

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,

Case No. 1:23-cv-00589

Hon. Jane M. Beckering

Plaintiffs,

v.

BURNETTE FOODS, INCORPORATED,

Defendant.

---

**DEFENDANT'S REPLY BRIEF IN SUPPORT OF**  
**MOTION FOR SUMMARY JUDGMENT**

**(Oral Argument Requested)**

## **TABLE OF CONTENTS**

I.	PLAINTIFFS ARE ATTEMPTING TO IMPROPERLY USURP EGLE'S REGULATORY AUTHORITY. ....	2
II.	THERE IS NO CWA-REGULATED DISCHARGE OF SURFACE WATER INTO THE WETLANDS. ....	5
A.	The Irrigated Agriculture Exemption is Applicable. ....	5
B.	There is No Point Source Discharge Directly into WOTUS. ....	6
C.	There is No Evidence of Any Surface Water Discharge into WOTUS. ....	7
III.	PLAINTIFFS CANNOT MEET THEIR BURDEN TO ESTABLISH THE FUNCTIONAL EQUIVALENT OF A DIRECT DISCHARGE. ....	8
IV.	THE WETLANDS ARE NOT WOTUS. ....	11
A.	Spencer Creek is not relatively permanent. ....	11
B.	There is No Continuous Surface Water Connection between the Wetlands and Spencer Creek. ....	15
V.	CONCLUSION.....	16

## INDEX OF AUTHORITIES

### Cases

<i>Carabell v. U.S. Army Corps of Eng'rs</i> , 391 F.3d 704 (6th Cir. 2004), cert. granted, 545 U.S. 1139 (2005) .....	14
<i>Concerned Area Residents for the Environment v. Southview Farm</i> , 34 F.3d 114 (2d Cir. 1994) .....	6
<i>Cordiano v. Metacon Gun Club</i> , 575 F.3d 199 (2d Cir. 2009) .....	5
<i>County of Maui v. Hawaii Wildlife Fund</i> , 590 U.S. 165 (2020) .....	7
<i>Courte Oreilles Lakes Assoc. v. Zawawistowski</i> , Case No. 24-cv-128, 2025 WL 993525, -- F. Supp. 3d -- (Feb. 7, 2025) .....	4
<i>Haw. Wildlife Fund v. County of Maui</i> , 550 F. Supp. 3d 871 (D. Haw. 2021) .....	8
<i>Hiebenthal v. Meduri Farms</i> , 242 F. Supp. 2d 885 (D. Or. 2002) .....	4
<i>Lewis v. United States</i> , 88 F.4th 1073 (5th Cir. 2023) .....	15
<i>Pac. Coast Fed'n of Fishermen's Ass'ns v. Conant</i> , 657 F. Supp. 3d 1341 (E.D. Cal. 2023) .....	5
<i>Pac. Coast Fed'n of Fishermen's Ass'ns v. Glaser</i> , 945 F.3d 1076 (9th Cir. 2019) .....	4, 5
<i>Rapanos v. United States</i> , 547 U.S. 715 (2006).....	13, 14
<i>Stone v. High Mountain</i> , 89 F.4th 1246 (10th Cir. 2024) .....	7, 8

### Statutes

33 U.S.C. § 1342(l)(1) .....	4
33 U.S.C. § 1362(14) .....	4, 5

**I. PLAINTIFFS ARE ATTEMPTING TO IMPROPERLY USURP EGLE'S REGULATORY AUTHORITY.**

The briefing in this case has confirmed that Plaintiffs' Clean Water Act ("CWA") claim is a thinly veiled attempt to position themselves as defenders of the environment regardless of whether any environmental damage has occurred. Since the beginning, Plaintiffs' claims have been premised on a hunch that Burnette is the cause of sporadic water discoloration near the Spencer Creek outlet in Elk Lake. They failed to realize that discolored water is common in wetlands. They also ignore similar discoloration near at least two other wetlands draining into Elk Lake. (ECF No. 96, PageID.4361-1462). Plaintiffs' minimal investigation revealed other conditions that are typical of wetlands (*e.g.*, high metals, low-dissolved oxygen, and *E. coli*) but Plaintiffs inexplicably attributed them to Burnette. Their villain chosen, Plaintiffs then announced their claims to their membership and the public at large and set about attacking Burnette.

