Fields is clearly not the source of the water flowing in Spencer Creek, Plaintiffs cannot establish that any injuries caused by downgradient surface impacts are fairly traceable to alleged groundwater contamination.

Notwithstanding the foregoing, the alleged injuries (*e.g.*, discoloration, low-DO and *E. coli)* in this case are consistent with the inherent characteristics of wetlands and surface water flowing out of those wetlands. Despite that fact, Plaintiffs simply assumed that any constituents observed in water flowing (out of the Wetlands) into Spencer Creek were caused by Burnette. Kendall Dep. at 198:16-23, JX 11. Plaintiffs failed to gather the data necessary to establish that any impacts from the Spray Fields were caused or contributing to any alleged injuries, and they declined to use more accurate techniques for lack of convenience. *See id*. at 58:9-60:13; 64:14-17; 91:25-92:19.

The lack of scientific rigor is telling. Despite purportedly conducting an extensive investigation, Plaintiffs failed to conduct any sampling at the point where groundwater discharges into surface water, and therefore fail to establish that any pollutants are entering surface water. Plaintiffs also failed to collect surface or groundwater samples within the Wetlands to establish that concentrations of any pollutants are higher in areas adjacent to the Wetlands. Both common sense and the scientific method dictate that without any data to distinguish between pollution allegedly caused by the Spray Fields and the naturally occurring characteristics of a wetland, Plaintiffs cannot meet their burden to establish that their injuries are fairly traceable to discharges at the Spray Fields.

Compounding the lack of data at the alleged point of discharge, Plaintiffs' sampling occurred at locations downgradient of the Spray Fields that necessarily includes the stormwater

from several other agricultural properties surrounding the Wetlands[1] as well as runoff from Elk Lake Road. *See* JX 43 at 13-14; **Exhibit 1**, Parcel Maps, BFI00021029-21041. However, Plaintiffs undertook no investigation to rule out other sources of impacts, most notably *E. coli* impacts from stormwater runoff across agricultural lands. Instead, Plaintiffs simply concluded there were none. See ECF No. 110, PageID.6878 (asserting that "Plaintiffs' witnesses considered reasonable alternative explanations for *E. coli* and other pollution and conditions in Spencer Creek and Elk Lake—septic systems, animals, other land uses, natural conditions—and identified none.").[2] Plaintiffs' paltry "consideration" of "alternative explanations" hardly constitutes a scientific evaluation or investigation to rule out sources. No evidence has been provided to suggest that Plaintiffs even walked the perimeter of the Wetland to identify potential sources of impacts. Kogge Dep. at 24:6-25:8, 27:2-11, JX 10; Kendall Dep. at 64:18-22, JX 11; Ogle Dep. at 82:1-86:12, JX 5. The mere conjecture of Plaintiffs' witnesses, who were not qualified as experts,[3] without investigation or analysis is hardly sufficient for Plaintiffs to conclude that the Spray Fields are the source of pollutants in the Wetlands.

II. PLAINTIFFS LACK CWA STANDING.

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

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[1] Unlike the Spray Fields, the surrounding properties do not have a berm to prevent stormwater runoff directly into the Wetlands.

[2] Plaintiffs notably failed to identify any potential *E. coli* impacts from animals (ECF No. 110, PageID.6878) despite the deer and mink present in videos at Spencer Creek during their field observations. **Exhibits D** and **E**.

[3] Note that Plaintiffs cite to the testimony of witnesses that are not experts, including Ogle and Smith. ECF No. 110, PageID.6878 fn 62. Moreover, Plaintiffs' expert acknowledged that he did not conduct any investigation of alternate sources. Kogge Dep. at 89:25-90:4.

May 10, 2022) (citing *Gwaltney of Smithfiled, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987)). In fact, Plaintiffs have acknowledged that "CWA citizens' suits require 'either continuous or intermittent violation' after filing." (ECF No. 110, PageID.6881). However, Plaintiffs fail to identify any specific instances of a violation ***of the CWA*** that occurred after filing. While Plaintiffs have asserted that Burnette violated the CWA by discharging pollutants into WOTUS without a NPDES permit (*see* Amended Complaint ⁋⁋ 101-104) they have not identified any such discharges having occurred after the date of filing of this lawsuit. Instead, Plaintiffs have alleged violations of Part 22 regulations and/or Burnette's state-issued Groundwater Discharge Permit. (*See* ECF No. 110, PageID.6881- ECF No. 110, PageID.6882). A violation of a state regulation is not a violation of the CWA. Plaintiffs cannot pursue a CWA citizen suit without identifying continuing violations ***of the CWA*** after the filing of this lawsuit. They have not and cannot do so. Because Plaintiffs have not and cannot identify continuing violations of the CWA, their citizen suit must be dismissed.

