UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, et al.,

Plaintiffs,

v.

BURNETTE FOODS, INCORPORATED,

Defendant.
_____/

Case No. 1:23-cv-589

HON. JANE M. BECKERING

OPINION AND ORDER

Plaintiffs brought this citizen suit against Defendant Burnette Foods, Incorporated, a fruit processor, alleging that Defendant is discharging its fruit processing wastewater in violation of both federal and state environmental laws. Pending before the Court is Defendant's Motion to Dismiss (ECF No. 20). For the following reasons, the Court denies the motion.

I. BACKGROUND

A. The Parties

Three Plaintiffs initiated this action: (1) the Grand Traverse Band of Ottawa and Chippewa Indians (GTB), a federally recognized Indian tribe headquartered in Leelanau County, Michigan; (2) the Grand Traverse Bay Watershed Initiative, Inc., d/b/a The Watershed Center Grand Traverse Bay (TWC), a Michigan nonprofit corporation advocating for clean water in Grand Traverse Bay; and (3) the Elk-Skegemog Lakes Association (ESLA), also a Michigan nonprofit corporation that "promotes an understanding and appreciation of the rights and responsibilities of riparian landowners and takes necessary or desirable actions to protect and preserve the environment of the Elk-Skegemog watershed with a focus on water quality" (Am. Compl. ¶¶ 10–12).

Defendant Burnette Foods, Incorporated (Burnette) is a Michigan corporation that produces and distributes locally and nationally sourced fruits and vegetables and has production facilities throughout Michigan (*id.* ¶ 13). Defendant owns and operates a fruit processing facility (the "Facility") in Elk Rapids, Antrim County, Michigan (*id.*). At the Facility, Defendant washes, processes, and cans fruit (*id.* ¶ 47). Defendant's fruit processing generates millions of gallons of wastewater each year (*id.*).

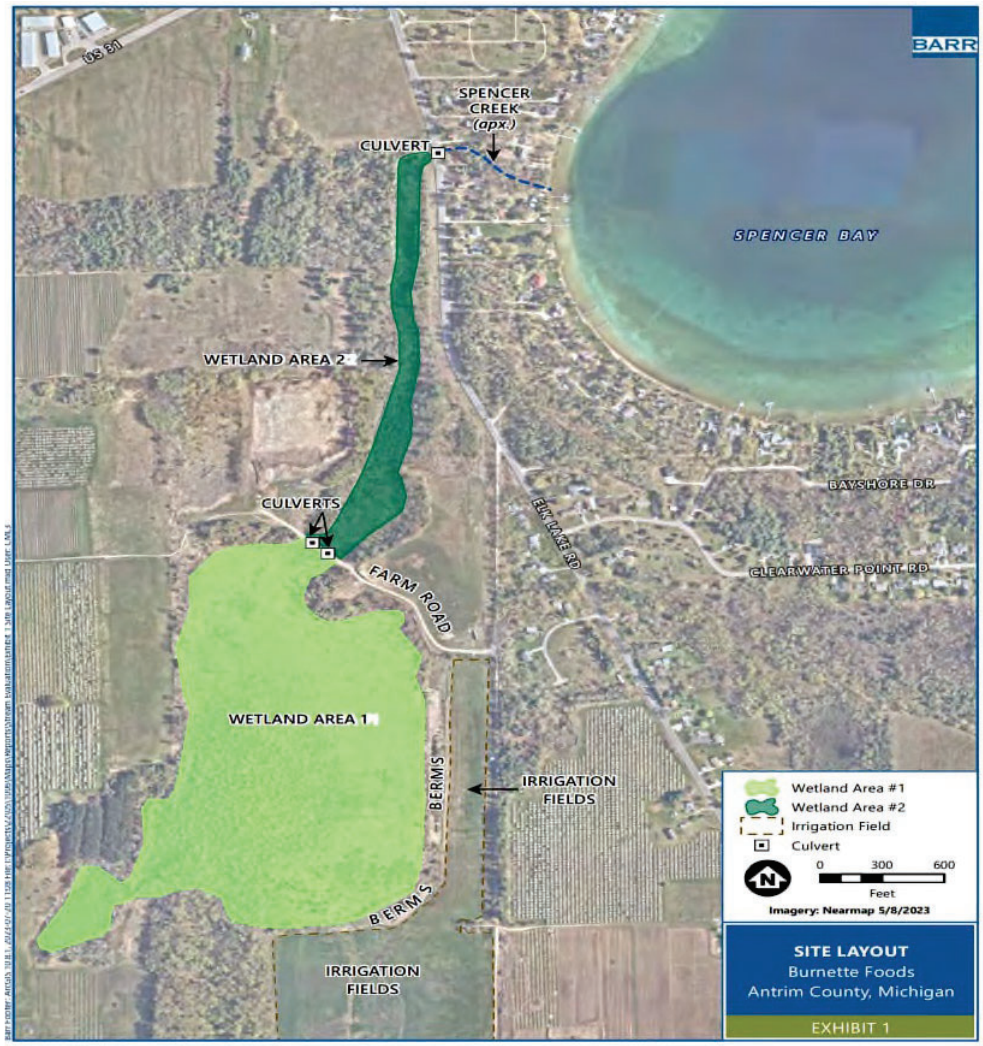
B. Plaintiffs' Allegations

According to Plaintiffs, Defendant's "fruit processing wastewater contains elevated concentrations of numerous pollutants" such as "phosphorus, biological oxygen demand (BOD), and total suspended solids (TSS)," which have "serious environmental impacts" because they are or contain oxygen-consuming materials (*id.* ¶¶ 48 & 50). Plaintiffs allege that the pollutants can also create disturbing qualities in natural waters such as "unnatural foaming, foul odors, algae blooms, and discoloration" (*id.* ¶ 50).

