BEFORE THE WISCONSIN
DEPARTMENT OF ADMINISTRATION

In the Matter of the Incorporation of the
Lands Comprising the Town of Campbell

CITY OF LA CROSSE REPLY TO TOWN OF CAMPBELL REBUTTAL

Prepared based upon prior City submittals and additional information provided by:

Matthew Gallager, Director of Engineering and Public Works
Jeffrey Schott, Fire Chief

INTRODUCTION

The City of La Crosse ("City") provided a detailed Report to the Incorporation Review Board ("Board") setting forth a thorough analysis of the five relevant standards to be applied by the Board in reviewing the Town of Campbell's ("Town") petition to incorporate as the Village of French Island. The City's Report is buttressed by significant testimony from City officials, staff, and consultants. The Report's conclusions that the Town's application fails to meet any of the five relevant standards are supported by court precedent and prior Board determinations.

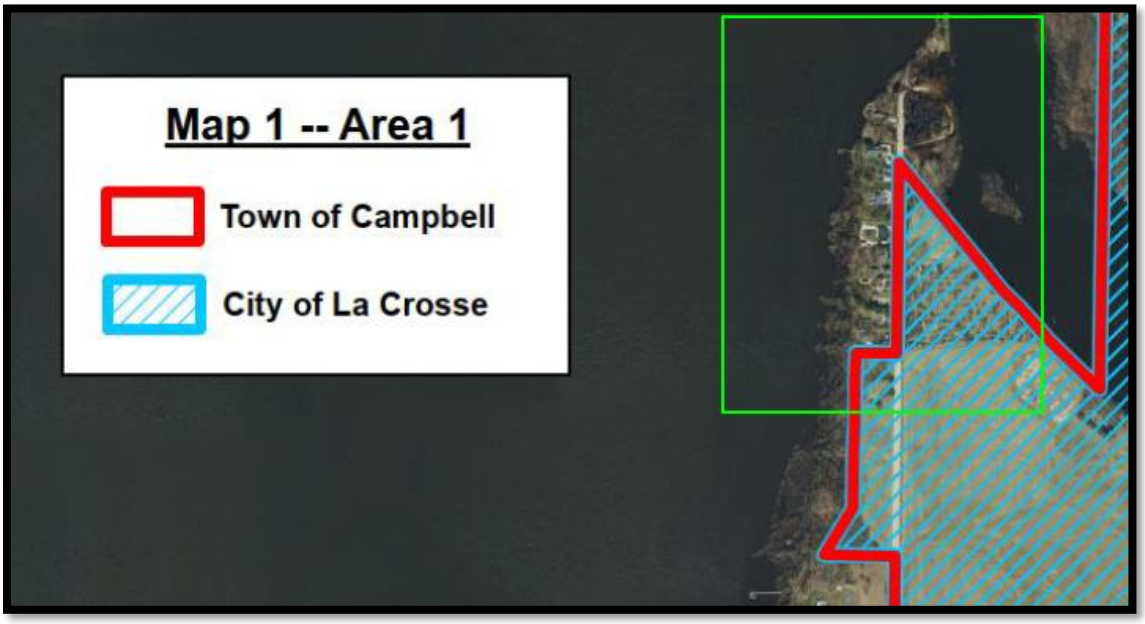
In response, the Town submitted a "Response to City of La Crosse Report Opposing the Proposed Incorporation of the Town of Campbell, La Crosse County, Wisconsin as the Village of French Island" ("Town Response"). In contrast to the City's Report, the Town Response is rife with inaccuracies in fact and law and veneered with anonymous authority.

The City stands by its Report as providing the solid and supported foundation for the Board to deny the Town's petition to incorporate and already provides the necessary rebuttal to the Town Response. However, the City provides this reply to address some of the more glaring issues of the Town Response.

Section 1 (a) Characteristics of the Territory

- Most of the Town is water which is not compact nor homogenous with the area on French Island. The entire territory must be considered to determine if this standard is met. However, the Town completely ignores that over **85%** (11 square miles) of the proposed village is under water or otherwise undevelopable. This area has no connection to the limited 1.9 square miles of developed or developable area. The Town attempts to focus only on the limited 1.9 square miles. However, a metropolitan village next to a second class city like La Crosse is required to have an area of 4 square miles. The developed and developable portions of the proposed village are not physically compact or homogeneous with the vast amount of undevelopable land included in the proposed village.

- The proposed territory's land boundaries are highly irregular. The developed or developable territory proposed for incorporation is long and narrow, with a number of town islands accessible by land only over property or streets within the City of La Crosse. In addition to the Hiawatha Island/Nakomis Avenue checkerboard and the town island north of the City's Airport Interchange Industrial Park, a third island exists on the northern point of French Island, where Nelson Park and a number of single family homes are accessible only by way of County Hwy BW through property within and owned by the City of La Crosse. See green-boxed portion of Map 1 – Area 1, inserted below.



- Approving incorporation with these boundary issues would set a troubling new precedent. In a review of the last thirty years of the Board's determinations, the Board has not approved a single incorporation with this level of extreme boundary issues without the petitioning town excluding problematic areas from the area to be incorporated or the support of the neighboring municipality through a negotiated boundary agreement. This is likely why the Town fails to point to a single example in its erroneous implication that its irregular boundaries are not an issue because "[t]his situation is less pronounced than many others."