III. PLAINTIFFS' MEPA CLAIM IS SUBJECT TO THE BAR ON PRE-ENFORCEMENT JUDICIAL REVIEW.

Part 201 of NREPA unequivocally provides that "[a] state court does not have jurisdiction to review challenges to a response activity selected or approved by [EGLE] under this part . . ." Mich. Comp. Laws § 324.20137(6). This provision is often referred to as the "bar on pre-enforcement review." Plaintiffs' MEPA claim is subject to the bar on pre-enforcement judicial review because a response activity has been selected by EGLE.

A. EGLE HAS SELECTED A RESPONSE ACTIVITY UNDER PART 201.

Plaintiffs attempt to avoid application of the bar on pre-enforcement review by arguing that it "is premature because it precedes any state approval of anything under any NREPA Part." ECF No. 110, PageID.6884 (emphasis added). This argument ignores the fact that the bar on

pre-enforcement review, by its express terms applies to any response activities "**selected** or **approved**" by EGLE. Mich. Comp. Laws § 324.20137(6) (emphasis added). Regardless of whether EGLE has "approved" a response, it clearly "selected" one when it ordered Burnette to conduct a hydrogeological study. *See* JX 50, 6-7. EGLE further included the hydrogeological study in the various iterations of the draft ACO and testified that EGLE required Burnette to conduct "an evaluation of the hydrogeologic conditions at the Spray Fields[.]" McAuliffe Dep. 153:8-11, JX 17; *see, e.g.,* Draft Administrative Consent Order, JX 55 (ECF No. 99-55, PageID.6040) ("On or before DATE, BFI ***shall implement*** the Hydrogeological Study Work Plan for the existing land application field . . . . On or before DATE, BFI ***shall implement*** the Hydrological Study Plan for the proposed field as described in Attachment L.") (emphasis added).

Plaintiffs suggest that a final executed ACO is somehow relevant to the selection of a remedy. It is not. Nothing in the text of the statute or any case law requires the entry of a consent order for the selection or approval of a remedy. Any direction from EGLE selecting a response activity requires application of the pre-enforcement bar under Mich. Comp. Laws § 324.20137(6).

A hydrogeological study is a response activity as defined by Part 201. The term "response activity" means "evaluation, interim response activity, remedial action, demolition, providing an alternative water supply, or the taking of other actions necessary to protect the public health, safety, or welfare, or the environment or the natural resources." Mich. Comp. Laws § 324.20101(1)(vv) (emphasis added). Meanwhile, the term "evaluation" is broadly defined to include "those activities including, but not limited to, investigation, studies, sampling, analysis, development of feasibility studies, and administrative efforts that are needed to determine the nature, extent, and impact of a release or threat of release and necessary response activities." Mich. Comp. Laws § 324.20101(1)(q) (emphasis added). The hydrogeological study required by EGLE fits squarely

within the definition of a "response activity" because it is an "evaluation" to investigate (including sampling and analysis) to determine the nature, extent, or impact of a release or threat of a release.[4]

B. PART 31 INCORPORATES REMEDIAL ACTION REQUIREMENTS FROM PART 201.

Plaintiffs argue that the response activities at issue are not "conducted pursuant to Part 201," arguing instead that "they are conducted pursuant to Part 22." ECF No. 110, PageID.6884. This argument is meritless. Although groundwater discharges are regulated under Part 31 of NREPA and the Part 22 Rules (Mich. Admin. Code. R. § 323.2201 *et seq.*), Part 31 has specifically adopted and incorporated by reference the remedial action requirements set forth in Part 201 at Mich. Comp. Laws § 324.3109b, which notably is entitled "Satisfaction of Remedial Obligations":

> Notwithstanding any other provision of this part, remedial actions that satisfy the requirements of part 201 satisfy a person's remedial obligations under this part.

Mich. Comp. Laws § 324.3109b.[5]

If this unequivocal incorporation of Part 201 remedial action standards in the statute governing groundwater discharges (Part 31) were not enough, both this Court and the Michigan Court of Appeals have confirmed that this bar on pre-enforcement review applies to claims arising under MEPA. *Abnet v. The Coca-Cola Co.*, 786 F. Supp. 2d 1341, 1347 (W.D. Mich. 2011); *see*

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[4] The hydrological study may not be the only response activity that EGLE selects. Response activities are typically conducted through an iterative process involving an investigation to determine the nature and extent of any impacts. Depending upon the extent of impacts, response activities may include monitoring or active remediation.