Defendant pipes its wastewater approximately one mile south of the Facility, where it discharges the wastewater onto a 40- to 50-acre parcel of land in Elk Lake Township, Michigan, which the parties refer to as the "Spray Fields" (and sometimes the "Irrigation Fields") (*id.* ¶¶ 13, 52, & 54). The Spray Fields are adjacent to a wetland complex ("the Wetlands") (*id.* ¶ 46). The Spray Fields are sloped toward the Wetlands, and Plaintiffs allege that hydrology reports show that both the Spray Fields' surface water runoff and any shallow groundwater underlying the Spray Fields flow into the Wetlands (*id.* ¶ 61). A "farm road" runs through the Wetlands, and an

"equalization culvert" runs under the farm road (*id.* ¶¶ 63–64).[1] The "equalization culvert" has an 18-inch diameter and is buried approximately 3.6 inches below surface grade (*id.* ¶ 64).

The Wetlands are headwaters for Spencer Creek (*id.* ¶ 46). Spencer Creek originates on Defendant's property at an "indistinguishable point" in the Wetlands, flowing approximately 3,000 feet before "out-falling" into Spencer Bay in Elk Lake (*id.* ¶¶ 16, 25, & 62), as depicted below:



[1] Defendant labels the area of the Wetlands north of the farm road as "Wetland Area 2" and the area south of the farm road as "Wetland Area 1" (ECF No. 21 at PageID.3550). Plaintiffs did not use these labels in their Amended Complaint but instead describe the Wetlands as a single wetland complex. *See, e.g.*, Am. Compl. ¶ 105. Plaintiffs emphasize that regulators have "long recognized" the Wetlands as a single wetland complex (ECF No. 24 at PageID.3621–3622).

(ECF No. 21 at PageID.3550). Elk Lake, in turn, flows into Grand Traverse Bay and then out to Lake Michigan (Am. Compl. ¶¶ 20, 27, & 103).

Defendant does not have a National Pollution Discharge Elimination System (NPDES) permit for the discharge of its fruit processing wastewater to its Spray Fields (*id.* ¶¶ 53 & 94), although the Environmental Protection Agency (EPA) has promulgated effluent limitations for fruit processing wastewater (*id.* ¶ 34, citing, in relevant part, 40 C.F.R. § 407.20 (Apple products subcategory)).

Defendant has a state-issued groundwater permit that authorizes discharges of the wastewater onto the Spray Fields as part of a "land treatment system," subject to maximum daily and yearly volume limits (Am. Compl. ¶ 54, citing Groundwater Permit, Ex. 5 to Compl. [ECF No. 16-5]). The state requires the Spray Fields to have specific plants capable of absorbing the wastewater pollutants (March 2019 EGLE Discharge Mgmt. Plan, Ex. 6 to Compl., ECF No. 16-6 at PageID.1717 (describing the design of the system and specifically delineating the crops "selected for this facility" due to their "nutrient uptake characteristics")). According to Plaintiffs, for "over three decades," Defendant has been "frequently spraying excessive amounts of its wastewater as well as wastewater with excessive levels of pollutants, in violation of its Groundwater Permit, onto the Spray Fields to the extent that the 'slow rate land treatment system' is overwhelmed and unable to absorb the wastewater effluent and the pollutants therein before they reach the Wetlands [and] contaminat[e] the Wetlands, Spencer Creek, and Elk Lake" (Am. Compl. ¶ 60, citing 2019, 2020, & 2021 EGLE Violation Notices [ECF Nos. 16-10, 16-11, & 16-12]). Specifically, Plaintiffs allege that pollutants are discharged "through surface water migrations and the groundwater underlying the Spray Fields" (*id.* ¶ 15).

C. Notice & Litigation

On November 17, 2022, Plaintiffs sent a document titled "Clean Water Act Notice of Intent to Sue/60-day Notice Letter" to Defendant about its irrigation practices (the "Pre-Suit Notice," Ex. 1 to Am. Compl., ECF No. 16-1). Plaintiffs indicated that Defendant's "effluent is periodically discharged to surface waters of the state and is likely causing impairment to wetlands, Spencer Creek, and Elk Lake. Surface water impairments include but are not limited to unnaturally high BOD in wetlands and Spencer Creek; low dissolved oxygen in Spencer Creek; elevated concentrations of total phosphorus in Spencer Creek; elevated levels of E. coli in Spencer Creek and Elk Lake; unnatural foam, odors, suspended solids, and colors in Spencer Creek; unnatural colors in Elk Lake; and other likely impairments" (*id.* at PageID.1655). Plaintiffs sent their Pre-Suit Notice to both the EPA and the state regulatory agency (*id.* at PageID.1648). Neither the EPA nor the state regulatory agency filed a civil enforcement action to prosecute Plaintiffs' claims (Am. Compl. ¶ 9).

Plaintiffs initiated this case in June 2023 with the filing of a Complaint (ECF No. 1). In lieu of filing an answer to Plaintiffs' Complaint, Defendant filed a Motion to Dismiss (ECF No. 10). This Court, without addressing the merits of Defendant's motion, permitted Plaintiffs to file an amended complaint (Order, ECF No. 13).

On August 25, 2023, Plaintiffs filed an Amended Complaint, alleging violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (Count I); and the Michigan Environmental Protection Act (MEPA), MICH. COMP. LAWS § 324.1701 *et seq.,* which is Part 17 of Michigan's Natural Resources and Environmental Protection Act (NREPA), MICH. COMP. LAWS § 324.101 *et seq.* (Count II) (ECF No. 16). Plaintiffs seek declaratory and injunctive relief, as well as civil penalties

and their costs (*id.* at PageID.1644–1645). Plaintiffs attached twenty exhibits to their Amended Complaint (ECF Nos. 16-1 through 16-21), including their Pre-Suit Notice (ECF No. 16-1).

This Court dismissed Defendant's first motion to dismiss as moot (ECF No. 17), and Defendant subsequently filed the motion at bar (ECF No. 20). Plaintiffs filed a response in opposition to the motion to dismiss (ECF No. 24), and Defendant filed a reply to the response (ECF No. 25). Having considered the parties' submissions, the Court concludes that oral argument is unnecessary to resolve the issues presented. *See* W.D. Mich. LCivR 7.2(d).

