STATE OF MICHIGAN
IN THE 30TH JUDICIAL CIRCUIT FOR INGHAM COUNTY

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Plaintiff,

v

OPINION & ORDER

CASE NO. 22-740-CE
HON WANDA M. STOKES

WEAVERLAND FARMS, NELSON WEAVER CONNIE WEAVER, ARNOLD WEAVER and ETHAN WEAVER,

Defendants.

At a session of said Court
held in the city of Mason, county of Ingham,
this 26th day of July, 2024.

PRESENT: HON. WANDA M. STOKES

This matter is before the Court on two motions for summary disposition which are both resolved in this Order. Defendants Weaverland Farms, Nelson Weaver, Connie Weaver, Arnold Weaver and Ethan Weaver's Motion for Summary Disposition and Plaintiff, Michigan Department of Environment, Great Lakes and Energy (MDEGLE) motion for summary disposition pursuant to MCR 2.116(C)(10), regarding the enforcement of alleged Natural Resources and Environment Protection Act ("NREPA") violations with respect to wetlands.

The Court, having read the motions, briefs and heard oral argument GRANTS Plaintiff's motion as there are no questions of fact in dispute regarding NREPA violations, and DENY Defendants motion and request for relief under MCR 2.116(I)(2).

The record reflects that Nelson and Connie Weaver are leaders of this family farm operating as a "sole proprietorship" where the family members by their own testimony, work "cooperatively" to operate a large dairy farm. The property known as 'Berden Field', which is at issue in this case, is owned by Co-Defendants Ethan and Arnold Weaver. However, the record reflects that all Defendants have utilized Berden Field for farming, and otherwise used the field as part of their operation of Weaverland Farms. Based upon two separate wetland delineations performed by Plaintiff, Berden Field contained 69 acres of protected wetlands. Additionally, this area is incorporated into Weaverland Farms' comprehensive nutrient management plan (CNMP), a state-required plan for concentrated animal feeding operations, like dairy farms, that details how the farm will handle, store, and dispose of its manure and animal waste. Likewise, all crops grown on this area have been fed to the cattle at Weaverland Farms.

The record reflects that all family members benefitted from the extra crop space created with the alleged disturbance of the wetlands. MCL 324.30304 (a) and (c) applies to "person[s]" who "permit the placing of fill material in a wetland," and those who "maintain any use or development in a wetland." This applies to individuals, sole proprietorship, or other legal entity. MCL 324.30301(j).

The Court finds no factual dispute for a jury to decide regarding whether Nelson and Connie Weaver maintained a use in Berden Field's wetlands in violation of MCL324.30304(c). Again, the record is clear that the entire family made use of the land for farming activities related to their dairy farm, and other activities.

Defendants argue that Weaverland Farms is not a proper Defendant. Defendants use an assumed named and MCR 2.201(C)(2) covers this situation. Weaverland Farms is a partnership, which is defined as "an association of two or more persons, which may consist of husband and

wife, to carry on as co-owners [of] a business for profit." MCL 449.6(1). A partnership "may . . . be sued in its partnership or association name, or in the names of any of its members designated as such or both." *Yenglin v Mazur*, 121 Mich App 218, 225 (1982), quoting MCL 600.2051(2) (emphasis added). Thus, the proper Defendant are named in this lawsuit, and Defendant's request for summary disposition pursuant to MCR 2.116(I)(2) is DENIED.

STANDARD OF REVIEW

Under MCR 2.116(C)(10), summary disposition is proper when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Lugo v Ameritech Corp*, 464 Mich 512, 520; 629 NW2d 384 (2001). In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacherv Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). If the moving party's initial burden is met, then "[t]he opposing party must set forth specific facts, by affidavit or documentary evidence, showing that there are genuine issues for trial, and may not rest upon mere allegations or denials in the pleading." *Johnson v Wayne Co,* 213 Mich App 143, 139; 540 NW2d 66 (1983). The opposing party's "mere pledge" to reveal an issue of fact at trial "cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817, 824 (1999). Rather, the opposing party must set forth the facts that establish a genuine issue for trial at the time of the motion. *Id.*

ANALYSIS

Defendants claim Plaintiffs' case must be dismissed for failing to follow pre-suit enforcement procedures, specifically, EGLE's duty to "provide the person in writing a list of each specific provision of statute, rule, or permit that the person is alleged to have violated and a

statement of the facts constituting the violation." MCL 324.1511(l)(a). Defendants assert that EGLE's statement of facts was deficient, not providing key information regarding the violations. Defendants also offer an unpublished case to support their argument for dismissal due to failure to follow notice procedures. In *Michigan Dep 't of Env't, Great Lakes, and Energy v Holloo Farms, LLC*, unpublished opinion of the Calhoun Co Cir Ct, issued Sept 18, 2022 (File No. 2022-1077-CE), EGLE provided Holloo Farms with notice of a continuing violations which distinguishes it from the subject case. While not binding, this Court considered the *Holloo* decision in its deliberations. The Calhoun Circuit Court found EGLE must comply every time it issues a pre-enforcement notice, and this Court agrees; however, that is not the situation in the instant case. The record reflects that pre-suit enforcement requirements were met through Plaintiff's statement of facts which informed the Defendants of the location of the violation, the time of the violation was observed, the activities that constituted the violation, how these activities violated Part 303. The notice also included a request for additional information regarding various activities conducted on Berden Field, including "tree clearing, tile installation, and placement of manure." Finally, the notice included an offer to meet with EGLE to discuss the issues raised. The information the Defendants claim is missing, including mapping, is actually not required by statute, and therefore EGLE's notice was not deficient.