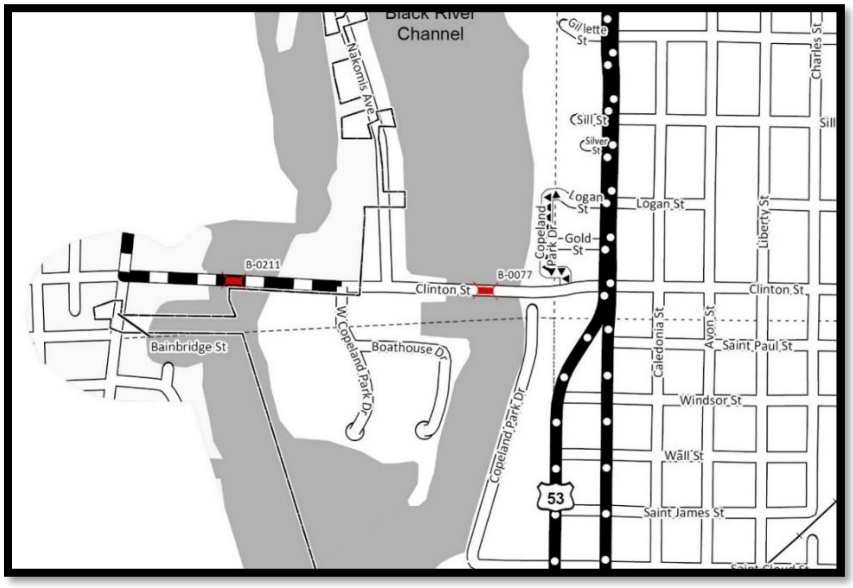
- Fragmentation by annexation is not an excuse for lack of compactness and homogeneity. The Town's argument blaming fragmentation on "the City's gerrymandering of the boundaries to effectuate annexations from the Town of Campbell" has been repeatedly rejected by the Board and Wisconsin courts. See *Pleasant Prairie v. Johhnson*, 34 Wis. 2d 8 (1966), *Incorporation of Town of Pewaukee*, 186 Wis. 2d 515 (1994), and the Department of Administration's determinations in denying the incorporations of the Town of Sheboygan (2000), pp. 21-22, and the Town of Brookfield (Brookfield II) (2001). Annexation, and the resulting fragmentation, are a natural and intended result of Wisconsin's local government system and, for successful incorporations, is routinely resolved through boundary agreements.

- <u>Portions of the Town are only accessible over City streets, which does not support compactness or homogeneity</u>. The Town asserts that "[a]ll Campbell areas are fully accessible by County roads and Town roads including Clinton Street bridge, County Hwy B, Bainbridge, Lakeshore, Dawson and Fanta Reed." (Town Response, p. 3). This is false. **Map 16**, attached, shows the location of City streets on French and Hiawatha Islands (white streets that lie within the City's boundaries) and nearby County roads (marked by black and white stripes).

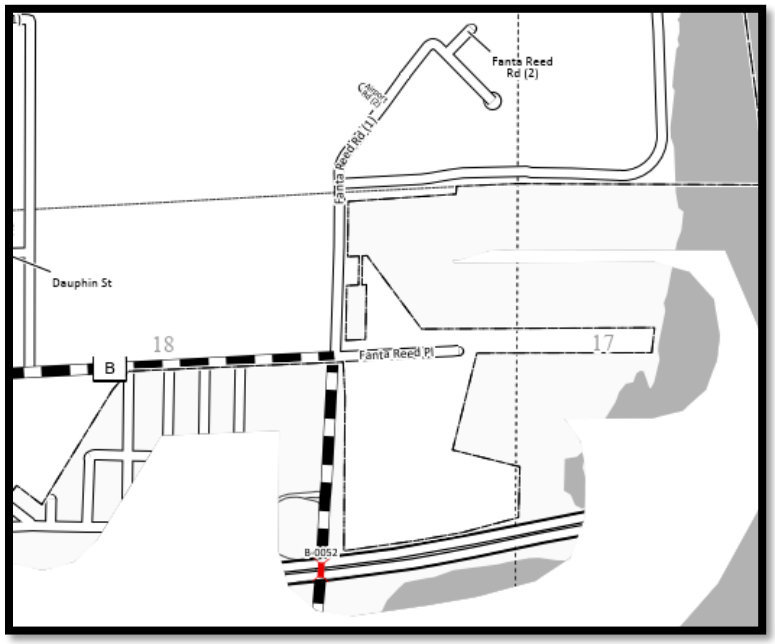
    - All properties in the Town on Hiawatha Island and the portions of the Town north of the City's Airport Interchange Industrial Park are **<u>only</u>** accessible via City streets. Being reliant on the streets of others does not support compactness or homogeneity and raises equity issues. See Sheboygan Determination (2000), p. 23 ("Also important to a lack of homogeneity is the fact that many areas within the territory proposed for incorporation are only accessible by traveling on City roads. This tends to show a lack of independence. It also raises equity issues because Town residents obviously do not pay for the City roads on which they use and rely.").

    - The Town may be confused that the naming of a street does not indicate who has jurisdiction over that street, including for improvements, repairs, maintenance, and regulation.

    - Town residents can only access Hiawatha Island over the City's street. A single road provides access to Hiawatha Island and Nakomis Avenue. This road is interchangeably called Clinton Street / County Road B. However, Clinton Street from the mainland to just west of Nakomis Avenue on Hiawatha Island is a City street, under the City's jurisdiction. Clinton Street comes under the county's jurisdiction at a point approximately 225 feet west of Nakomis Avenue. See **Map 16**, attached, the relevant portion of which is copied below.



- Similarly, access to the Town island north of the City's Airport Interchange Industrial Park requires travel over County Road B and the City's portion of Fanta Reed Road north of County Road B. See **Map 16** (a portion of which is copied below).



- <u>The Town relies on County roads for internal connectivity on French Island and for all external access from French Island, which does not support compactness or homogeneity</u>.

    - County Roads B and BW provide the main N/S thoroughfares in the Town and the only access off French Island—either to the City's portion of Clinton Street or access to the Interstate 90 interchange.

    - See Town of Sheboygan Determination (2000), p. 23: "Town roads themselves do not permit good access or connectivity within the Town. Travel options are limited to major county roads. … As a result, subdivision developments are left isolated and unconnected and the only means of reaching them is by traveling on a county trunk highway."

    - See also Town of Waukesha Determination (2000), p. 19: "Town residents must primarily use roads maintained by Waukesha County, the city of Waukesha, or state highways to travel through the town. This raises questions of equity since Town residents benefit from facilities built by other municipalities."

- <u>The Town takes credit for private events held at Celebrations on the River and other locations.</u> On page 4 of the Town Response, the Town lists a number of events, claiming them to be "Town civic events," including private events held at the event center Celebrations on the River by companies not located within the Town and promotional

and marketing activities at some area taverns. This is emblematic of how the Town misleadingly inflates its own offerings in an effort to ignore its ties to the City.

- The Town is intimately connected with the City through the La Crosse School District. Just as in the Town of Sheboygan Determination (2000), "the social and recreational homogeneity *between* the Town" and the City of La Crosse "is strengthened by the school district" where Town and City children attend school together for their entire lives, mostly in schools located within the City. Town of Sheboygan Determination (2000), p. 24 (emphasis in original).