II. ANALYSIS

A. Motion Standards

1. Rule 12(b)(1)

Defendant's motion to dismiss is filed pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Rule 12(b)(1) authorizes the court to dismiss a claim for relief in any pleading if the court "lack[s] subject-matter jurisdiction." FED. R. CIV. P. 12(b)(1). If a movant challenges the court's subject-matter jurisdiction under Rule 12(b)(1), then "the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Houchens v. Beshear*, 850 F. App'x 340, 342 (6th Cir. 2021). A defendant can challenge subject-matter jurisdiction in one of two ways: a facial attack or a factual attack. *Enriquez-Perdomo v. Newman*, 54 F.4th 855, 861 (6th Cir. 2022). "In a facial attack, a 'movant accepts the alleged jurisdictional facts as true and 'questions merely the sufficiency of the pleading' to invoke federal jurisdiction.'" *Polselli v. United States Dep't of the Treasury–Internal Revenue Serv.*, 23 F.4th 616, 621 (6th Cir.) (citation omitted), aff'd sub nom. *Polselli v. Internal Revenue Serv.*, 598 U.S. 432 (2023). "A factual attack, by contrast, is advanced when the movant contests the alleged jurisdictional facts by introducing evidence outside the pleadings." *Enriquez-Perdomo*, *supra* (citation omitted). "In such a case, the district court has

wide discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve jurisdictional facts, and the court can actually weigh evidence to confirm the existence of the factual predicates for subject-matter jurisdiction." *Id.* Defendant's motion presents both kinds of attack (ECF No. 21 at PageID.3557).

2. Rule 12(b)(6)

Rule 12(b)(6) authorizes the court to dismiss a claim for relief in any pleading if it "fail[s] to state a claim upon which relief can be granted[.]" FED. R. CIV. P. 12(b)(6). To survive a motion to dismiss, a complaint must present "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Although the plausibility standard is not equivalent to a "'probability requirement,' … it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678 (quoting *Twombly*, 550 U.S. at 556).

In deciding a motion to dismiss for failure to state a claim, the court must construe the complaint in the light most favorable to the non-movant and accept all well-pleaded factual allegations in the complaint as true. *Thompson v. Bank of Am., N.A.*, 773 F.3d 741, 750 (6th Cir. 2014). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

When considering a motion to dismiss for failure to state a claim, a court generally does not consider matters outside the pleadings unless the court treats the motion as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *Gavitt v. Born*, 835 F.3d 623,

640 (6th Cir. 2016); *see also* FED. R. CIV. P. 12(d) ("If, on a motion under Rule 12(b)(6) …, matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."). However, a court may, without converting the motion to one for summary judgment, consider "exhibits attached to the complaint, public records, items appearing in the record of the case, and exhibits attached to defendant's motion to dismiss, so long as they are referred to in the complaint and are central to the claims contained therein[.]" *Gavitt, supra.*

B. Discussion

Congress enacted the Clean Water Act (CWA) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *South Side Quarry, LLC v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 28 F.4th 684, 689 (6th Cir. 2022) (quoting, in pertinent part, 33 U.S.C. § 1251). The goal of the CWA is to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2). To reach this goal, the CWA encompasses a "comprehensive statutory system for controlling water pollution." *South Side Quarry, supra.* The "cornerstone" of this system is the NPDES permit program. *Id.* (citing, in pertinent part, 33 U.S.C. § 1342). With an NPDES permit, a person may discharge pollutants so long as he stays within the permit's limits; however, without a permit, a "discharge ... [is] unlawful." *Id.* (quoting 33 U.S.C. § 1311(a)).

The CWA's permit program relies on "cooperative federalism" to manage the nation's water resources. *Id.* at 690 (citation omitted). States "typically control the NPDES permitting programs as they apply to waters within their borders, subject to EPA approval." *Id.* (citing, in pertinent part, 33 U.S.C. §§ 1314(i)(2), 1342(b)–(c)). The CWA also preserves states' "primary

responsibilities and rights" to "allocate quantities of water within [their] jurisdiction." 33 U.S.C. § 1251(b), (g).

In Michigan, the Department of Environment, Great Lakes, and Energy (EGLE) issues permits for waters within the State pursuant to Part 31 of the MEPA. Together, the NPDES and EGLE permits create a "patchwork of 'effluent limitations'" that limit the discharge of pollutants. *South Side Quarry*, 28 F.4th at 690 (citing 33 U.S.C. § 1362(11) (defining "effluent limitation" as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance")). Effluent limitations "restrict the quantities, rates, and concentrations" of pollutants discharged by a permit holder. *Id.* (citing *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (citing 33 U.S.C. §§ 1311, 1314)). "If a person discharging a pollutant fails to meet an effluent limitation or standard found in a regulation or permit—or fails to get a permit—he violates the CWA." *Id.*

When violations occur, the EPA and the states form the first line of defense. *Id.* The federal and state agencies retain the "primary" power to "enforce[ ]" the CWA. *Id.* (citation omitted). However, in "limited circumstances," the CWA also permits private citizen suits. *Id.* (citing 33 U.S.C. § 1365). Such suits serve as "backup, 'permitting citizens to abate pollution when the government cannot or will not command compliance.'" *Id.* (quoting, in pertinent part, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987)). The Sixth Circuit has observed that citizen suits "provide a second level of enforcement and can serve as a check to ensure the state and federal governments are diligent in prosecuting Clean Water Act violations." *Sierra Club v. Hamilton Cty. Bd. of Cty. Comm'rs*, 504 F.3d 634, 637 (6th Cir. 2007).

Before a potential plaintiff can file a citizen suit, he must "strictly comply with statutory conditions precedent to suit." *South Side Quarry*, 28 F.4th at 690 (quoting, in pertinent part, *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 28 (1989)). In the context of the CWA, that condition takes the form of a notice requirement. *Id.* The notice requirement mandates that a plaintiff give the purported polluter warning of the intent to sue and of the alleged violation. *Id.* (citing 33 U.S.C. § 1365(b)(1)(A)).