That effort began with attempts to intrude upon ongoing settlement discussions regarding alleged violations of Plaintiffs' state-issued Groundwater Discharge Permit. When EGLE did not allow Plaintiffs to actively participate in its regulation of Burnette, Plaintiffs submitted a Notice of Intent to Sue.<sup>1</sup> See ECF No. 16, PageID.1648. Plaintiffs next sought to insert themselves into ongoing settlement discussions between EGLE and Burnette; however, that request was unequivocally rejected by EGLE. When they filed this lawsuit (six months later), Plaintiffs again requested to be included in settlement discussions with EGLE, which the Court summarily rejected during the Scheduling Conference. This demonstrates that this suit is driven by Plaintiffs' belief that they can regulate Burnette's operations better than EGLE, notwithstanding their lack of knowledge, experience, expertise, or authority. Plaintiffs are not entitled to a seat at the table, and

---

<sup>1</sup> Neither EGLE nor the EPA took Plaintiffs' claims seriously. Neither agency filed its own lawsuit, which would have cut off any CWA citizen suit from the outset.

their attempts to usurp EGLE's regulatory authority only serve to divert the time and resources of the agency, the Court, and Burnette.

Plaintiffs have attempted to justify their meddling by reciting a litany of “violations” but conveniently ignore that these alleged violations relate to Part 22 regulations (which are EGLE-promulgated regulations governing *groundwater* discharges) whereas they attempt to advance a citizen suit under the CWA (a federal law governing *surface water* discharges). Plaintiffs hope that by dredging up this history, the Court will not realize that any violations of Part 22 are wholly irrelevant to a CWA claim. Plaintiffs further attempt to use those same violations to disparage both EGLE and Burnette, stating that "EGLE demonstrated no inclination to hold Burnette accountable" and that "Burnette demonstrated no inclination to modify its discharges." Like the rest of Plaintiffs’ allegations, this claim is not supported by the facts. Burnette has taken significant steps to “modify its discharges” under the oversight of EGLE without the need for any intervention by Plaintiffs, which is established by a chronological review of the alleged violations listed by Plaintiffs in JX-81 as shown in the table below:

Year	Total Reported Violations
2018	84
2019	106
2020	71
2021	45
2022	15
2023	5
2024	3
2025	0

\*Table 1-A Summarizing data contained in Plaintiffs Exhibit JX-81.

The trend in Table 1A (above) is apparent. Plaintiffs' own records show that Burnette has already modified its discharge and achieved compliance with the effluent limits in its Groundwater Discharge Permit.

Plaintiffs' unsupported claims that Burnette is unwilling to make improvements to its wastewater system (*see e.g.*, ECF No. 110, PageID.6854.) are also categorically false. Burnette has nearly completed construction of a wastewater system expansion, which is expected to be operational by the end of 2025. *See* Affidavit of Kevin Kalchik, ¶ 5, 6. **Exhibit A**. To date, Plaintiffs have incurred actual costs and expenses well in excess of \$6.2 Million in that effort, and did so voluntarily before the issuance of a final consent order with EGLE. *Id.* ¶ 7. Because Burnette is already in compliance with applicable effluent limits, any treatment provided by the wastewater system will provide an additional margin of compliance, mitigating against future violations.

Plaintiffs' misrepresentation of Burnette's compliance status and wastewater system improvements are part of an ongoing campaign of misdirection in which they have repeatedly mischaracterized evidence, testimony, and applicable law. In fact, it is not possible to address the breadth or scope of those mischaracterizations within the confines of this Brief. Accordingly, Burnette has attached as **Exhibit B** an errata sheet identifying Plaintiffs most egregious misrepresentations of fact and law, as well as chronic reliance on unreliable hearsay evidence.<sup>2</sup> Plaintiffs' need to mischaracterize material facts and testimony to try to make their case demonstrates their lack of reliable or scientifically valid evidence in this case.

---

<sup>2</sup> **Exhibit B** references mischaracterizations in Plaintiffs' response to Burnette's Motion for Summary Judgment. However, there is a consistent pattern of similar mischaracterizations, misrepresentations, and misstatements of fact and law throughout Plaintiffs' pleadings.