    - See also Town of Waukesha Determination (2000), p. 19: "The reliance by Town residents on [City of Waukesha] services and facilities tends to strengthen the linkages *between* the Town and the City and indicates a lack of internal coherence and independence within the Town. This conclusion is bolstered by the fact that the entire town falls within the Waukesha school district. Although one elementary school in this district is located within the Town of Waukesha, students from the Town attend junior high and high school at schools in the city of Waukesha." (emphasis in original).

Section 1 (b) Territory Beyond the Core

The reasons why the Town's Petition fails to meet this standard is thoroughly set out in the City's Report. The proposed village has no growth area. Its limited 1.9 miles of dry land is almost fully developed. This is not consistent with the standards and needs for a newly incorporated metropolitan community. The Board should not waive this requirement.

Section 2 (a) Tax Revenue

Rather than address the fact that the Town has been operating at an unsustainable deficit to sustain its current levels of limited services, the Town attempts to obfuscate the tax revenue standard by pivoting to blaming the City for PFAS within the Town's shallow aquifer.

PFAS is a very complex issue that impacts the entire nation and has resulted in numerous lawsuits against the manufacturers of PFAS. The Town oversimplifies the issue. In the Town's submittal, the Town recognizes that the City's airport "offers opportunities for residents of the Coulee region (sic) access to any other part of the world via air transportation" and "contributes to Campbell's regional importance." (Town Incorporation Report, pp. 8 & 13). Yet the Town criticizes the City for operating the airport in accordance with Federal Aviation Administration ("FAA") requirements, including the use of Aqueous Film Forming Foam ("AFFF").

In a case of first impression, Michigan's Circuit Court for the County of Kent ruled that federal aviation law barred the State of Michigan's claims against the Gerald R. Ford International Airport ("GRR") related to its historic use of AFFF.[1] The court found that AFFF was "federally

[1] *Mich. Dep't of Env't, Great Lakes & Energy v. Gerald R. Ford Int'l Airport Auth.,* No. 23-08850-CE (Mich. Cir. Ct. Kent Cnty. Nov. 24, 2025), attached as **Supplemental Attachment 1**.

mandated" and that "the use of AFFF is a matter of aviation safety, and as a result federal preemption applies and bars Plaintiffs from litigating their claim against the Airport."

The City of La Crosse likewise follows the law and operates its airport in accordance with FAA regulations. In 2021, after the City became aware of issues related to the use of FAA required AFFF, the City submitted a request to the FAA to allow the City to stop using AFFF at the airport. The FAA did not grant this request. To not follow FAA requirements would have resulted in fines or a closure of the regionally important airport.

Regardless, the Town's reference to the City's airport is a red herring. It is used to justify the Town's risky and costly proposed water system and to distract from the Town's unsupportable financial situation and the fact that the Town does not meet the relevant statutory standards.

Section 2 (b) Level of Services

Water Supply. The City can supply better, less costly, and less risky water service than the Town can and the Town's arguments to the contrary fall flat.

- The Town's arguments that incorporation is necessary for its water system are flawed or misleading. The Town is legally able to construct a water system regardless of incorporation. However, one of the Town's contentions is that the "financial feasibility" of the proposed water system is dependent on "maintaining the entire customer base" through incorporation. (Town Incorporation Report, p. 61). Yet, the Town also states that "[w]ith the advent of a new municipal water supply, **there will be no incentive for future annexations**." (Town Incorporation Report, p. 129)(emphasis added). In spite of the issues raised by third-party consultants, the Town contends that its system will produce all the capacity needed for consumptive use and fire protection in the Town. (Town Response pp. 11, 12, & 15). If the construction of the Town's proposed water system removes the incentive for future annexations, then incorporation is not necessary to protect the water system. If the Town remains concerned that property owners will still seek annexation once the water system is constructed, then it raises the question, "what is the Town not telling its citizens or the Incorporation Review Board?"

- The Town is not forthright with its citizens about the Town's proposed water system's risks or costs. The Town continues to provide unsubstantiated testimony that the financial impact will not be as high as what the PSC and third-party consultants estimate. There is additional cause to doubt the Town's contentions and what it has told its citizens. During the Public Hearing, the Town's consultant, Mike Davy, reported that the Town's proposed source of supply is "high in iron and manganese **and other things that are naturally occurring** that have to be treated to have an acceptable form of supply. But that's routine, we do that all over in western Wisconsin—treat water for those natural contaminants, so that's not an issue" (emphasis added).[2] Tellingly, the Town was not able to admit to its gathered residents that its water source is contaminated with radium above federal and state drinking water standards. However, the Town has falsely

[2] See recording of December 3, 2025, public hearing at timestamp 32:49, available at https://www.youtube.com/watch?v=b9kVQTordJg&t=1s.