Defendant's motion to dismiss at bar challenges two aspects of Plaintiffs' pre-suit notice under Rule 12(b)(1) and two elements of Plaintiffs' CWA claim under Rule 12(b)(6). According to Defendant, because Plaintiffs' CWA claim in Count I fails either for lack of notice or failure to state a claim, this Court should also decline to exercise supplemental jurisdiction over their state-law MEPA claim in Count II (ECF No. 21 at PageID.3556). The Court considers the parties' arguments on both topics, in turn.

1. Pre-Suit Notice

a. Specific CWA Standard, Limitation, or Order

In its Rule 12(b)(1) facial attack on Plaintiffs' claimed subject-matter jurisdiction, Defendant argues that Plaintiffs' Pre-Suit Notice, which identified only the CWA's general prohibition against unpermitted discharges into surface water, is insufficient notice under binding Sixth Circuit precedent (ECF No. 21 at PageID.3561–3564, citing *South Side Quarry*, 28 F.4th at 696).

In response, Plaintiffs assert that their Pre-Suit Notice more than adequately advised Defendant of the nature of their allegations, and Plaintiffs argue that the "plain language" of CWA's general prohibition "clearly permits citizen suits for violations of the Section 301 prohibition against discharging pollutants without a permit" (ECF No. 24 at PageID.3627–3629).

According to Plaintiffs, Defendant misrepresents the Sixth Circuit's holding in *South Side Quarry* to support its argument (*id.* at PageID.3629–3631).

Defendant's argument for dismissal lacks merit.

As noted, the CWA has a pre-suit notice requirement, which instructs that "[n]o action may be commenced—(1) under subsection (a)(1) of this section—(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order[.]" 33 U.S.C. § 1365(b). The CWA authorizes the EPA Administrator to "prescribe by regulation" the manner in which a pre-suit notice must be given. *Id.* The relevant regulation instructs that the contents of a pre-suit notice "shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated[;] the activity alleged to constitute a violation[;] the person or persons responsible for the alleged violation[;] the location of the alleged violation[;] the date or dates of such violation[;] and the full name, address, and telephone number of the person giving notice." 40 C.F.R. § 135.3(a). The purpose of the detailed description is to allow the alleged violator to identify any violation, bring its conduct into compliance with the law, and avoid the suit. *South Side Quarry*, 28 F.4th at 693–94 (citing, in pertinent part, *Gwaltney*, 484 U.S. at 60). The Sixth Circuit has indicated that a plaintiff's pre-suit notice should "contain sufficient information to allow [the defendant] to identify all pertinent aspects of its [alleged] violations without extensive investigation." *Sierra Club*, 504 F.3d at 644.

The pre-suit notice requirement is a "mandatory condition[] precedent to suit" with which a plaintiff must "strictly comply." *South Side Quarry*, 28 F.4th at 690 & 694 (citation omitted). If a plaintiff fails to provide sufficient notice, then a district court "must dismiss the action as barred" under the CWA. *Id.* (citing, in pertinent part, *Greene v. Reilly*, 956 F.2d 593, 594 (6th Cir.

1992) (explaining that "the notice requirement is not a mere technical wrinkle of statutory drafting or formality to be waived by the federal courts")).

Plaintiffs' approximately 20-page Pre-Suit Notice has ten sections, with the seventh section addressing "Violations of Clean Water Act (Federal and State Law)" (ECF No. 16-1 at PageID.1658). Therein, Plaintiffs state that "[t]he Clean Water Act prohibits the 'discharge of any pollutant' into 'navigable waters' from any 'point source,' except when authorized by a [NPDES] permit" (*id.*). Plaintiffs allege that Defendant's wastewater "pools" on its Spray Fields and then "discharges to wetlands" (*id.* at PageID.1658). Plaintiffs indicate that although Defendant holds a state-issued Groundwater Permit, "it lacks a NPDES permit issued by EGLE under Part 31 (permit to discharge wastewater to surface water)" (*id.*). Plaintiffs conclude that Defendant's "unpermitted discharges to wetlands are discharges into waters of the state that violate the Clean Water Act" (*id.* at PageID.1659).

Defendant, which challenges Plaintiffs' omission of a "specific standard, limitation, or order alleged to have been violated," 40 C.F.R. § 135.3(a), relies on the Sixth Circuit's holding in *South Side Quarry*, 28 F.4th at 696, that "the CWA's citizen-suit provision doesn't authorize citizen suits for violating some general prohibition." However, as Plaintiffs point out, while most of the CWA claims in *South Side Quarry* rested on violations of existing regulations, permits, or property rights, which mandated the specificity of notice required by 40 C.F.R. § 135.3(a), South Side Quarry also based its citizen suit on "a permit that doesn't exist." 28 F.4th at 694. South Side Quarry claimed that the Jefferson County Metropolitan Sewer District (MSD) needed—and failed—to obtain Kentucky-issued NPDES (KPDES) permits for the quarry basin at issue. *Id.* The Sixth Circuit indicated that the outcome of South Side Quarry's suit therefore turned on two corresponding inquiries: (1) "whether MSD's diversion system violated a specific standard,

limitation, or order found in an existing KDPES permit" and (2) "whether MSD failed to obtain a KPDES permit specific to its operation of the diversion system." *Id.*[2]

The holding on which Defendant here relies is contained within the Sixth Circuit's discussion of the first inquiry. There, the Sixth Circuit held that because the defendant in *South Side Quarry* had KPDES permits for the subject discharges, South Side Quarry's pre-suit notice allegations of violating Section 301 "general prohibition" was insufficient. *Id.* at 696. In contrast, on the second inquiry (whether the defendant was in violation of the CWA for its failure to obtain a permit), the Sixth Circuit rejected South Side Quarry's notice not because the notice was insufficient, but because the notice was just "wrong," where the water allocation system at issue fell outside the CWA's regulatory ambit. *Id.* at 697–700 ("MSD did not need a KPDES permit when it first built the channel between Fishpool Creek and Vulcan Quarry, and it doesn't need one now").