Discovery has established that Plaintiffs have “cried wolf.” They hoped that they could use their CWA claim to insert themselves into EGLE’s regulation of Burnette. But Plaintiffs’ posturing and the lack of evidence of continuing CWA violations confirms that this case was merely an means to an end: aggrandizing themselves as environmental crusaders. It should therefore be no surprise that summary judgment in Burnette’s favor is necessary.

## **II. THERE IS NO CWA-REGULATED DISCHARGE OF SURFACE WATER INTO THE WETLANDS.**

### **A. THE IRRIGATED AGRICULTURE EXEMPTION IS APPLICABLE.**

The Irrigated Agriculture Exemption set forth in the CWA at 33 U.S.C. § 1362(14) excludes “return flows from irrigated agriculture” from the definition of a “point source.” There is also an explicit prohibition on permitting requirements at 33 U.S.C. § 1342(l)(1) for “discharges composed entirely of return flows from irrigated agriculture.” In both instances, applicability of the exemption is premised on whether the return flows are from irrigated “agriculture.” The term “agriculture” includes all activities related to growing crops. *See Pac. Coast Fed’n of Fishermen’s Ass’ns v. Glaser*, 945 F.3d 1076, 1084 (9th Cir. 2019). There can be no dispute that the Spray Fields are utilized for agriculture, which includes growing crops. ECF No. 96, PageID.4374-ECF No. 96, PageID.437.5 Therefore, any runoff from the Spray Fields necessarily constitutes return flows from irrigated agriculture and are exempt from CWA regulation pursuant to Irrigated Agriculture Exemption. *See Courte Oreilles Lakes Assoc. v. Zawawistowski*, Case No. 24-cv-128, 2025 WL 993525, at \*9, -- F. Supp. 3d -- (Feb. 7, 2025), *Hiebenthal v. Meduri Farms*, 242 F. Supp. 2d 885 (D. Or. 2002).

Plaintiffs argue that the operation of the Spray Fields does not qualify for the Irrigated Agriculture Exemption because discharges to the Spray Fields are not “entirely” composed of return flows from irrigated agriculture, ECF No. 112-1, PageID.7142 citing *Pac. Coast Fed’n of*

*Fishermen's Ass'ns v. Glaser*, 945 F.3d 1076 (9th Cir. 2019). Plaintiffs correctly note that *Glaser* provides that the Irrigated Agriculture Exemption applies to discharges that are entirely composed of return flows related to crop production. Burnette meets that test because its Spray Fields are used for crop production. This is confirmed by the *Glaser* district court's opinion on remand, where the court held that the Exemption applied even though run off from a solar project did not directly involve crop production. See *Pac. Coast Fed'n of Fishermen's Ass'ns v. Conant*, 657 F. Supp. 3d 1341, 1364 (E.D. Cal. 2023). If the facts of *Glaser* are sufficient to trigger the Exemption, the facts here must be too. Thus, the Irrigated Agriculture Exemption is applicable, and Plaintiffs' CWA claim must be dismissed.

**B. THERE IS NO POINT SOURCE DISCHARGE DIRECTLY INTO WOTUS.**

Even if the Irrigated Agriculture Exemption did not categorically exclude surface water runoff from the Spray Fields, the CWA still does not apply because any runoff is not discharged directly into the Wetlands through a "point source." ECF No. 108, PageID.6726-6727. It is undisputed that in order to enter the Wetlands, any surface water would have to pass over the main berm. It is also beyond dispute that a berm is not, and could never be, a "point source." ECF No. 108, PageID.6727-6728. A "point source" is a discernable, confined or discreet conveyance that conveys or carries water, see 33 U.S.C. § 1362(14), while a berm is an obstacle or barrier that prevents the flow of surface water. To the extent it is not obvious that a berm is not a "point source," courts have already found that a berm was not a discernable, confined or discreet "conveyance" consistent with 33 U.S.C. § 1362(14).<sup>3</sup> *Cordiano v. Metacon Gun Club*, 575 F.3d

---

<sup>3</sup> Plaintiffs attempt to distinguish *Cordiano* by noting that it did not determine "that a berm can never constitute a point source." ECF No. 118, PageID.7815. This misses the point. Plaintiff has not identified any portion of the berm that could qualify as a discernable, confined, or discreet conveyance. Thus, even if a berm could theoretically become a point source, this one is not.