A. Existence of the wetland

EGLE asserts that there is no factual dispute that the wetland existed on the Defendants property, and this Court agrees. The Defendant's own experts admits that 42.89 acres of Berden field constitute protected wetland. EGLE asserts that 69 acres of Berden Field is protected wetland and provide their own experts methodology in contrast to the Defendants. EGLE's expert used aerial data going back years before the development and farming in Berden Field to

determine how much of the land was wetlands. There is thus no dispute that Berden Field contains protected wetland, and the only remaining dispute is the amount of damages.

MCL 324.30304 prohibits the following in a wetland: (1) the depositing or permitting the placing of fill material, (2) dredging or removal of soil or minerals, (3) Maintaining any "use or development," and (4) draining of surface water. "Fill material" is defined broadly as "soil, rocks, sand, waste of any kind, or any other material that displaces soil or water or reduces water retention potential." MCL324.30301 (d).

Plaintiffs have presented undisputed evidence of the Defendants engaged in prohibited activity. While Defendants offer arguments that the pre-suit practices in this particular case amounted to an unconstitutional taking, and a violation of the Unconstitutional-Conditions doctrine, the fundamental practices of notice and an opportunity to be heard were offered multiple times to Defendants before legal action or the assessment of fines.

Defendants criticize the notice given by Plaintiff for not identifying the location of the wetland, the prohibited conduct prior to the filing of the Enforcement Notice, and finally that the notice did not include a proposed penalty. The efforts to meet with Defendant were presented opportunities for Defendants to address these alleged deficiencies. There is no evidence that Defendants were somehow precluded from gaining more detailed information regarding the alleged wetland violations. The record evidence demonstrates Defendants baseless denial and lack of participation in the pre-lawsuit process belies the strength of this last-minute argument.

This Court does not dispute the holding in *Koontz v St. Johns River Water Mgt Dist*, 570 US 595, 604 (2013) that "the government may not deny a benefit to a person because he exercises a constitutional right". However, the undisputed factual evidence does not demonstrate conduct by Plaintiff that is contrary to the holding in *Koontz*.

The Court finds there is no dispute that Defendants were aware and had notice of the wetland and Defendants dredged and filled wetlands to engage in farming activities in violation of part 303. While there may be a dispute as to how much of the land would constitute protected wetlands, this is a question of damages.

RIGHT TO FARM ACT

Defendants argue specifically that EGLE's enforcement practices in this case are in violation of the Right to Farm Act, and that resolution of complaints must comply with the MOU between EGLE and MDARD. Further Defendants argue that EGLE mis-stepped by not adhering to the Property Rights Preservation Act, which required EGLE to review takings assessment guidelines before initiating enforcement action and to update the relevant guidelines annually to reflect current law.

MCL 286.474(5) specifically provides that the Right to Farm Act "does not affect the application of state statutes and federal statutes," which would include the NREPA. This case alleges violations of Part 303 of the NREPA, not causes of action for a public or private nuisance. Accordingly, the Right to Farm Act provides no defense here. *City of Troy v. Papadelis*, 226 Mich. App. 90, 96 (1997). The Court in City of Troy found that the Right to Farm Act does not create a cause of action for the application of state statue but rather for public and private nuisance claims. Here, EGLE's claims are solely to enforce NREPA violations, and therefore do not implicate the Right to Farm Act.

REGULATORY TAKING

Defendants assert that the enforcement plan that requires restoration and a civil fine constitutes a constitutional taking in violation of the constitution. When determining whether there is a regulatory taking this Court must consider: "[1] The economic impact of the regulation

on the claimant and, particularly, [2] the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations" and "[3] the character of the governmental action." *Penn Central Transp Co*, 438 US 104, 124; 57 L. Ed 2d 631 (1978). Defendants assert that the economic impact would be enormous, exceeding the value of bearer field and making the property worthless, and therefore contradictory to the expectations of the investment-backed expectations of the buyer, who wanted to farm on the land. Defendants also argue that the act "goes too far" and thus constitutes a taking. The Court finds no evidence to support Defendants argument.

In *Department of Environmental Quality v Morley*, 314 Mich App 306 (2015) the Court of Appeals held that ""Part 303 applies throughout the state for the benefit of everyone, and there is no evidence that defendant was singled out to bear the burden of the public's interest in wetlands." In *Morley* the Defendants farmed a wetland and were forced to cease all activities, restore the wetland, and pay a fine. Like in the instant case, Morley argued that the fine would completely devalue the land; however the Court upheld the enforcement. The Court found that the defendant had notice of the applicable 303 regulations when he purchased the property. In the subject case Defendants likewise had notice since part 303 was in place for 22 years before the Defendant's purchase.

CONCLUSION

THEREFORE, as the evidence demonstrates that the Defendants violated part 303 and there are no disputed questions of material fact, this Court GRANTS Plaintiffs' Motion for Summary Disposition in its entirety; DENIES Defendants' I(2) request and DENIES Defendant's Motion for Summary Disposition in its entirety.

IT IS FURTHER ORDERED that Defendants shall restore the wetland to its condition immediately before the acts in violation of the NREPA occurred.

IT IS FURTHER ORDERED that Defendants shall pay civil fines under MCL 324.30316 in the amount of $10,000.00.

SO ORDERED.

In accordance with MCR 2.602(A)(3), this is a final order resolving all claims, and closed the case.

7/26/2024
Date

Hon. Wanda M. Stokes
Circuit Court Judge

PROOF OF SERVICE

I hereby certify that I provided a copy of the above ORDER to each attorney of record, or to the parties, by electronic mail (email), hand delivery, or by placing a true copy in a sealed envelope, addressed to each, with full postage prepaid and placing said envelope in the United States Postal Service mail, on 7/26/, 2024.