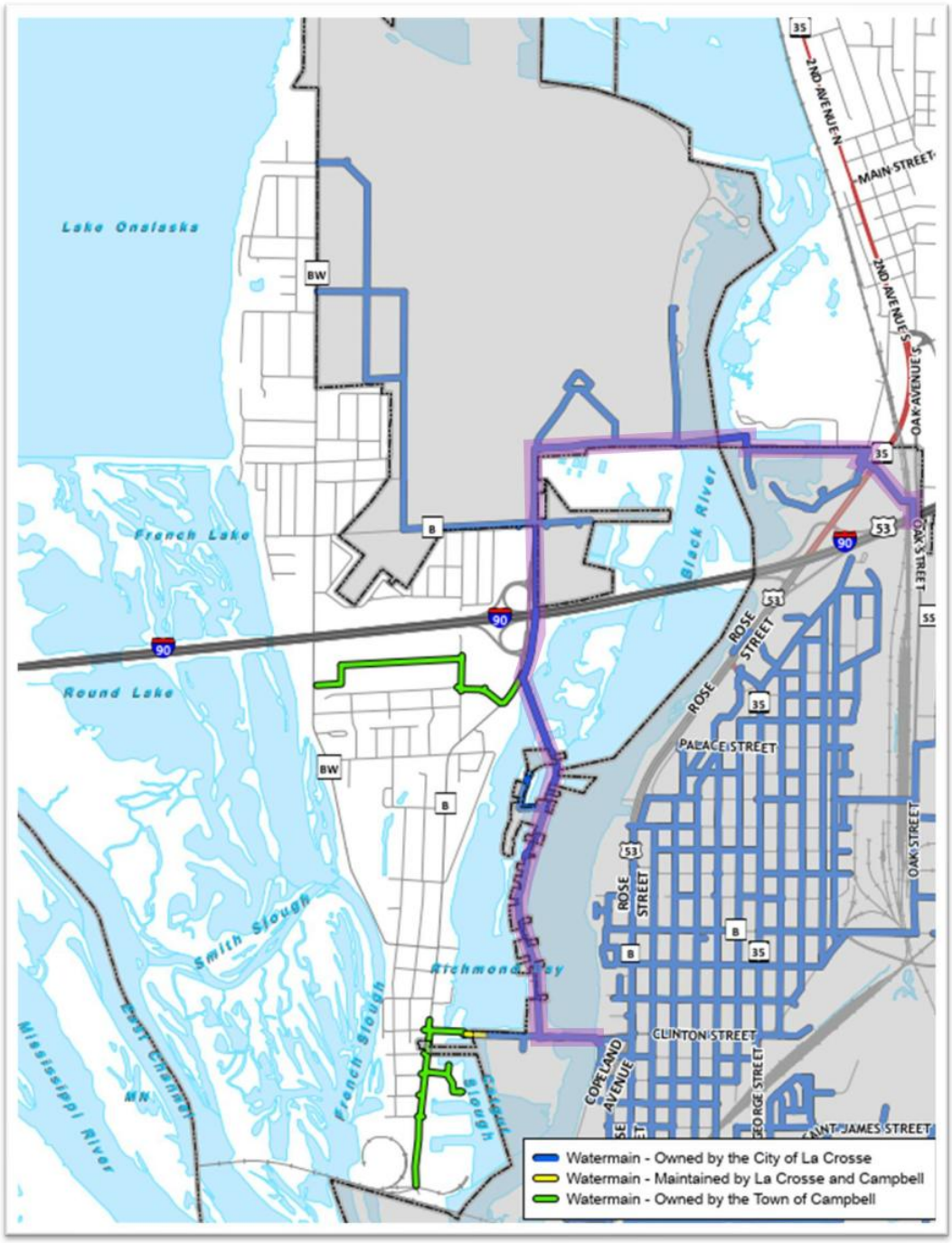
convinced its residents that "La Crosse water is known to be contaminated," (Town Incorporation Report, p. 87) in spite of the fact that the City's Water Utility meets all safe drinking water quality requirements[3] and has twice won statewide contests for best-tasting drinking water (Gallager Testimony, p. 26).

- The Public Service Commission of Wisconsin ("PSC") continues to flag the Town's failure to provide estimated customer rates based on Commission rate-setting methodology. The Town pushes that its water rates can be established using a method not recognized by the PSC. The Town states, without evidence, that "[t]he Town and PSC recognize that PSC's standard rate-setting methodology does not fit well for a utility where almost all the infrastructure is new." (Town Response, p. 13.) However, on January 26, 2026, the PSC issued a second incompleteness determination on the Town's construction application. Among other issues, the determination stated that the Town again "fails to provide estimated customer rates based on Commission rate-setting methodology."[4] This was one of the same issues raised in the PSC's first incompleteness determination on October 29, 2025.[5] The PSC also questions the Town's plan to charge all new customers only $500, when the Town's service line estimates amount to at least four times that amount.[6]

- The City's watermains on French and Hiawatha Islands are critical components of the City's system providing water service to City properties. The Town engineer's suggestion that because the City has abandoned wells on French Island, the City water system's "loop back into the City does not have the same value" is not only factually incorrect but is a highly questionable statement to be made by an engineer.

    - The City has an extensive water system on French and Hiawatha Islands. See **Map 14** from the City's Report (copied below).[7] This system provides water service to the City's approximately 122 customer connections on French and Hiawatha Islands, which serve the City's Airport and the City's two industrial parks located on French Island and 76 residential parcels on Hiawatha Island. It is clearly evident that the water mains serving City properties are necessary for the City to supply water to its territory.

[3] See the City's 2024 Water Quality Report, available at https://www.cityoflacrosse.org/home/showpublisheddocument/9448/638874895014130000.
[4] January 26, 2026, letter from Andrew P. Galvin, Administrator, Division of Water Utility Regulation and Analysis, to Michelle Stahl, Clerk/Treasurer, Campbell Water Utility, re: Application of the Town of Campbell, as a Water Public Utility, for Authority to Construct a New Water System, in the Town of Campbell, La Crosse County, Wisconsin, PSC REF# 574771, at Attachment A, Section 1.2. Available at https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=574771.
[5] The October 29, 2025, incompleteness determination is available at https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=566243.
[6] See January 26, 2026, incompleteness determination at Attachment A, Supplemental Question paragraph 8.a.
[7] The version copied below outlines in purple the portions of the City's loop system located on and immediately outside of French and Hiawatha Islands.



- In addition, a looped system, like the City's, provides critical redundancy and ensures that water serving the islands and northern party of the mainland has adequate pressure and water quality. The map above shows the portion of the looped system located on and immediately outside of French and Hiawatha Islands in purple. With a looped system, water will not remain stagnant in pipes. This is even more important since the City does not have wells on French Island.

- Specifically regarding the City's Hiawatha Island mains and the Town's "offer" to provide service at the Town's expected highest-in-the-state rates, more of Hiawatha Island is within the City than the Town. On Hiawatha Island, there are 76 residential parcels and one large public authority parcel (Veteran's Freedom Park with a water connection) within the City, compared to only 42 residential parcels and one small park in the Town. Not only is the City's Nakomis Avenue main critical for the City's system, but the City has responsibility to provide water service to its residents. The City is not going to delegate that responsibility to the Town and lose its critical loop and redundancy. Conversely, the Town does **not** need to spend over $3 million to construct a duplicate and confusing water main over the Black River and down Nakomis Avenue on Hiawatha Island.

- The City can supply the safe water necessary to serve French and Hiawatha Islands. As stated in Matthew Gallager's testimony, p. 28, "[t]he [City of La Crosse Water] Utility has sufficient reliable supply and storage to supply the Town and still meet the City's 2042 water demands." This is supported by publicly available information in the City's Annual Report to the PSC[8] and its annual Water Quality Report[9], summarized below.

  - The City has 10 active wells with a pumping capacity of 35.6 million gallons per day (MGD) and a reservoir with a total storage capacity of 5 million gallons.

  - The water use in the City averaged 8.5 MGD in 2024, as compared to 9.6 million MGD in 2023. The maximum day water use in 2023 was 14.4 MGD.