[5] Underscoring the incorporation of Part 201 remedial action requirements by reference in Part 31, the Part 22 regulations (promulgated pursuant to Part 31) also reference Part 201 remediation standards. *See e.g.,* Mich. Admin. Code. R. § 323.2227(2)(e) (providing that EGLE may require dischargers to "[d]efine the extent to which groundwater quality exceeds the applicable criteria established by the department under section 20120a(1)(a) of the act."); Mich. Admin. Code. R. § 323.2227(2)(k) (providing that EGLE may require dischargers to "[r]emediate contamination to comply with the terms of section 20120a and b of the act.").

also, Genesco, Inc. v. Michigan Dep't of Envtl. Quality, 250 Mich. App. 45, 55-56 (2002). In fact, this Court has already decided this issue under an almost identical state of facts. In *Abnet*, the Coca Cola Company sprayed wastewater from its fruit and juice processing facility onto open fields adjacent to its facility pursuant to a permit issued by EGLE's predecessor agency, the Michigan Department of Natural Resources and Environment. *Abnet*, 786 F. Supp. 2d at 1342. The plaintiffs asserted a MEPA claim, alleging Coca-Cola's wastewater discharges exceeded permit limits resulting in pooling, ponding and runoff of wastewater, and in contamination of groundwater. *Id*. at 1342. This Court nonetheless dismissed plaintiffs' MEPA claim seeking declaratory and equitable relief. Despite plaintiffs' claims that they were not seeking to directly interfere with response activities mandated by the agency, the Court noted that "seeking injunctive relief requiring Defendants to perform additional response activities not required by MDNRE is tantamount to challenging the adequacy of MDNRE's decisions with respect to remedial action. Plaintiffs are alleging that the MDNRE hasn't done enough." *Id*. at 1347.

Despite Plaintiffs' attempts to distinguish *Abnet*, it is squarely on point here. First, the Court applied the Part 201 bar on pre-enforcement review even though the permit to spray wastewater was issued pursuant to another statute. This squarely contradicts Plaintiffs' argument that the bar on pre-enforcement review is not applicable in this case because Burnette's permit was issued pursuant to the Part 22 regulations (and not Part 201). Second, just as in *Abnet*, Plaintiffs' claims for declaratory and injunctive relief are tantamount to a challenge of the response activity selected by EGLE. Plaintiffs cannot perform an end-run around on the bar on pre-enforcement judicial simply by advancing a MEPA claim.

Plaintiffs' assertion that Part 201 is not the governing standard for response activities is also contradicted by their own previous statements. Prior to being confronting with the bar on pre-

enforcement judicial review, Plaintiffs repeatedly referenced and implicated the applicability of Part 201 standards in their Brief in its Motion for Summary Judgment, stating as follows:

> Burnette's GWDP also prohibits its discharge from creating a hazardous waste "facility" under Part 201 of NREPA, Mich. Comp. Laws § 324.20101 *et seq.* Burnette's 2023 sampling reports arsenic at 25 ug/L and 13 ug/L in MWs-10 and 11 respectively, well above the 10 ug/L standard. The Michigan Department of Environment, Great Lakes, and Energy ("EGLE") cited Burnette for violating Part 201 levels for arsenic and manganese, supported by EGLE's 2023 sampling in Burnette's downstream groundwater monitoring wells. And EGLE's compilation of historic data from downgradient Field 36 monitoring wells show three out of four wells consistently exceeded Part 201 arsenic levels. EGLE's analysis shows iron and manganese levels similarly exceed Part 201 standards.

ECF No. 89, PageID.4261(footnotes omitted).[6]

Plaintiffs next cite to two inapposite cases in an attempt to refute the clear holdings of *Abnet* and *Genesco*. Plaintiffs cite to *Anglers of the AuSable, Inc. v. Dep't of Envtl. Quality,* 283 Mich. App. 115, 127, 770 N.W.2d 359 (2009), which was later **vacated** by *Anglers of the AuSable, Inc. v. Dept. of Environmental Quality*, 796 N.W.2d 240 (Mich. 2011). *Anglers* involved a plume of contaminated groundwater regulated pursuant to Part 615 of NREPA (Mich. Comp. Laws § 324.61501 *et seq*), which regulates oil and gas wells. Notwithstanding the fact that *Anglers* was vacated by the Michigan Supreme Court, the Court of Appeals determined that the bar on pre-enforcement review was inapplicable because Part 615 did not specifically implicate Part 201, specifically noting that "neither part 615 nor rules promulgated pursuant to that part make any

[6] Plaintiffs changed their story once confronted by the bar on pre-enforcement review. As set forth in the excerpt above, Plaintiffs previously claimed that EGLE "cited Burnette for new Part 201 levels for arsenic and manganese." That statement is clearly incongruent with its new position that "[t]he state never cited Burnette for violating Part 201." ECF No. 110, PageID.6885.

reference to part 201." *Id.* at 370. As noted above, both Part 31 and the Part 22 regulations both reference and incorporate Part 201 remedial standards.