Plaintiffs do not dispute that their Pre-Suit Notice does not identify a specific effluent standard or limitation in a permit. Plaintiffs argue that such specificity is not required where their CWA claim is premised not on Defendant's failure to comply with the parameters of an NPDES permit, but on Defendant's complete failure to obtain an NPDES permit for its irrigation activities

[2] As Plaintiffs point out (ECF No. 24 at PageID.3630–3631), other circuits have likewise recognized these two types of citizen suits. *See Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 642 (4th Cir. 2018) ("[A] polluter does not violate the statute only when it exceeds limitations in its permit. Instead, a polluter also may be in violation of the statute due to a discharge for which the polluter could not have obtained any permit."), judgment vacated on other grounds, 140 S. Ct. 2736, 206 L. Ed. 2d 916 (2020); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546 (5th Cir. 1996) (indicating that the discharge of any "pollutant" without an NPDES permit is unlawful act under CWA and may be the basis of a CWA citizen suit even if the EPA has not established applicable effluent limitation or permit for "pollutant" at issue); *Olympic Forest Coal. v. Coast Seafoods Co.*, 884 F.3d 901 (9th Cir. 2018) (citizen suit claiming that discharge required NPDES permit); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10th Cir. 2005), as corrected (Oct. 21, 2005) (citizen suit claiming that discharge required NPDES permit).

that fall within the ambit of the CWA. The Court agrees. Because Plaintiffs' claim falls within the second category of claims (where a defendant wholly lacks a required permit), the rule of law from *South Side Quarry* upon which Defendant relies (where a defendant allegedly committed violations of an existing permit) does not apply to the notice in this case.

Plaintiffs' notice is more akin to the notice in *StarLink Logistics Inc. v. ACC, LLC*, 642 F. Supp. 3d 652 (M.D. Tenn. 2022), *appeal pending*, which the plaintiff supplied against its neighbor, a landfill operator. The plaintiff in *StarLink* claimed that the defendant was required to obtain both an NPDES permit and a dredge-and-fill permit, but in fact had neither. Like Defendant's argument here, the defendant in *StarLink* argued that the plaintiff's notice was deficient because it failed to identify the "specific permit, standard, regulation, condition, requirement, or order which has allegedly been violated." *Id.* However, the district court disagreed, finding that the notice adequately informed the defendant of what requirements the plaintiff claimed were violated. *Id.* The district court reasoned that "[u]nder these circumstances, it would make little sense to require Plaintiff to specify the particular effluent standard or limitation in the permit at issue when Plaintiff's claim is that *there is no permit at all* (even though, according to Plaintiff, there should be)." *Id.* at 695 (emphasis in original).

Plaintiffs' Pre-Suit Notice likewise does not frustrate the purpose that the notice for a CWA private citizen suit is intended to serve, to wit: to allow Defendant to identify the violation, bring its conduct into compliance with the law, and avoid the suit. *See South Side Quarry*, 28 F.4th at 693–94. In short, Defendant's first challenge to Plaintiffs' Pre-Suit Notice does not entitle it to dismissal of Plaintiffs' Count I.

b. Activity Violating the CWA

In its factual attack on Plaintiffs' claimed subject-matter jurisdiction, Defendant next argues that Plaintiffs' notice was "actively misleading" inasmuch as the notice "gave no indication that they planned to bring a federal claim for unpermitted discharge" where Plaintiffs "described the relevant water bodies as only 'waters of the state'" and "never mentioned the 'functional-equivalent' exception to the CWA's point-source requirement" from Supreme Court precedent upon which they now rely in their Amended Complaint (ECF No. 21 at PageID.3548, 3564–3568, citing Am. Compl. ¶ 109 and referencing *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 590 U.S. 165 (2020)). According to Defendant, the violations that Plaintiffs describe relate only to its state-issued Groundwater Permit and do not implicate the CWA's prohibition on unpermitted discharges into surface waters of the United States, thereby failing to effectively invoke CWA jurisdiction (*id.* at PageID.3552).

In response, Plaintiffs point out that their notice is titled a "Clean Water Act Notice of Intent to Sue" and states at least 14 times that Defendant's unpermitted discharges violate the CWA (ECF No. 24 at PageID.3619). Plaintiffs argue that they were not required to articulate their legal theories in a pre-suit notice and, conversely, that their Pre-Suit Notice contained "more than enough factual elucidation of its discharge theory" (*id.* at PageID.3631–3635). Last, Plaintiffs opine that they reasonably framed their allegations around both "surface waters of the state" and "waters of the state subject to the CWA" because their notice (and their subsequent complaints) assert both claims under both federal and state law (*id.* at PageID.3634).

Defendant's argument for dismissal lacks merit.

Again, the purpose of the requisite notice is to allow a defendant to identify the violation, bring its conduct into compliance with the law, and avoid the suit. *South Side Quarry*, 28 F.4th at

693–94. As a threshold matter, Defendant's assertion that Plaintiffs "gave no indication that they planned to bring a federal claim for unpermitted discharge" is belied by the title of Plaintiffs' Pre-Suit Notice as well as the references to the Clean Water Act therein. Additionally, while Defendants further assert that a "glaring mismatch" exists between Plaintiffs' Pre-Suit Notice and their Amended Complaint, their arguments are not persuasive.

Defendant emphasizes at length that the terms "waters of the state" and "surface waters of the state" referenced in the Pre-Suit Notice are not synonymous with the CWA's definition of "waters of the United States," but Plaintiffs do not dispute this proposition. In Section 7 ("Violations of Clean Water Act (Federal and State Law)"), Plaintiffs' notice expressly qualified the term "waters of the state" with the phrase "subject to the Clean Water Act." *See* ECF No. 16-1 at PageID.1658–1659 ("Burnette's discharge into wetlands is a discharge into surface waters of the state that is subject to the Clean Water Act and rules implementing it in Michigan."); *see also id.* at PageID.1659 ("Burnette's unpermitted discharges to wetlands are discharges into waters of the state that violate the Clean Water Act.").