  - The City easily has the excess capacity to serve the Town. Even taking a max day situation where the City is using 14.4 MGD, the City has 21.2 MGD in excess capacity.

  - In addition, in 2026, the City is constructing a Highway 16 water main to convey water to the north side of La Crosse, including on French and Hiawatha Islands. This new water main serves multiple purposes – it improves redundancy, pressure, and capacity for the area north of La Crosse Street, including the City's system on the islands.

Wastewater. The Town is not entitled to discharge radium-contaminated wastewater to the City's wastewater treatment system.

- The Town has no wastewater agreement with the City. The Town's prior wastewater agreement with the City has expired. The City offered to enter into a new agreement with the Town based on standard terms agreed to by two other wholesale communities,

[8] See the La Crosse Water Utility's 2024 Annual Report, available at https://apps.psc.wi.gov/PDFfiles/Annual%20Reports/WEGS/WEGS_2024_2920.pdf

[9] The City's Water Quality Reports from 2010 to 2024 are available on the City's website at https://www.cityoflacrosse.org/your-government/departments/utilities/water-utility/water-quality/water-quality-reports.

but the Town refused. The Town's ability to obtain wastewater treatment services is therefore defined by the City's ordinance. See City Report, p. 106.

- Under the City's ordinance, the Town is not permitted to increase the volume or strength of its wastewater conveyed to the City's wastewater treatment plant. The levels of service provided by the City to the Town are restricted by ordinance to those services in place at the time of the Town's expired agreement. No increase in the volume or strength of wastewater is permitted and no wastewater from any new connection to the Town's collection system will be accepted for conveyance and treatment. Accordingly, no new connection for the Town's radium treatment system will be permitted.

- The Town will be subject to penalties and other enforcement actions if it discharges wastewater in violation of the City's ordinance. If the Town discharges wastewater to the City's system in contravention of the City's ordinance, the Town will be subject to fines and other enforcement actions, including a potential termination of service.

- The City of La Crosse has an agreement with the City of La Crescent. The Town attempts to argue that the City must accept radium-contaminated wastewater from the Town because the City accepts comparable wastewater from the City of La Crescent. The key difference is that the City has an agreement with La Crescent providing for the provision of wastewater service to La Crescent. The Town has no such agreement. The Town is instead comparable to the Town of Shelby (another wholesale customer without a contract). The City has not permitted Shelby to add new wastewater connections under its ordinance and this determination has been upheld by the circuit court.

Fire Protection. The Town Fire Chief Rebuttal is likewise replete with inaccuracies, mischaracterizations, and patently false statements. Some of this may be due to a failure with internal communications between the Town and its volunteer fire department. Regardless of the cause, the City must correct the record.

- The City does not request mutual aid from the Town. The Town Fire Chief stated that "[i]n fact, the La Crosse, Onalaska, and Holmen Fire Departments utilize mutual aid on every structure fire, even residential fires." (Town Response, p. 14.) This is false. As stated in Chief Schott's testimony, in at least the last 10 years the City has "never requested assistance from the Town of Campbell Volunteer Fire Department." (Schott Testimony, p. 25.) But the City's testimony is not even needed to prove the Town's statement untrue—**the Town Fire Chief discredits his own testimony four pages later**, stating "La Crosse later stopped requesting mutual aid from Campbell during Chief Ken Gilliam's public campaign to discredit regional mutual aid." (Town Response, p. 18.)

- The Town's fire department showed up during the City's 2011 tornado incident without being requested and was asked to leave. Chief Schott, a captain at the time, recalls working the day of the tornado and that "the Campbell Fire Department showed up unrequested, along with some others from the Town of Campbell. They were told by the La Crosse Fire Department personnel that they were not needed, and they were told to leave." The City has a professional fire department with the experience, expertise, and

equipment to be able to respond to large fires and natural disasters, including tornados and City fires involving multi-story commercial structures. This is why the La Crosse Fire Department was able to provide its high-level response capabilities for the Omaha Track fires. Just as important, the City's Fire Department also has the experience to not show up when not requested at a scene. Rather than aiding the City, a volunteer fire department showing up unrequested can hamper the City's organized response to emergencies within the City.

- The Town's Fire Department cannot provide emergency medical services above its permitted EMR license. Fire departments can only provide services for which they are licensed and credentialed and for which they carry the appropriate and necessary equipment. Campbell acknowledges that it does not carry the necessary license to provide paramedic services (Town Response, p. 16), regardless of having a single volunteer that holds a paramedic-level certification. The La Crosse Fire Department is licensed and credentialed under a medical director at a local medical facility to provide paramedic-level care and always has at least one paramedic on duty with additional paramedic staffing on the weekends. (Schott Testimony, p. 4.)

- The WPF Report was not funded by the City. The Town Fire Chief stated that the regional fire services study by the Wisconsin Policy Forum (City Attachment 8) "was clearly commissioned by the City of La Crosse, and this influence was clearly attempting to steer the results of the survey." This unsupported assertion is also false. The WPF Report itself states twice states that La Crosse County and the La Crosse Area Planning Committee ("LAPC") jointly commissioned and underwrote much of the cost of the WPF Report with additional financial support by the University of Wisconsin-La Crosse (see WPF Report "Preface and Acknowledgements" and Introduction p. 3). Notably, the LAPC is the designated Metropolitan Planning Organization for the greater La Crosse area, and is governed by a Policy Board comprised of representatives from 10 regional cities, villages, and towns, *including the Town of Campbell*.

- The Town Fire Chief incorrectly contends that the Town provides firefighting water in the Town.

    - The City supplied water for fire protection services to very limited commercial areas within the Town pursuant to both a now expired Water and Fire Service Agreement and the related agreements with the property owners. The water supplied under the expired agreements was and remains the City's water.

    - This City water was used to fight the Omaha Track fire and following the fire, the Water Utility contacted the Town to recover water costs. The Town referred the City's Water Utility to Omaha Track, and the Water Utility had to seek reimbursement and recover the water costs directly from Omaha Track.

    - Under the prior agreement, the City was the primary responders for fire protection to portions of the limited commercial area. Following its expiration, the Town is now the primary responder for fire protection in all of the Town. The Town

confirmed this understanding via correspondence with the City in December 2024.

- Regardless of what may have been available to certain properties in the past, after the Town's water system is built the Town will disconnect from the City system, removing this source of water for firefighting purposes in the Town.