199, 224-25 (2d Cir. 2009). Put simply, berms do not convey water. A berm is no more a conveyance than a shield is a sword—it serves the opposite function.

Confronted with the lack of an actual “point source” connection to convey surface water from the Spray Fields into the Wetlands, Plaintiffs cite *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) to support their claim that swales in the Spray fields leading to an unidentified “low spot” in the berm constitute a point source connection. ECF No. 118, PageID.7818. Plaintiffs fail to note that *Southview Farm* did not involve a berm that actually impeded the flow of water, but it did involve two obvious point sources (a pipe and a ditch) that actually conveyed water into regulated water bodies. *See id.* at 118 (stating “We believe that the swale coupled with the pipe under the stonewall leading into the ditch that leads into the stream was in and of itself a point source.”). Unlike *Southview Farm*, there is no pipe or ditch (or any other “point source”) conveying water from the Spray Fields to the Wetlands—instead there is berm that serves as a barrier to conveyance.

**C. THERE IS NO EVIDENCE OF ANY SURFACE WATER DISCHARGE INTO WOTUS.**

Burnette has already addressed the lack of any evidence to support Plaintiffs' claims of direct surface water discharges into the Wetlands. *See* ECF No. 96, PageID.4365, 4370, 4387-88; ECF No. 108, PageID.6725-29; ECF No. 86, PageID.4101-14. Plaintiffs now assert that the distinction between wetlands south and north of the main berm is meaningless because they are part of the one wetland complex connected by the main berm. ECF No. 118, PageID.7818. Although Burnette disputes that the wetlands are one wetland complex<sup>4</sup>, that distinction is

---

<sup>4</sup>Plaintiffs claim that the berm is a wetland is premised on an isolated statement in a 2020 wetland evaluation conducted by Lakeshore Environmental. However, that same report noted that the Wetlands are not connected by surface water—“[t]he created berm which separates them prevents surface water from Wetland A entering Wetland B.” ECF No. 99-36, PageID.5621.

irrelevant. There is not and cannot be a “continuous surface connection” as required by *Sackett* across an upland berm that separates any wetlands to the north or south.<sup>5</sup> The upland berm lying between any wetlands north and south does not allow for a continuous surface connection such that it is difficult to tell where the wetlands end and WOTUS begins (as required by *Sackett*). On the contrary, it represents a clear and unmistakable break in any surface connection. Meanwhile, any water flowing under or through the berm would occur in groundwater (not surface water), which in turn would require Plaintiffs to establish the functional equivalent of a direct discharge under *Maui*. 590 U.S. at 186.

### **III. PLAINTIFFS CANNOT MEET THEIR BURDEN TO ESTABLISH THE FUNCTIONAL EQUIVALENT OF A DIRECT DISCHARGE.**

Because there is no “point source” discharge of surface water into WOTUS, Plaintiffs bear the burden of establishing that groundwater discharges are the functional equivalent of a direct discharge pursuant to *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 186 (2020). *Maui* sets forth seven factors that must be evaluated to determine whether a groundwater discharge is the functional equivalent of a direct discharge.

Plaintiffs’ continued suggestion that only two of those factors, time and distance, need be established, is meritless. The *Maui* Court never said that time and distance could be the only factors considered; it stated that time and distance will be the most important factors in most cases, but not necessarily every case. *See Maui* at 185. Obviously, if only time and distance were relevant, the Court would not have included the other five *Maui* factors. As the Tenth Circuit explicitly held, plaintiffs bear the burden to establish all relevant *Maui* factors. *Stone v. High*

---

<sup>5</sup> Any wetlands (south of the main berm) were not part of any one wetland complex because they were likely incidentally created when the main berm trapped surface water. ECF No. 99-36, PageID.5619.