Similarly, Plaintiffs do not dispute that they first expressly invoked the Supreme Court's decision in *Maui* in their Amended Complaint, but they point out that their Pre-Suit Notice clearly articulated their discharge theory in Section 5 ("Burnette's Land Discharge Overflows to Wetlands"). There, Plaintiffs indicated that "excessive effluent that Burnette applies to the spray irrigation fields overflows towards the wetland network, resulting in direct discharge to the wetland network when soils are saturated and/or effluent application rates are exceeded" (ECF No. 16-1 at PageID.1653). Additionally, Plaintiffs indicated that "hydraulic overloading in areas with a shallow low permeability silty clay layer may also cause subsurface lateral movement of Burnette's effluent to the wetland network" (*id.*).

In short, Defendant's second challenge to Plaintiffs' notice also fails. The notice gave Defendant sufficient indication that Plaintiffs intended to bring a claim under the CWA, and the notice sufficiently elucidated Plaintiffs' theory that Defendant's discharges are unpermitted discharges into surface waters in violation of the CWA. The notice "contain[ed] sufficient information to allow [Defendant] to identify all pertinent aspects of its [alleged] violations without extensive investigation." *See Sierra Club*, 504 F.3d at 644. Consequently, the Court turns to Defendant's arguments that Plaintiffs' Amended Complaint fails to state a plausible CWA claim.

2. Failure to State a Claim

a. Waters of the United States

Under Federal Rule of Civil Procedure 12(b)(6), Defendant first argues that Plaintiffs failed to sufficiently plead that the Wetlands are "waters of the United States" (ECF No. 21 at PageID.3548). According to Defendant, absent a "stream or tributary of a navigable water flowing into or out of Wetland Area 1, there could not be a continuous surface water connection between Wetland Area 1 and any 'water of the United States'" and "[t]his alone breaks the chain necessary for CWA jurisdiction to attach under *Sackett* because the Farm Road Culvert provides a clear break in continuous surface water connection" (ECF No. 21 at PageID.3572–3575, citing *Sackett v. EPA*, ___ U.S. ___; 143 S. Ct. 1322 (2023)).

In response, Plaintiffs argue that they alleged sufficient facts to support the reasonable inference that Defendant's discharges reach and harm Spencer Creek and Elk Lake, both "waters of the United States" (ECF No. 24 at PageID.3644–3647).[3] Plaintiffs opine that those allegations

[3] Specifically, Plaintiffs allege that Elk Lake falls within the category of "waters of the United States" as it is a "traditional navigable" waterbody connected to Lake Michigan, which is an interstate navigable waterbody (Am. Compl. ¶ 103), and that Spencer Creek likewise falls within the category of "waters of the United States" as it is a "relatively permanent body of water connected to traditional interstate navigable waters" (*id.* ¶ 104).

are alone sufficient to defeat Defendant's first argument for dismissal of its CWA claim (*id.* at PageID.3653). Alternatively, Plaintiffs argue that they also alleged sufficient facts to support the additional inference that the Wetlands themselves are "waters of the United States" and that Defendant's discharges reach and harm the Wetlands, harm for which Defendant is liable even if the culvert under the farm road creates two separate wetlands (*id.* at PageID.3648–3652).

Defendant's argument for dismissal lacks merit.

The CWA prohibits the "discharge of any pollutant," 33 U.S.C § 1311(a), a phrase that is defined to mean "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12). "Navigable waters" are broadly defined as "waters of the United States." 33 U.S.C. § 1362(7). In relevant part, "waters of the United States" include "[i]nterstate waters," 40 C.F.R § 120.2(a)(1)(*iii*); tributaries of interstate waters that are "relatively permanent, standing or continuously flowing bodies of water," *id.* § 120.2(a)(3); and "wetlands adjacent" thereto, *id.* § 120.2(a)(4).

The Sixth Circuit has held that a CWA claim has the following five elements: "(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source." *Tennessee Clean Water Network v. Tennessee Valley Auth.*, 905 F.3d 436, 439 (6th Cir. 2018). Defendant's argument here—that Plaintiffs failed to sufficiently plead that the Wetlands are "waters of the United States"—implicates the third element of Plaintiffs' CWA claim and the United States Supreme Court's decision in *Sackett.*

By way of background, the plaintiffs in *Sackett* were private property owners who, in preparation for building their home on their small lot near a lake, "began backfilling their property with dirt and rocks." 598 U.S. at 462. The EPA sent the Sacketts a compliance order informing them that their backfilling violated the CWA because their property contained protected wetlands.

Id. The Supreme Court, which opined that the "outer boundaries" of the CWA's geographical reach had been "uncertain from the start," expressly sought to resolve the CWA's applicability to wetlands. *Id.* at 658, 663. The Supreme Court ultimately held that "some wetlands qualify as 'waters of the United States'" but "only those wetlands that are as a practical matter indistinguishable from waters of the United States." *Id.* at 1338–39. According to the Supreme Court, a party asserting jurisdiction over adjacent wetlands is required to establish "first, that the adjacent body of water constitutes 'waters of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 1341.

Here, however, Plaintiffs' CWA claim is not primarily dependent on asserting CWA jurisdiction over the Wetlands. The CWA violation theory that Plaintiffs espouse is wholly different from the theory (and factual allegations) in *Sackett*. As Plaintiffs point out, the discharge in this case is not "unpermitted immobile fill deposited into an isolated wetland" (ECF No. 24 at PageID.3619), i.e., solids that do not readily wash downstream. Indeed, Plaintiffs do not allege in their Amended Complaint that any ongoing point source discharges directly into the Wetlands. Rather, Plaintiffs allege that Defendant's discharges are "unpermitted industrial wastewater" that drain through the wetland-stream complex into Spencer Bay and Elk Lake (*id.*). *See* Am. Compl. ¶ 110 ("Burnette's frequent and ongoing excessive applications of wastewater effluent to its Spray Fields that saturates the Spray Fields, caus[es] the wastewater effluent to pool and pond on the surface of the fields and to migrate from its Spray Fields to the Wetlands and Spencer Creek through the groundwater and surface water runoff"). Defendant's argument for dismissal, which

essentially ignores Plaintiffs' primary theory of liability, is misplaced and does not alone support the conclusion that Plaintiffs failed to state a plausible CWA claim.