Stormwater Systems. The Town tries to classify its largely hands-off approach to stormwater management as a benefit. Yet the City has already provided testimony on why a proper stormwater management system is needed to mitigate flooding. Even so, the Town's stormwater management is both minimal and, like other services, reliant upon La Crosse County. See pages 33-34 of the Town of Campbell Comprehensive Plan. Even so, a drive around the Town's roads clearly shows that the Town roads are not "typically lined with ditches." Quite the opposite, the Town is largely devoid of stormwater management facilities.

Section 2 (d) Impact on the Metropolitan Community

- Incorporation will lock in highly irregular and confusing boundaries impacting services. Past incorporation petitions have been dismissed for the same issues caused by the highly irregular boundaries proposed by the Town.

  - See e.g., Town of Waukesha Determination (2000) at p. 51:

    > The existence of Town islands and peninsulas makes service provision difficult and expensive for the City. For example, as mentioned previously in the 'Services' section, the irregular boundaries often cause fire personnel from both the City and Town to respond to the same fire call … Another example of a service problem related to Town islands and peninsulas is design. City developments include, among other things, curbs, gutters, stormwater drains and sidewalks, whereas Town development do not. … In addition to being unsightly, design discontinuity creates problems for pedestrians and stormwater management systems.

  - A second water main on Hiawatha Island will only increase the confusion. See e.g., Town of Sheboygan Determination (2000) at p. 37: "Area residents may benefit from City fire protection service of some Town areas in order to avoid duplication of service. For example, one Town resident complained of the inefficiency of needing two fire hydrants right next to each other just because one is a town hydrant and the other a city hydrant."

  - Rather than having "worked well," the checkerboard pattern on Hiawatha Island and unclear boundaries in other areas has resulted in duplication and confusion of services including emergency and public works services, confusion of boundaries, and the inability of the City to construct and maintain City-standard improvements in these areas.

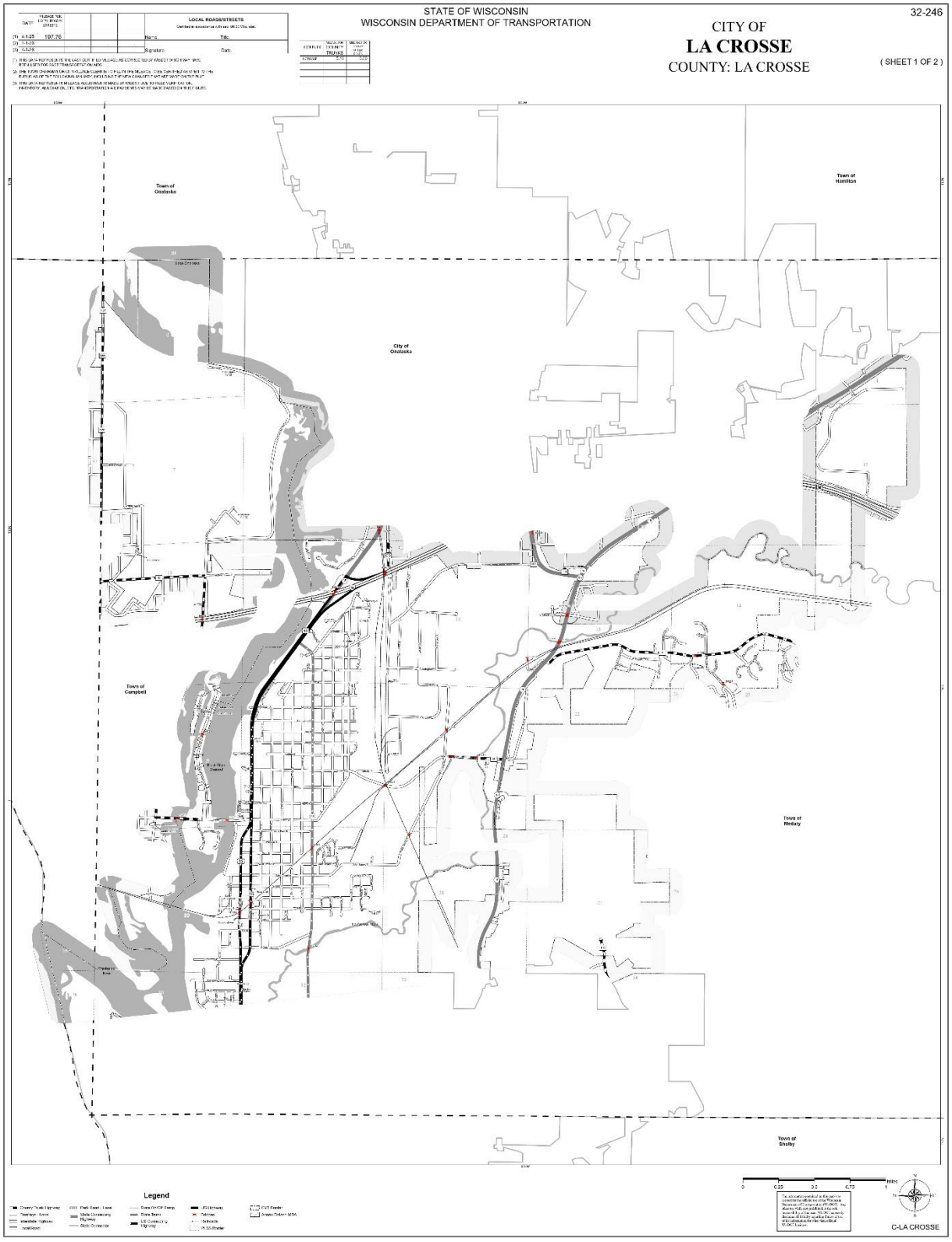
- Approving incorporation will inhibit the resolution of metropolitan issues between the City and the Town. The Town has chosen to proceed with incorporation without holistically engaging with the City on the numerous regional issues. Approving the incorporation to "protect" the proposed water system (which the Town admits does not need protection) will result in Town residents overpaying for water and will create additional regional issues when the Town's system proves to be undersized and overpriced. It is unsurprising that no other community has actively become involved in this incorporation. The Town is effectively surrounded by either water or the City of La Crosse. If incorporated, when the proposed village faces issues, it will continue to be the City which is most impacted.

CONCLUSION

For the reasons stated in the City's Report and above, the proposed incorporation should be dismissed. The area proposed for incorporation cannot meet any of the statutory standards set forth in § 66.0207.