*Mountain*, 89 F.4th 1246, 1260 (10th Cir. 2024). Plaintiffs simply ignored *Stone* in their Response because: (1) they cannot meet their burden to establish all seven *Maui* factors; and (2) it negates their strategy of shifting the burden of proof to Burnette.<sup>6</sup>

It is also clear that the “functional equivalent” of a direct discharge requires that virtually all, or at least the vast majority, of the pollutants at issue must be discharged into WOTUS. The *Maui* Court held that the point of the “functional equivalent” test was to determine exactly how similar a groundwater discharge is compared to a direct discharge. *See Maui* at 184 (“Whether pollutants that arrive at navigable waters after traveling through groundwater are “from” a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge.”).<sup>7</sup> *See also Stone* at 1260 (“*Maui*’s plain directive suggests that the functional-equivalent test has some measure of qualitative and quantitative dimensions, which is highly relevant here where the water-quality testing is wanting.”). The defining feature of a “direct discharge” is that virtually all pollutants are discharged into WOTUS from a point source. As a result, a groundwater discharge can only be the “functional equivalent” of a direct discharge when all, or at least the vast majority of, pollutants are discharged into WOTUS.<sup>8</sup>

---

<sup>6</sup> *Stone* clearly holds that it is inappropriate to shift the burden to defendants to prove that groundwater discharges were “not the functional equivalent of a direct discharge.” *Id.* at 1260-1261. Nevertheless, Plaintiffs attempt to do just that at every turn. Rather than producing actual data, Plaintiffs seek to support their claims by suggesting that Burnette or its experts have not produced evidence or provided data. *See* ECF No. 117, PageID.7607-7620.

<sup>7</sup> To drive that point home, each of the enumerated *Maui* factors are designed to provide a framework for measuring and analyzing how similar a groundwater discharge might be to a direct discharge.

<sup>8</sup> Although Plaintiffs are prone to noting that the discharge at issue in *Maui* was determined to be the functional equivalent of a direct discharge upon remand, they fail to note that it was determined that 100% of the wastewater entered WOTUS through groundwater. *See Haw. Wildlife Fund v. County of Maui*, 550 F. Supp. 3d 871, 874 (D. Haw. 2021).

Plaintiffs cannot establish that all, or even a majority, of the pollutants discharged in the Spray Fields enter WOTUS. Plaintiffs cannot even produce the evidence necessary for the Court to apply the *Maui* factors. See ECF No. 96, PageID.4377-4391. Although Plaintiffs make bold pronouncements about irrefutable data, it is beyond dispute that they collected no groundwater sampling data to support a *Maui* theory that is entirely premised upon the movement of pollutants in groundwater. Moreover, actual groundwater sampling data directly refutes Plaintiffs' theoretical impacts. For example, throughout the course of this case, Plaintiffs' central thesis has been that allegedly high concentrations of BOD in Burnette's wastewater were entering the Wetlands through groundwater. See e.g., ECF No. 117, PageID.7615; ECF No. 16, PageID.1637-38. This claim is conjecture. When actual groundwater testing was conducted in the Spray Fields to measure BOD concentrations, no detectable levels of BOD were present in any of the eleven monitoring wells. See BFI00003907-BFI00003911 (**Exhibit C**). Thus Plaintiffs' pronouncements that BOD in groundwater is impacting the Wetlands or Spencer Creek is entirely unsupported by actual and verifiable data.

Plaintiffs' continued claims regarding *E. coli* impacts are also inconsistent with sampling data. Plaintiffs assert that the source of *E. coli* present in Spencer Creek is sewage from a crumbling municipal wastewater collection pipe that had infiltrated Burnette's wastewater treatment system. ECF No. 118, PageID.7827. While the failing municipal pipe may explain the source of the *E. coli* that was detected in Burnette's wastewater, Plaintiffs are well aware that it was not the source of any *E. coli* in Spencer Creek. In fact, ESLA Board Member, Andrew Hogarth, sent an email to Burnette stating that ESLA had conducted genetic source testing of *E.*

*Coli* in Spencer Creek.<sup>9</sup> Mr. Hogarth confirmed that genetic source testing determined that the marker gene Bacteroides HF 183 used to identify “human sewage” **was not present**. **Exhibit D** PLFS002339-PLFS002340.