The Supreme Court's decision in *Maui*, not *Sackett*, is more apropos. In *Maui*, 590 U.S. at 186, also a citizen-CWA lawsuit, the Supreme Court held that a point source need not discharge a pollutant directly into the waters of the United States. The case was initiated by several environmental groups against the County of Maui, which operated a wastewater reclamation facility on the island of Maui, Hawaii. *Id.* at 171. The wastewater reclamation facility collected sewage from the surrounding area, partially treated it, and pumped the treated water through four wells hundreds of feet underground. *Id.* The effluent, amounting to about 4 million gallons each day, then travelled a further half mile or so, through groundwater, to the ocean. *Id.* The environmental groups claimed that the County of Maui was "discharg[ing]" a "pollutant" to "navigable waters," namely, the Pacific Ocean, without the permit required by the Clean Water Act. *Id.* The specific legal issue was whether "pollution that reaches navigable waters only through groundwater pollution is '*from*' a point source," i.e., does the Clean Water Act require a permit "when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source," here, 'groundwater.'" *Id.* at 172, 170 (emphasis added).

The Supreme Court acknowledged that the structure of the CWA indicates that, "as to groundwater pollution and nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States," which have developed methods of regulating nonpoint source pollution through water quality standards, and otherwise. *Id.* at 174–75. Indeed, the Supreme Court observed that the CWA "envisions EPA's role in managing nonpoint source pollution and groundwater pollution as limited to studying the issue, sharing information with and collecting information from the States, and issuing monetary grants." *Id.* at 175.

The Court nonetheless ultimately concluded that the CWA requires a permit not only "when there is a direct discharge from a point source into navigable waters" but also when there is the "functional equivalent of a direct discharge." *Id.* at 183. That is, according to the Supreme Court in *Maui*, "an addition falls within the statutory requirement that it be 'from any point source' when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means." *Id.* at 183–84. *Cf. Rapanos v. United States*, 547 U.S. 715, 743 (2006) (plurality decision observing that "from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between"). The Court therefore turns to Defendant's remaining argument for dismissal of Plaintiffs' Count I, that Plaintiffs' CWA claim fails for failing to plausibly plead a pollutant was discharged "from" a point source, i.e., the fourth element of Plaintiffs' CWA claim.

b. From a Point-Source Discharge

Defendant supplies the following three reasons why this Court should conclude that Plaintiffs failed to sufficiently plead a discharge from a point source: (1) the alleged runoff from an agricultural field, including a field in which irrigation is utilized, is not a point source discharge regulated under the CWA; (2) the alleged runoff must migrate into navigable waters, and neither the Wetlands nor Spencer Creek are navigable; and (3) Plaintiffs fail to provide any factual support for their functional-equivalent theory (ECF No. 21 at PageID.3575–3578).

In response, Plaintiffs argue that (1) Defendant's industrial wastewater containing numerous regulated pollutants does not "magically" become "agricultural return flow" just because Defendant first sprays it on a field; (2) "it is irrelevant that boats can't float in the receiving

wetlands and creek"; and (3) Defendant ignores the "pile of factual allegations in Plaintiffs' Complaint and supporting exhibits" that show that Defendant's wastewater pollutants reach "waters of the United States" through indirect discharges within a timeframe, distance, and quality that satisfy the *Maui* functional-equivalency test (ECF No. 24 at PageID.3636–3648).

Defendant's arguments for dismissal lack merit.

Return-Flows Exclusion. As a threshold matter, "canned and preserved fruits and vegetables processing" facilities are expressly included within the list of industries regulated by the Administrator of the EPA as "sources" "from which there is or may be the discharge of pollutants." 33 U.S.C. § 1316(b)(1)(A). And, as previously noted, the EPA has promulgated effluent limitations applicable to the pollutants in fruit processing wastewater. *See, e.g.*, 40 C.F.R. § 407.20 (Apple products subcategory)).

A "point source" is "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). As Defendants correctly indicate, Congress expressly excluded from the statutory definition of a "point source" "agricultural stormwater discharges and return flows from irrigated agriculture." *Id.* The Act provides that no NPDES permit is required for "discharges composed *entirely* of return flows from irrigated agriculture." 33 U.S.C. § 1342(l)(1) (emphasis added). The relevant regulation likewise excludes from the NPDES permit requirement "[a]ny introduction of pollutants from *nonpoint-source* agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands." 40 C.F.R. § 122.3 (Exclusions) (emphasis added). *See, e.g.*, *Pac. Coast Fed'n of Fishermen's Associations v. Glaser*, 945 F.3d 1076, 1085 (9th Cir. 2019) (holding that the text of 33 U.S.C. § 1342(l)(1) "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").

In support of their argument for dismissal based on application of the return-flows exclusion, Defendant directs this Court's attention to the decision of a district court in Oregon, where the plaintiffs alleged that the defendant irrigated its prune orchards and grass fields using wastewater from dehydrated fruit in a larger quantity than was necessary. *Hiebenthal v. Meduri Farms*, 242 F.Supp.2d 885, 886 (D. Or. 2002). The plaintiffs in *Hiebenthal* argued that the CWA's exclusion for agricultural return flows was inapplicable to the defendant's operations because the defendant's alleged over-application of fruit processing wastewater to its crops was "more akin to industrial, non-agricultural activities." *Id.* at 888. The district court held that the plaintiffs' theory may support a revision of the defendant's state permit, but the exclusion prevented the court from exercising subject-matter jurisdiction over their claim under the CWA. *Id.*

Hiebenthal is factually distinguishable. Plaintiffs do not allege that Defendant's irrigation activities concern water obtained from a natural source to irrigate crops that is then "returned" to its source. Instead, Plaintiffs allege that Defendant is spraying industrial wastewater effluent from a spray irrigation system, pointing the discharge at a state-mandated and state-designed land-treatment vegetation system, where the excessive wastewater effluent and the pollutants therein are purposefully directed to waters of the United States without an NPDES permit. *See* Am. Compl. ¶¶ 6, 52–60. Viewing the factual allegations in the light most favorable to Plaintiffs, the Court cannot conclude that intentional drainage of industrial wastewater is subsumed in the agricultural return-flows exclusion. In Plaintiffs' words, "[t]he Spray Fields exist to treat the wastewater; the wastewater doesn't exist to irrigate the vegetation" (ECF No. 24 at PageID.3638).