Next, Plaintiffs argue that *Zanke-Jodway v. City of Boyne City*, No. 1:08-cv-930, 2009 BL 206766, at *20 (W.D. Mich. Sept. 28, 2009) stands for the proposition that it can pursue "MEPA Part 17 claims to enforce sections of NREPA Parts 31, 91, 301." ECF No. 110, PageID.6888. This case is irrelevant; *Zanke* held that plaintiffs in that case had statutory authority to enforce MEPA claims relating to alleged violations of Part 31, 91, and 301. *Id.* at 19-20. It did not hold or even suggest that plaintiffs could mount an indirect permit challenge through MEPA.

Ultimately, Plaintiffs have requested declaratory and injunctive relief under MEPA that is inconsistent with the response activities selected by EGLE. Plaintiffs' belief that they know better than EGLE is not a sufficient basis for this Court to grant it injunctive relief in contrast to the clear directive of the bar on pre-enforcement review at Mich. Comp. Laws § 324.20137(6). Accordingly, Plaintiffs' MEPA claim must be dismissed.

IV. THE COURT LACKS JURISDICTION TO AWARD PLAINTIFFS ANY RELIEF PURSUANT TO MEPA THAT CONFLICTS WITH THE PART 22 PERMIT ISSUED TO BURNETTE.

Plaintiffs attempt to distinguish established Michigan caselaw in *Lakeshore Group v. State*, No. 341310, 2018 WL 6624870 (Mich. Ct. App. Dec. 18, 2018), which precludes private parties from utilizing MEPA claims as a method of circumventing the permit appeal process established under the Michigan Administrative Procedures Act ("MAPA"). Notably, the Michigan Supreme Court subsequently denied an application for leave to appeal in *Lakeshore Group v. State*, 977 N.W.2d 789 (Mich. 2022). The Plaintiffs essentially argue that *Lakeshore* allows private parties to challenge a permit holder's conduct in a separate action without having to go through administrative review. *See* ECF No. 110, PageID.6890. While *Lakeshore* may allow for a separate

action to challenge a permit holder's conduct, it does not allow plaintiff to disguise a permit challenge by simply recharacterizing it as a MEPA claim.

The Plaintiffs have asked this Court to enjoin "conduct that has already, is currently, or is likely to pollute, impair, or destroy the natural environment" (See Amended Complaint ¶ 121) (emphasis added); however, the "conduct" that Plaintiffs seek to challenge in this case relates to the operation of the Spray Fields that is governed by the Groundwater Discharge Permit. Any injunctive relief restricting, limiting, or otherwise modifying the operation of the Spray Fields would effectively constitute an amendment of the Groundwater Discharge Permit. As a result, Plaintiffs' MEPA claim is nothing more than a thinly-veiled permit challenge. As discussed in *Lakeshore*, Plaintiffs cannot circumvent the administrative procedures for challenging a state-issued permit established by MAPA. Doing so, would have the same negative effects that *Lakeshore* warned against:

> Otherwise, MEPA would seemingly create a workaround through which: (1) the statutory restrictions on who may challenge SDPMA permits would be rendered meaningless; (2) no permit challengers would be motivated to file their challenges within the DEQ as the SDPMA requires, if they could get a more favorable standard of review by raising a MEPA challenge; and (3) the DEQ's expertise, which the SDPMA appears to rely on by requiring SDPMA permit challenges to originate within the DEQ, would be absent from the circuit court's primary review of the record.

Id. at 791.

Regardless of the manner in which Plaintiffs attempt to recharacterize their MEPA claim, under any scenario they still amount to a challenge of the Groundwater Discharge Permit issued by EGLE. Plaintiffs' MEPA claim is yet another example of their ongoing campaign to usurp EGLE's authority to regulate groundwater discharges. That is not their role under MEPA, or otherwise. As a matter of federalism, comity, and consideration of agency expertise, this Court cannot second-guess EGLE's judgments.

V. CONCLUSION

Burnette respectfully requests that this Court grant its Motion to Dismiss for Lack of Subject-Matter Jurisdiction.

Respectfully submitted,

VARNUM LLP
Attorneys for Defendants

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By: */s/ Neil E. Youngdahl*

Aaron M. Phelps (P64790)
Matthew B. Eugster (P63402)
Neil E. Youngdahl (P82452)
P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000
amphelps@varnumlaw.com
mbeugster@varnumlaw.com
neyoungdahl@varnumnlaw.com