Obviously, the municipal (human) sewage infiltrating Burnette’s wastewater was not the source of any *E. coli* in Spencer Creek and Plaintiffs knew it. That certainly did not stop them from alleging that it was. Plaintiffs also ignored the obvious source of the *E. coli* in Spencer Creek (wildlife excrement) and studies in their possession establishing that *E. coli* thrives and reproduces in wetlands.<sup>10</sup> Plaintiffs failed to even produce expert testimony to support their theory that Burnette was a source of *E. Coli* in Spencer Creek. Mr. Kogge freely admitted that he was not an *E. coli* expert and had no experience tracing sources of *E. coli*. Kogge Dep. 93: 14-18.

In sum, Plaintiffs cannot meet their burden to establish the functional equivalent of direct discharge under the test forth in *Maui*.

#### **IV. THE WETLANDS ARE NOT WOTUS.**

##### **A. SPENCER CREEK IS NOT RELATIVELY PERMANENT.**

Plaintiffs have acknowledged that CWA jurisdiction based on seasonal flow would require Spencer Creek to flow “continuously for at least three months annually.” ECF No. 117, PageID.7629. Plaintiffs cannot meet their burden even under that reduced test because they do not have evidence of **continuous** flow for three consecutive months, much less for that three months

---

<sup>9</sup> Mr. Hogarth’s email is offered as an Opposing Party Statement excluded from hearsay pursuant to FRE 801(C).

<sup>10</sup> Mr. Hogarth’s email also referenced and attached a study showing that *E. coli* can “survive and populate in the environment,” noting that “[t]heir presence is not necessarily an indication of the presence of human wastes.” **Exhibit D** PLFS002339-PLFS002340, **Exhibit E** PLF-EGLE012480.

annually. For flow to be “continuous,” it must be constant and uninterrupted. For flow to be continuous for three months “annually,” that three-month period of continuous flow must occur during the same season year-in and year-out. Plaintiffs have not met and cannot meet their burden to establish any of the elements of their own test. Burnette has previously addressed Plaintiffs’ evidence of continuous flow, or the lack thereof (see ECF No. 108, PageID.6741-6745).

Plaintiffs are clearly aware that they cannot establish continuous flow because they have advanced a new theory to support their claim that Spencer Creek is relatively permanent, claiming that it is “‘perennial’ in its upstream reaches and becomes ‘intermittent’ farther downstream.” ECF No. 117, PageID.7626. Their sole support for this claim is the testimony of Mr. Kogge. ECF No. 117, PageID.7626. This argument is meritless. The “upstream reaches” that Plaintiffs are referring to is a section of roadside ditch within the wetlands that Mr. Kogge estimated to be 16 feet long, 19-30 inches wide and 3 inches deep. ECF No. 99-10, PageID.4637 (Kogge Dep 62:19-25). It is a linear man-made sump within the wetlands in which landscape fabric has been installed to allow the flow of water through the wetlands in the roadside ditch.

Plaintiffs’ claims of perennial flow in the roadside ditch are clearly false. Mr. Kogge testified that “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” ECF No. 99-10, PageID.4665 (Kogge Dep at 175:2-4). It can easily be established that there is not continuous flow in the roadside ditch 365 days of year based on photos<sup>11</sup> in evidence:

---

<sup>11</sup> While Plaintiffs cannot establish continuous flow with photographs because they represent one point in time, Burnette can establish that water is not flowing all the time (365 days per year) with one photo.





ECF No. 99-64, PageID.6208.

Moreover, any water flowing through the roadside ditch has nowhere to go except through the culvert underlying Elk Lake Road and into Spencer Creek. Yet, there are photos showing that water in the roadside ditch is below the bottom of that culvert.



ECF No. 99-26, PageID.5318.

Moreover, Plaintiffs have already acknowledged that water does not flow in Spencer Creek 365 days a year and often does not flow at all in the summer. *See e.g.*, ECF No. 89, PageID.4271, ECF No. 117, PageID.7622, ECF No. 117, PageID.7625.