Navigable Waters. There is likewise no merit in Defendant's second argument that dismissal of Count I is warranted because the alleged runoff does not migrate into "navigable waters." As the Supreme Court has explained, the CWA "uses the phrase 'navigable waters' as a defined term, and the definition is simply 'the waters of the United States.'" *Rapanos*, 547 U.S. at 730–31 (quoting 33 U.S.C. § 1362(7)) (rejecting the petitioners' argument that the phrase "navigable waters" must be limited to the "traditional definition" requiring that the waters be "navigable in fact, or susceptible of being rendered so").

Functional Equivalent of a Direct Discharge. Last, there is no merit in Defendant's argument that Plaintiffs have not plausibly alleged their functional-equivalent theory. In *Maui*, 590 U.S. at 171, as discussed earlier, the Supreme Court examined whether, or how, the CWA applied to a pollutant that reaches navigable waters only after it leaves a "point source" and then travels through groundwater before reaching navigable waters. The Supreme Court identified the following seven factors that may be relevant, "depending upon the circumstances of a particular case," in determining whether there is the "functional equivalent" of a direct discharge into navigable waters: "(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity." *Id.* at 184–85. The Court indicated that "[t]ime and distance will be the most important factors in most cases[.]" *Id.* at 185.

Regarding the *Maui* time factor, Plaintiffs allege in their Amended Complaint that Defendant's "sprayers and drip systems are in proximity to both the Wetlands and Spencer Creek

and the resulting flow of wastewater effluent through the groundwater and surface runoff takes a short span of time to enter into the Wetlands and flow into Spencer Creek" (Am. Compl. ¶ 107). Plaintiffs allege that EGLE inspectors observed effluent pooling on Spray Field surfaces causing contemporaneous flow of the wastewater into the Wetlands (*id.* ¶¶ 95–98). Plaintiffs attach affidavits from residents attesting that the effluent pollutes Spencer Creek and Elk Lake during the summer months, which corresponds to Defendant's busiest spraying season (Gretel Aff. ¶ 12 [ECF No. 16-2 at PageID.1672]; Taylor Aff. ¶ 10 [ECF No. 16-3 at PageID.1678]; Ogle Aff. ¶ 27 [ECF No. 16-4 at PageID.1686]). Plaintiffs also attach the 2021 EGLE Violation Notice wherein state inspectors similarly described a history of resident complaints about discoloration, cherry pulp, and foam during "the high discharge period of cherry harvest processing at the Facility" (2021 Violation Notice [ECF No. 16-12 at PageID.2011]).

Regarding the *Maui* distance factor, Plaintiffs allege that Defendant sprays its industrial wastewater onto Spray Fields that "abut" or are "adjacent to" the Wetlands and Spencer Creek (Am. Compl. ¶¶ 46, 61, 105, 107). Plaintiffs allege the distance from the Wetlands to Elk Lake is "approximately a mile or less" (*id.* ¶ 62). Plaintiffs include a map showing the proximity of the Spray Fields to the Wetlands and Spencer Creek and a diagram showing the hydrological flow from the Spray Fields toward and into the Wetlands and Spencer Creek (*id.* ¶ 61). Plaintiffs attach exhibits where EGLE inspectors over the years documented Defendant's effluent flowing across the fields into the Wetlands (2019 Violation Notice [ECF No. 16-10 at PageID.1993]); 2020 Violation Notice [ECF No. 16-11 at PageID.1999]; 2021 Violation Notice [ECF No. 16-12 at PageID.2008]).

Last, in further support of their functional-equivalent theory of liability and the additional *Maui* factors, Plaintiffs describe in their Amended Complaint the nature of the material through

which the pollutants travel as "surface water runoff" and "groundwater," flowing through the Wetlands, into Spencer Creek, and downstream into Elk Lake and out to Lake Michigan (Am. Comp. ¶¶ 20, 27, 60–61, 66, 69, 92, 95–98, 103, & 107). Plaintiffs describe the extent to which the pollutants maintain their specific identity, describing the "unnatural foam," "strong odors," "staining," and "orange and red settleable solids" in Spencer Creek and Elk Lake that are indicative of the BOD, phosphorous, and TSS pollutants originating in the fruit processing wastewater (*id.* ¶¶ 68, 69, 83). Plaintiffs also allege that E. coli bacteria were detected in Defendant's wastewater effluent in 2021 and in water samples collected from numerous points in Spencer Creek in 2021, with concentrations "regularly" above the maximum level for "total body contact recreation" (*id.* ¶¶ 71 & 74–76). Plaintiffs also allege that 2021 water samples from the Wetlands indicated the presence of arsenic, which was "mobilized" by overapplication of high-strength wastewater (*id.* ¶¶ 81–82).

In sum, Plaintiffs have pleaded more than sufficient factual content that, taken as true, plausibly describes the functional equivalent of a direct discharge of a pollutant into navigable waters. Defendant's last argument for dismissal of Count I is unavailing.

III. CONCLUSION

Importantly, the merits of Plaintiffs' Clean Water Act claim are not before the Court at this early stage in the litigation. The Court holds only that Defendant's Rule 12 arguments do not support either the conclusion that this Court lacks jurisdiction over the subject matter of Plaintiffs' CWA claim or the conclusion that Plaintiffs' CWA claim lacks facial plausibility. For these reasons,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (ECF No. 20) is DENIED.

IT IS FURTHER ORDERED that Defendant shall, not later than 14 days after entry of this Opinion and Order, file its Answer to Plaintiffs' Amended Complaint (ECF No. 16).

Dated: April 26, 2024

/s/ Jane M. Beckering
JANE M. BECKERING
United States District Judge