STANDARD 1 (a) Characteristics of territory - not met
STANDARD 1 (b) Territory beyond the core - not met
STANDARD 2 (a) Tax revenue - not met
STANDARD 2 (b) Level of services - not met
STANDARD 2 (d) Impact on the metropolitan community - not met

Map 16 – City and County Street Map



Supplemental Attachment 1

ABA Litigation Section Newsletter, December 3, 2025

(Inserted on subsequent pages.)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY; and ATTORNEY GENERAL DANA NESSEL,

Plaintiffs,

vs

GERALD R. FORD INTERNATIONAL AIRPORT AUTHORITY,

Defendant.

_____/

HON. GEORGE JAY QUIST

Case No. 23-08850-CE

OPINION/ORDER RE: PLAINTIFFS' MOTION FOR PARTIAL SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

AND

DEFENDANT'S CROSS MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(I)(2)

At a session of said Court, held in the Kent County Courthouse in the City of Grand Rapids, in said county on November 24, 2025.

Present: HON. GEORGE JAY QUIST
Circuit Judge

OPINION AND ORDER

I. Issue Presented and Disposition

Plaintiffs filed this lawsuit against the Gerald R. Ford International Airport (the "Airport"), alleging that the Airport's use of aqueous film-forming foam ("AFFF") contained per- and poly-fluoroalkyl substances ("PFAS"), resulting in the release of PFAS in the soil and groundwater at the Airport. Plaintiffs allege that the Airport was required to obtain permits under Michigan's Natural Resources & Environmental Protection Act ("NREPA"), and by failing to do so should be held liable for various fines, remediation expenses, costs, and attorney fees related to the contamination. In response, the Airport argues it was required to use AFFF per the Federal Aviation Administration (the "FAA"), and because it is a matter of safety, federal preemption applies as to the NREPA requirements. Moreover, the Airport had a license from the Michigan Department of Transportation ("MDOT"), which found the Airport in compliance with existing state and federal regulations. The Court heard oral argument on November 21, 2025. Based on

the material facts and applicable law, Plaintiffs' motion is respectfully **DENIED** and the Airport's motion is **GRANTED**.

II. Material Facts

This lawsuit concerns the use of AFFF at the Airport. By way of background, for decades AFFF products were used at commercial airports across the country (Part 139 airports). The use of AFFF products were used for fire suppression in the event of a fire; AFFF is extremely effective at quickly suppressing petroleum-based fires. Notably, the FAA required the use of AFFF as a fire suppressant; failure of an airport to use it would result in the cancellation of an airport's Part 139 certification. Unfortunately, PFAS was a required ingredient in AFFF. In 2023, the FAA updated its regulations and introduced a new fire suppressant that removed PFAS as an ingredient.

In September 2023, Plaintiffs filed a complaint against the Airport, requesting the Court compel the Airport's compliance with Parts 31 and 201 of NREPA and requesting the Airport pay fines and costs related to the Airport's use of AFFF. Plaintiffs allege that the Airport has never conducted any sort of environmental assessment as it related to the AFFF contamination, and that Part 201 of NREPA places a series of direct, affirmative requirements on liable parties to report, investigate, and take responsibility once the release of hazardous substances has been detected.

Plaintiffs allege that the Airport became aware of the PFAS substances in 2018, after a local news station ran a story about it. This alerted the Michigan Department of Environment, Great Lakes, and Energy ("EGLE") regarding the potential contamination, and it sent a letter to the Airport requesting additional information regarding the contamination and that the Airport investigate the potential contamination, in compliance with Part 201 of NREPA. Plaintiffs allege that the Airport refused to comply with NREPA, resulting in this lawsuit.

While the Airport does not dispute that it used AFFF, it argues that it was federally mandated to use it as part of its operations to respond to aviation-related emergencies. Further, the Airport states that it attempted to work with EGLE, but ultimately because the use of AFFF was required as part of the Airport's operations, it could not just stop using it. The Airport states that it did not freely choose to use AFFF, nor did it profit from its use. Additionally, the Airport states that after the 2018 news story was published, the Airport undertook efforts to determine the levels of contamination in the areas surrounding the Airport—despite maintaining that it was not liable for

the PFAS mitigation. Further, the Airport states that it has continued to investigate possible PFAS contamination, which is above and beyond what it is required to do.

Both parties now move for summary disposition. Plaintiffs request that the Court hold the Airport liable for response costs to assist with mitigating PFAS, as well as any future response costs. Plaintiffs also argue that the Airport is subject to civil fines for failure to comply with NREPA's Part 201 requirements, and request that the Court require the Airport to comply with any future demands from EGLE related to PFAS mitigation. In response, the Airport also requests summary disposition, arguing that it has gone above and beyond what is required of it in terms of PFAS investigation and mitigation; however, it also argues that the Court cannot compel compliance with NREPA because the use of AFFF is federally preempted by the FAA.

III. Standard of Review

A motion under MCR 2.116(C)(10) tests the factual basis for the complaint.[1] Summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[2] When reviewing such a motion, "a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion."[3] "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ."[4] 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.[5]

The burden then shifts to the nonmoving party to establish that a genuine issue of material fact exists.[6] The nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.[7]

Summary disposition is warranted under MCR 2.116(I)(2) where the pleadings show to the court that the opposing party, rather than the moving party, is entitled to judgment. In other words,

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[1] El-Khalalil v Oakwood Healthcare, Inc, 504 Mich 152, 160 (2019).
[2] MCR 2.116(C)(10).
[3] El-Khalalil, 504 Mich at 160.
[4] Id. (internal quotation marks omitted).
[5] Quinto v Cross and Peters Co, 451 Mich 358, 362 (1996), quoting Celotex Corp v Catrett, 477 US 317, 331 (1986); Neubacher v Globe Furniture Rentals, 205 Mich App 418, 420 (1994).
[6] Id.
[7] McCart v J. Walter Thompson, 437 Mich 109, 115 (1991).

the trial court may grant summary disposition to the nonmoving party if it is entitled to judgment as a matter of law.[8]

IV. Law and Analysis

This appears to be a case of first impression as neither party cited to any cases on point where a state sued an airport for its use of AFFF. To that end, the Court believes that federal preemption applies and thus prevents the State from suing the Airport for alleged NREPA violations. Additionally, even if compliance with the State is required, the Airport operates under a valid license from MDOT, which has indicated that the Airport is in full compliance with State rules and regulations.