Plaintiffs' attempt to rely on the testimony of Stuart Kogge to support a claim that Spencer Creek is perennial cannot be supported by the investigation that he conducted. He made one visit to the Site. ECF No. 99-10, PageID.4623 (Kogge Dep 9:15-16). He also acknowledged that his determination that the roadside ditch was "perennial" was premised on a discussion with Samantha Ogle.<sup>12</sup> *Id.* at 4666 (Kogge Dep 179:3-14). Even then, Mr. Kogge could not decide whether the roadside ditch was perennial or intermittent. When questioned about the classification of the roadside ditch Mr. Kogge waffled, stating: "Sorry, I have to call it intermittent, I can't call it a perennial. But because we saw water when we were out there I, you know, agree with Samantha that, you know, based on her experience she's always seen it there and we would stick to calling it a perennial versus intermittent." *Id.* at 4667 (Kogge Dep 182:7-19).

Finally, even if the 16-foot roadside ditch was perennial, Spencer Creek still would not be a relatively permanent tributary. In Jurisdictional Memorandum MVS-2023-0023-00288 (**Exhibit F**), the EPA and the U.S. Army Corps of Engineers jointly considered whether a small section of perennial stream within a larger intermittent stream was relatively permanent under the *Rapanos* test. The agencies noted that "the majority of the tributary reach had characteristics of non-relatively permanent flow and the minority of the tributary reach, largely within the review area, had characteristics of relatively permanent flow" **Exhibit F** at 2. Applying EPA's *Rapanos*

---

<sup>12</sup> Ms. Ogle's experience also cannot establish continuous flow because she visits the roadside ditch only a few times a year.



Guidance<sup>13</sup>, the agencies determined that the stream was “non-jurisdictional” noting that “[w]here data indicate the flow characteristics at the downstream limit are not representative of the entire reach of the tributary, the flow characteristics that best described the entire tributary reach must be used.” *See id.* at 3. Thus, even if 16-foot roadside ditch was actually a perennial stream (which it clearly is not), it would not make Spencer Creek relatively permanent as it would only constitute a small fraction of the total reach of Spencer Creek.

**B. THERE IS NO CONTINUOUS SURFACE WATER CONNECTION BETWEEN THE WETLANDS AND SPENCER CREEK.**

Notwithstanding Plaintiff attempts to “muddy the waters,” it is indisputable that *Sackett* requires that the party asserting CWA jurisdiction to establish that any wetlands have a continuous surface connection to a relatively permanent tributary “making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” 598 U.S. 651, 679 (2023). In this case, it is not difficult to tell where the Wetlands end. The experts for both parties agreed that the Wetlands end at the mouth of the culvert underlying Elk Lake Road. See MacGregor Report, ECF No. 99-26, PageID.5317 (“At the northern end of Wetland Area 2 intermittent surface water flows into a culvert under Elk Lake Road.”); see also *id.* at 5329-30 (Figures 5 and 6a); Kogge Rebuttal Report ECF No. 99-21, PageID.5123 (“The Wetlands extend all the way to Elk Lake Road, as shown in Figures 5 and 6a.”). The location described above is depicted in the photo below:

---

<sup>13</sup> Notably, Plaintiffs have previously cited this same EPA’s Guidance entitled “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States*,” (Dec. 2, 2008) as authority. See ECF No. 89, PageID.4273.



ECF No. 99-26, PageID.5318.

The precise location where the wetlands end is obvious. Therefore, consistent with both *Sackett* and *Lewis v. United States*, 88 F.4th 1073, 1076 (5th Cir. 2023), there is not a continuous surface connection. Accordingly, Burnette is entitled to summary judgment on Plaintiffs' CWA claim.


## V. CONCLUSION

Accordingly, Burnette respectfully requests that this Court grant Burnette's Motion for Summary Judgment and enter judgment in its favor.

Respectfully submitted,

**VARNUM LLP**  
*Attorneys for Defendant*

Dated: June 16, 2025

By:   
Aaron M. Phelps (P64790)  
Matthew B. Eugster (P63402)

Neil E. Youngdahl (P82452)  
Bridgewater Place, P.O. Box 352  
Grand Rapids, MI 49501-0352  
(616) 336-6000  
amphelps@varnumlaw.com  
mbeugster@varnumlaw.com  
neyoungdahl@varnumlaw.com