There is no dispute that there is PFAS contained in AFFF, and that the Airport used AFFF for training in the event of emergencies, as well as actual emergencies. There is also no dispute that the FAA mandated the use of AFFF as part of the Airport's safety operations.[9] Despite this federal mandate, Plaintiffs argue that even if the Airport was mandated to use AFFF, "that is not the same thing as having a 'permit' to 'release' AFFF into the 'environment.'"[10] Put another way, Plaintiffs argue that the FAA's requirement that the Airport use AFFF does not conflict with NREPA's Part 201 requirements. In response, the Airport argues that federal law fully preempts the field of aviation safety.

The Airport cites several cases to support its argument that federal law preempts the field of aviation safety not only when the planes are in the air, but also when they are grounded on tarmacs. After reviewing the cases that the Airport cites—along with some additional cases—the Court finds that the use of AFFF is a matter of aviation safety, and as a result federal preemption applies and bars Plaintiffs from litigating their claim against the Airport.

Field preemption occurs if "federal law thoroughly occupies the legislative field in question, i.e. the field of aviation safety."[11] Put another way,

> Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where the object sought to be

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[8] Washburn v Michailoff, 240 Mich App 669, 672, 613 NW2d 405 (2000).
[9] See, e.g, 14 CFR 139.317.
[10] Plaintiffs' Brief in Support of Summary Disposition, p 27.
[11] Abdullah v Am Airlines, Inc, 181 F3d 363, 367 (3d Cir 1999).

> obtained by the federal law and the character of obligations imposed by it ... reveal the same purpose.[12]

Here, multiple Courts have found that various aspects of aviation safety have been federally preempted, not just limited to the direct airspace. The areas of aviation safety that have been found to be federally preempted include pilot regulation, airspace management, flight operations, and aviation noise[13]--but have also found that federal preemption applies to aviation safety even on the ground—otherwise, airlines would be subject to a "patchwork of obligations which might be contradictory to federal obligations."[14]

Indeed, Congress' purpose in enacting the FAA was "to promote safety in aviation and thereby protect the lives of persons who travel on board aircraft."[15] The airport's use of AFFF falls directly in line with aviation safety in this regard: the primary function of aircraft rescue and firefighting units is to respond to airport emergencies. The firefighting units train extensively for emergencies and, given the catastrophic nature of airline emergencies, the FAA precisely specified the formulation of AFFF for use at airports.

Plaintiffs argue that the FAA operating certificate does not give the Airport a "free pass to contaminate the environment or fail to cleanup any releases that occurred," and then cite several cases to support this point. However, none of the cases that the Plaintiffs cite to support their claim involved the use of a federally mandated product. This puts the Airport in an impossible situation: compliance with the FAA Part 139 certification and Plaintiffs' interpretation of NREPA are in direct conflict with each other.

Finally, although the Court is unaware of any case law that is directly on point regarding the use of AFFF in regards to preemption, the Court notes that the Second Circuit made findings regarding state and local permitting in *Goodspeed Airport, LLC v East Haddam Inland Wetlands and Watercourses Commission*. In *Goodspeed*, a privately owned and operated airport argued that it was entitled to cut down trees in protected wetlands without first obtaining permits because the trees were considered obstructions on the runway. The airport argued that the tree obstructions

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[12] Id., citing Schneidewind v. ANR Pipeline Co., 485 US 293, 300, 108 SCt 1145, 99 L.Ed.2d 316 (1988) (citations omitted).
[13] Abdullah, 181 F3d at 369-71 (citations omitted).
[14] Allen v Spirit Airlines, Inc, 981 FSupp 2d 688, 697 (ED Mich 2013).
[15] In re Mexico City Aircrash of Oct. 31, 1979, 708 F2d 400, 406 (9th Cir 1983).

were matters of aviation safety, and therefore it was not required to obtain the state and local permits due to preemption.

The *Goodspeed* district found that state and local statutes did not interfere with the federal laws and regulations sufficiently to fall within the scope of the preempted field. In its decision, the district court distinguished another case where municipal defendants sought to prevent a commercial airport from "obstructing construction of a federally-mandated, federally-funded, and state- and federally- approved runway project intended to enhance aviation safety." The Second Circuit agreed, finding that the airport was not "licensed by the FAA; it [was] not federally funded, and no federal agency [had] approved or mandated the removal of trees from its property." Because of this, the airport was required to obtain the necessary state and local permits to remove trees.

The Court finds at least some similarities between the *Goodspeed* case and the facts here, with regards to state and local permitting requirements. However, the Airport here is licensed by the FAA, receives federal funding, and the FAA directly mandated the use of AFFF as a matter of aviation safety. Again, given the importance of aviation safety, the FAA required the use of AFFF as a fire suppression method. By requiring the use of AFFF, the Court finds that federal preemption applies the use of AFFF as a matter of aviation safety. Because federal preemption applies, the Plaintiffs cannot force compliance with NREPA, and the Plaintiffs' case must be dismissed.

However, to the extent that the state argues that the requirements of NREPA and the mandated use of AFFF do not conflict, the Court finds that the Airport is operating under a validly issued MDOT license. Under Part 201 of NREPA, a "permitted release" includes a "release in compliance with an applicable, legally enforceable permit issued under state law."[16] The MDOT is a state agency, and the MDOT certificate is a legally enforceable permit issued under state law: it certifies that the Airport meets licensing standards and is approved as a Part 139 airport. By certifying the airport, MDOT has found that the airport is in compliance with existing state and federal regulations.

Because the Court has decided this issue on the basis of preemption as well as a validly existing state license, the remaining arguments will not be discussed. However, to the extent that the Court did not address arguments raised by the parties, the Court adopts the Airport's arguments as the

[16] MCL 324.20101(mm)(i).

analysis of the Court. No further analysis is necessary. MCR 2.517(A)(4); *Lud v Howard*, 161 Mich App 603 (1987).

V. Conclusion

Based on the above analysis, Plaintiffs' Motion for Summary Disposition is respectfully **DENIED**. It is further ordered that the Airport's Motion for Summary Disposition is **GRANTED** under MCR 2.116(I)(2). This case is dismissed with prejudice.

This a final order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

11-24-25
DATE

GEORGE JAY QUIST, Circuit Judge (P43884)

PROOF OF SERVICE

Service of a copy of this document was made by ordinary mail and electronic mail on the parties who have appeared, or their attorneys of record, on this date.

11-24-25
DATE

Tatianna Bragg, Judicial Clerk